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**CONSULTATION MEETING
ON THE PROTECTION OF RIGHTS OF BROADCASTING ORGANISATIONS**

**Strasbourg
28 and 29 January 2010
Agora Building
Room G 04**

Draft Meeting report

Executive Summary

The experts participating in the meeting:

- discussed a number of issues concerning the object and scope of protection under a possible new legal instrument on the protection of neighbouring rights of broadcasting organisations;
- recommended that, on the basis of treaty proposals that are in place, a draft text with legal provisions and explanatory notes be prepared for the first meeting of the MC-S-NR;
- recommended that a consultation conference with stakeholders be organised during the drafting process.

Background information

1. Following a stock-taking of international law on the protection of the neighbouring rights of broadcasting organisations in 2008, the Steering Committee on the Media and New Communication Services (CDMC) decided at its 10th meeting (27 May 2009) to approve the Terms of Reference of the Ad Hoc Advisory Group on the Protection of Neighbouring Rights of Broadcasting Organisations (MC-S-NR) and at its 11th meeting (20-23 October 2009) to pursue work on the elaboration of a Council of Europe convention for the protection of neighbouring rights of broadcasting organisations.

2. In anticipation of the constitution of the MC-S-NR, a consultation meeting was organised on 28 and 29 January 2010 in Strasbourg with a view to preparing for the future work of the group. More specifically, the consultation meeting aimed at discussing issues related to the object and scope of protection of a possible new instrument and the possible involvement of participants in the MC-S-NR.

Item 1: Opening of the meeting and information by the Secretariat

3. The Chair provided background information concerning the examination of the protection of the neighbouring rights of broadcasting organisations by the CDMC. Particular reference was made to the Memorandum on a possible Council of Europe Instrument on the Protection of Broadcasting Organisations; Feasibility Assessment for the CDMC prepared by the Ad-hoc Stocktaking Group¹, which was elaborated in 2008. It was also recalled that the CDMC had decided to support the elaboration of a Council of Europe convention to protect the neighbouring rights of broadcasting organisations on condition that the European Commission be mandated to negotiate such a convention.

4. The Secretariat recalled the Council of Europe standards on the protection of neighbouring rights of broadcasting organisations and gave relevant information concerning the constitution of the future MC-S-NR. The Terms of Reference of the group are attached in Appendix 1.

5. While emphasizing that the mandate of negotiations for a WIPO treaty on the subject matter remains unchanged, Ms Carole Croella from the WIPO Secretariat reported that, due to a number of internal and external factors, progress is slow. Nevertheless, it is hoped that the completion of a study on the socio economic dimension of the unauthorized use of signals, addressing current market and technology trends in the broadcasting sector, as well as an anticipated process of regional seminars, will revive debates in the WIPO Standing Committee on Copyright and Related Rights.

6. The participants took note of the findings and recommendations of the Memorandum on a possible Council of Europe Instrument on the Protection of Broadcasting Organisations². The preparation of a binding legal instrument in this area should take into account the work and results of WIPO. Provisions on the relations to other treaties should

¹ CDMC(2008)Misc6rev2

² *Idem.*

be designed in such a way that a new legally binding instrument does not affect other existing and possible future international obligations of the contracting parties in this area.

7. European Digital Rights (EDRi) argued that further research was needed in order to assess whether the existing protections under international law are adequate for broadcasters and a new instrument on the protection of broadcasting organisations is justified.

Item 2: Adoption of the agenda

8. Participants adopted the agenda as set out in Appendix 2 of this report. Ms Delia Mucica, the Chair of the CDMC, chaired the meeting on the first day and Mr Jukka Liedes, Director of the Culture and Media Policy Division at the Ministry of Education and Culture in Finland on the second day. The list of participants and the list of working documents are attached in Appendices 3 and 4 to the report.

