



Explanatory Report to the Protocol to the European Convention for the Protection of the Audiovisual Heritage, on the Protection of Television Productions *

Strasbourg, 8.XI.2001

The text of this explanatory report does not constitute an instrument providing an authoritative interpretation of the Protocol, although it might be of such a nature as to facilitate the application of the provisions contained therein. This Protocol has been opened for signature in Strasbourg, on 8 November 2001, on the occasion of the 109th Session of the Committee of Ministers of the Council of Europe.

I. Introduction

1. At its 765th meeting in Strasbourg, on 19 September 2001, the Committee of Ministers of the Council of Europe decided to open for signature, on 8 November 2001, the European Convention for the Protection of the Audiovisual Heritage (hereinafter: the Convention) and its Protocol on the Protection of Television Productions (hereinafter: the Protocol). On the same day, the Committee of Ministers authorised the Secretary General to publish this Explanatory Report to the Protocol.

2. The Convention carries the number 183 of the European Treaty Series (ETS) and the Protocol the number 184 of the European Treaty Series. They are kept at the Council of Europe in Strasbourg. Other related treaties are the European Convention on Transfrontier Television of 1989 (ETS No. 132) as amended by the Protocol of 1998 (ETS No. 171) and the European Convention on Cinematographic Co-production of 1992 (ETS No. 147).

3. The Protocol provides specific rules for the application of the general principles of the Convention to television productions.

4. This Explanatory Report to the Protocol is neither part of the Protocol itself, nor is it legally binding upon the Contracting Parties or the member States of the Council of Europe. It is rather an explanation of the legal history and reasoning of the Protocol and a source for the interpretation of the provisions of the Protocol.

5. The initiative to draw up the Convention and its Explanatory Report came from the Council for Cultural Co-operation (CDCC) and its Culture Committee (CC-Cult). The Steering Committee on the Mass Media (CDMM) was subsequently involved in this work, as the draft Convention prepared under the authority of the CDCC was intended to cover not only cinematographic works but also television productions. Both steering committees (CDCC and CDMM) decided to set up the Joint CDCC-CDMM Working Party on the Protection of the Audiovisual Heritage (GT-PA), entrusted with the preparation of an additional Protocol concerning television productions and the finalisation of the Convention.

(*) The Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community entered into force on 1 December 2009. As a consequence, as from that date, any reference to the European Community shall be read as the European Union.

II. General considerations

6. During the elaboration of the Convention, the CDCC and the CDMM came to the conclusion that it would be advisable to have a general treaty on the protection of the audiovisual heritage which could then be complemented by additional Protocols concerning "moving image material other than cinematographic works". Television productions were identified as constituting the largest sector of moving image material and thus being of highest relevance to the audiovisual heritage as defined by the Convention. At the same time, it was noted that television productions have a number of specificities, as compared with cinematographic works. Therefore, the CDCC and the CDMM requested the GT-PA to draft such an additional Protocol addressing the specific question of the protection of television productions. The major differences of television productions as compared to cinematographic works can be found in their quantity, the ephemeral nature of a large number of programmes, their modes of transmission and recording, their nearly universal availability, and their impact on individuals and society as a whole. Other additional Protocols might be drawn up in the future, once the CDCC or the CDMM identify other new developments in the field of audiovisual media which may require specific provisions for the protection of the audiovisual heritage.

7. The initiative to define a common European framework for the protection of television productions was spurred by several developments which have characterised the television environment in the last decade. The number of broadcasters has increased in Europe, especially as a result of the granting of broadcasting licences to private broadcasters, as well as the daily hours of broadcasting, hence leading to a growing amount of television productions. The introduction of cable, satellite and digital broadcasting has enlarged this amount and widened the range of television productions. At the same time, the archives of older broadcasters have been facing the progressive deterioration of old productions and the need to spend more resources for the maintenance of steadily growing archives.

8. On the other hand, the development of digital information technologies has made it technically possible, in particular for broadcasters, to copy and archive much larger volumes of television productions at lower costs, and to make them easily available for "cultural, scientific and research purposes in the public interest", subject to respect for copyright and neighbouring rights.