Item 3: Discussion of the content of a Council of Europe binding instrument on the protection of neighbouring rights of broadcasting organisations

Object of protection

9. Discussions on the rationale of protection of the rights of broadcasting organisations underlined the necessity to focus on the types of activities carried out by broadcasters which are worthy of intellectual property protection. There was agreement that investment both in linear and non-linear scheduling constitute the justification for protection regardless of the means or platforms used for transmission. As a consequence, broadcasting should be defined in technologically neutral terms and legal treatment thereof should adopt a signal-based approach. One of the participants mentioned that, as in the case of copyright, the protection of broadcasters should not be conditional on the level or quality of their intellectual investment. EDRi expressed the view that a demonstrated need for protection should be the primary consideration.

10. Participants discussed the concept of broadcasting and elements that are relevant to its definition. The main focus of these discussions was on identifying the types of activities carried out by broadcasters that should be protected, as well as the treatment of pre-broadcast signals. It was agreed that new media services may not be broadcasting in the strict sense and that the desirability of their protection under a new legal instrument requires further analysis.

11. In discussing broadcasters' new media services, participants examined the possible protection of on-demand and catch-up services. One participant maintained that non-linear delivery is close to 'making available' and therefore adequately protected under existing regulation concerning database and conditional access. On this view, extending protection to on-demand services would widen the circle of beneficiaries of protection while shifting the costs of protection to society; consequently, such services should be

treated differently and be granted secondary protection only. Other participants argued that, because the provision by broadcasters of linear and on-demand services serves the same purpose of delivering content to the general public, there should, in principle, be no question of excluding on-demand services from the object of protection. Instead, what is needed is an identification of which of these services deserve protection. On this point, EDRi suggested that it will be necessary to show a clear need for protection under a possible new instrument.

12. It was suggested that elements such as initiation, scheduling and programming, reception by the general public, responsibility for acquiring rights and editorial liability should be borne in mind when determining the object of protection. The basic elements for a new concept of broadcasting have been already put in place through the Rome convention and other international law instruments. They should be used and referred to when developing a new legal instrument on this subject.

Scope of protection

13. The scope of rights to be protected was considered to be intrinsically linked to the determination of the object of protection. A modern model of protection should grant broadcasting organisations exclusive intellectual property (IP) type rights such as the right of fixation, the right of reproduction, the right of retransmission, the right of making available, the right of communication to the public, the right of distribution. The national regulation in some European countries is already based on this model. As with the definition of broadcasting, the rights to be granted should be defined in technologically neutral terms. For example, the right of fixation should be defined in a way that includes electronic fixation.

14. With respect to pre-broadcast signals, it was considered by some participants that protection should be extended not only to transmitted signals but also to signals carrying raw material or material that might finally not be broadcasted. It was argued that such signals may be easily misappropriated and, as a consequence, those who have not made any investment deserving of protection might claim rights in respect of them. The scope of protection in relation to pre-broadcast signals remains an open issue.

15. Different opinions were expressed with respect to the term of protection. One participant argued that the term should not exceed that set by the Rome Convention and that there should be cost analysis in the process of its determination.

16. There was agreement that a new legal instrument should not have an exhaustive list of limitations and exceptions. One participant suggested that three-step test clauses, as already included in several international treaties on intellectual property, should inform the limitations and exceptions provisions of a new legal instrument³.

Item 4: Discussion of future involvement and work

³ Three-step test clauses generally provide for the application of limitations and exceptions to certain special cases which do not conflict with the normal exploitation of the protected work and do not unreasonably prejudice the legitimate interests of the right holder. These principles are recognised in the Berne Convention for the Protection of Literary and Artistic Works, the TRIPS: (Agreement on Trade Related Aspects of Intellectual Property Rights), and the WIPO Copyright Treaty.

17. Most of the participants expressed their wish to be associated with the future group and indicated the contribution they could make to its work.

Item 5: Conclusion of the meeting

18. There was consensus that a new legal instrument in the field of protection of neighbouring rights of broadcasting organisations should be adapted to the new realities. Treaty proposals, such as that of the European Commission and its Member States, can be sources of inspiration for preparing a draft text with legal provisions and explanatory notes. It was recommended that this document should be available for the first meeting of the MC-S-NR.

19. Furthermore, it was considered important that discussions on a new legal instrument on the protection of neighbouring rights of broadcasting organisations should be open to all stakeholders. In that regard, it was suggested that a conference be organised aimed at collecting views of stakeholders. The creation of a shared collaborative workspace for discussions within the group and with outside experts was supported by all participants.

Appendix 1

Draft Terms of Reference of the Ad hoc Advisory Group on the Protection of Neighbouring Rights of Broadcasting Organisations (MC-S-NR)

1.	Name of committee:	Ad hoc Advisory Group on the Protection of Neighbouring Rights of Broadcasting Organisations (MC-S-NR)
2.	Type of committee:	Ad hoc Advisory Group
3.	Source of terms of reference:	The Committee of Ministers upon the proposal of the Steering Committee on the Media and New Communication Services (CDMC)
4.	Terms of reference:	
		Having regard to:
-		Resolution Res(2005)47 on committees and subordinate bodies, their terms of reference and working methods;
-		Declaration and the Action Plan adopted at the Third Summit of Heads of State and Government of the Council of Europe member states (Warsaw, 16-17 May 2005; CM(2005)80 final 17 May 2005), in particular chapter I.3. “Strengthening democracy, good governance and the rule of law in member states”;
-		Decision No. CM/875/20022008 adopted by the Ministers’ Deputies on 20 February 2008 at their 1018th meeting on Ad hoc terms of reference for the Steering Committee on the Media and New Communication Services (CDMC) on the protection of the neighbouring rights of broadcasting organisations;
-		Convention for the Protection of Human Rights and Fundamental Freedoms (1950, CETS No. 5), its additional protocols and the case-law of the European Court of Human Rights.
		Under the authority of the Steering Committee on the Media and New Communication Services (CDMC) and in relation with the implementation of Project 2008/DGHL/1415 “Standard-setting and policy assistance on topical issues concerning the media and new communication services”, the Group is instructed to:
i.		Pursue work on the protection of neighbouring rights of broadcasting

	organisations and, if the requisite conditions are met, submit a draft convention on the subject.
5.	Composition of the Group:
5.A.	Members
	The Group shall be composed of five specialists in intellectual property law, to be appointed by the Secretary General. The Council of Europe budget will bear their travel and subsistence expenses incurred in connection with their participation in meetings of the Group.
5.B.	Other Participants
	The European Commission may send a representative to meetings of the Group, without the right to vote or defrayal of expenses.
5.C.	Observers
	The following bodies and intergovernmental organisations may send a representative to meetings of the Group without the right to vote or defrayal of expenses: <ul style="list-style-type: none"> - Association of Commercial Television in Europe (ACT); - World Intellectual Property Organisation (WIPO); - European Broadcasting Union (EBU).
6.	Working Methods and Structures
	In order to carry out its tasks, the Group may, where necessary, within the limits of available budgetary appropriations, seek advice of external experts, have recourse to consultants and consult with relevant governmental and/or non-governmental organisations and other members of civil society, as well as other pertinent bodies. The MC-S-NR is entitled to invite other participants and/or observers to meetings of the Group, without the right to vote or defrayal of expenses. Member states may be able to designate representatives to attend and present their position at meetings, without the right to vote or defrayal of expenses. The MC-S-NR will have to request the necessary authorisation from the CDMC for the admission of observers (other than those already identified in the Terms of Reference).
7.	Duration

	These terms of reference will expire on 31 December 2010.
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**CONSULTATION MEETING
ON THE PROTECTION OF RIGHTS OF BROADCASTING ORGANISATIONS**

**Agora Building,
28-29 January 2010
Strasbourg
Room G04**

Agenda

- 1. Opening of the meeting and information by the Secretariat**
- 2. Adoption of the agenda**
- 3. Discussion of the content of a Council of Europe binding instrument on the protection of neighbouring rights of broadcasting organisations.**
- 4. Discussion of future involvement and work**
- 5. Conclusions**

Appendix 3

List of participants

Stephen Edwards

Law Firm Reed Smith – Former Head of copyright at the BBC - UK

Pascal Fehlbaum

Swiss Federal Institute and Intellectual Property – Bern

Jukka Liedes (29 January)

Director, Culture and Media policy Division, Ministry of Education and Culture – Finland

Delia Mucica (CHAIR)

Professor, National University of Theatre and Film “I.L. Caragiale” Bucharest,
Senior advisor, Ministry of Culture and National Heritage - Romania

Malgorzata Pek

Director of the Legal Department, National Broadcasting Council - Poland

Florian Philipitsch

Kommunikationsbehörde Austria (KommAustria)

Velizar Sokolov

Managing Partner, ARSIS Consulting Intellectual Property Lawyers - Bulgaria

Charlotte Vaughan

Intellectual Property Lawyer for BBC

Mr. Alfredo dos Santos Gil

Senior legal advisor Netherlands Public Broadcasting – The Netherlands

European Commission

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European Broadcasting Union - EBU Geneva

Heijo Ruijsenaars

Head of intellectual property

ACT

Tom Rivers

Copyright and media consultant - UK

WIPO

Carole Croella

Counselor, Copyright law sector

World intellectual property organization – Geneva

European Digital Rights (EDRI)

Joe McNamee, EDRI advocacy coordinator

Secretariat

Jan Malinowski, Head of Media and Information Society Division, Directorate General of Human Rights and Legal Affairs of the Council of Europe

Anita van de Kar-Bachelet, Administrator, Media and Information Society Division, Directorate General of Human Rights and Legal Affairs

Elvana Thaçi, Administrator, Media and Information Society Division, Directorate General of Human Rights and Legal Affairs of the Council of Europe

Corinne Gavrilovic, Assistant, Media and Information Society Division, Directorate General of Human Rights and Legal Affairs of the Council of Europe

Appendix 4

Working documents

1. Draft agenda and draft annotated agenda.
2. Terms of Reference of the Ad hoc Advisory Group on the Protection of Neighbouring Rights of Broadcasting Organisations (MC-S-NR).
3. Report of the 11th meeting of the CDMC (page 11).
4. Memorandum on a possible Council of Europe Instrument on the Protection of Broadcasting Organisations; Feasibility assessment for the CDMC prepared by the Ad-hoc Stocktaking Group (CDMC(2008)Misc6rev2).
5. Recommendation Rec(2002)7 of the Committee of Ministers to member states on measures to enhance the protection of the neighbouring rights of broadcasting organisations. <https://wcm.coe.int/ViewDoc.jsp?id=303043&Lang=en>
6. Revised Draft Basic Proposal for the WIPO Treaty on the Protection of Broadcasting Organizations; SCCR Fifteenth Session, 11-13 September 2006 (SCCR/15/12). http://www.wipo.int/edocs/mdocs/copyright/en/sccr_15/sccr_15_2.doc
7. The WIPO Treaty on the Protection of Broadcasting Organisations; Informal Paper prepared by the Chairman of the Standing Committee on Copyright and Related Rights (SCCR) According to the Decision of the SCCR at its 16th Session (March 2008); SCCR Seventeenth Session, 3-7 November 2008 (SCCR/17/INF1). http://www.wipo.int/edocs/mdocs/copyright/en/sccr_17/sccr_17_inf_1.pdf
8. Protection of the Rights of Broadcasting Organizations; Submitted by the European Community and its Member States; SCCR Sixth Session, 26-30 November 2001 (SCCR/6/2). http://www.wipo.int/edocs/mdocs/copyright/en/sccr_6/sccr_6_2.pdf
9. Article 1BIS; Proposal submitted by the European Community and its Member States; SCCR Ninth Session, 23-27 June 2003 (SCCR/9/12). http://www.wipo.int/edocs/mdocs/copyright/en/sccr_9/sccr_9_12.pdf
10. Protection of Broadcasting Organizations: Terms and Concepts – Working paper prepared by the Secretariat; SCCR Eighth Session, 4-8 November 2002 (SCCR/8/INF.1). http://www.wipo.int/edocs/mdocs/copyright/en/sccr_8/sccr_8_inf_1.pdf

11. Study on the Socio Economic Dimension of the Unauthorized Use of Signals; Part I: Current Market and Technology Trends in the Broadcasting Sector; SCCR Nineteenth Session, 14-18 December 2009 (SCCR/19/12).
http://www.wipo.int/edocs/mdocs/copyright/en/sccr_19/sccr_19_12.pdf