9. In some member States, film archive bodies have started to archive television productions. For example, France has widened the scope of its *Institute National de l'Audiovisuel* (National Audiovisual Institute) by creating the *Inathèque de France* for the legal deposit concerning television broadcasting. In the same vein, some broadcasters have decided to archive their own television productions.

10. The advantage of having a common European framework through this Protocol was seen, for example, in providing member States with the possibility of joining in a pan-European effort for preserving important sectors of their national audiovisual heritage. In the same vein, the Protocol should lead to the effect of having broadcasters in Europe and other depository bodies operate under similar obligations and opportunities.

III. Commentary on the provisions of the Protocol

Preamble

11. The Preamble of the Protocol makes reference to the specificity of television productions and their major importance for audiovisual heritage and refers to Article 3 and 18 of the Convention, which concern Protocols to the Convention.

12. In the fifth paragraph, the Preamble refers to "international treaties in force for the protection of copyright and neighbouring rights". The drafters of the Protocol had in particular mind the Berne Convention for the Protection of Literary and Artistic Works, the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations, the WIPO Copyright Treaty, the WIPO Performances and Phonograms Treaty, the European Agreement on the Protection of Television Broadcasts and the European Convention relating to Questions on Copyright Law and Neighbouring Rights in the Framework of Transfrontier Broadcasting by Satellite. This reference is to be understood in the light of Article 4 of the Convention, which indicates that nothing in this Convention and its Protocols shall be interpreted as limiting or derogating from the respective international obligations of the Parties (see also Article 4 of the Convention).

Article 1 – Definitions

13. The Protocol uses all the terms of the Convention as defined by the latter instrument.

14. In addition, the following new terms are defined by Article 1 of the Protocol:

(a) "television productions"

15. Television productions are covered by the general term "moving image material", but they are not "cinematographic works" under the meaning of Article 2 of the Convention. The specific feature of television productions is that they have been "produced for transmission via terrestrial transmitter, cable, satellite or other means, for reception by the public", while cinematographic works are defined by the fact that they are primarily intended to be shown in cinemas. Moving image material "transmitted on individual demand", such as video-on-demand, is excluded as well as "interactive moving image material", i.e. audiovisual productions which allow the viewer to contribute to the content, for example video games via Internet.

(b) "depository body"

16. The Protocol uses this term to cover "any institution, including archive bodies, designated by a Party to carry out the functions related to legal or voluntary deposit". In practice, this will include specialised depository bodies, such as public archives, as well as broadcasters who agree to maintain their archives in accordance with the provisions of the Protocol and the Convention as implemented at the national level (see also Articles 5 and 6 of the Protocol).

(c) "broadcaster"

17. The Protocol defines and, therefore, uses the term "broadcaster" along the lines of the definition used in the European Convention on Transfrontier Television. The major elements are (i) the "editorial responsibility for the composition of television productions", (ii) the direct or indirect transmission of television productions, and (iii) their "reception by the public". Editorial responsibility does usually not lie with, for example, cable network operators or operators of transmission facilities.

Article 2 – Scope of application

18. The aim of this Protocol is to provide specific rules for the application of the general principles of the Convention to television productions. Due to the specificity of television productions, it is necessary to have specific provisions in addition to the Convention, some of which may be applied instead of the respective provisions of the Convention as far as television productions are concerned.

19. Therefore, Article 2 of the Protocol specifies that:

20. Article 3 of this Protocol (legal deposit) shall be applied instead of Article 5 of the Convention (general obligation of legal deposit);

21. Article 4 of this Protocol (voluntary deposit) shall be applied instead of Article 11 of the Convention (promotion of voluntary deposit);

22. Article 5 of this Protocol (designation of depository bodies) shall be applied instead of Article 6 of the Convention (designation and tasks of archive bodies);

23. and Article 7 of this Protocol (conditions of deposit) shall be applied instead of Article 8 of the Convention (conditions of legal deposit).

24. The terms defined in Article 1 of this Protocol shall be regarded as additional definitions with respect to Article 2 of the Convention.

Article 3 – Legal deposit

Paragraph 1

25. Paragraph 1 of Article 3 provides the specific rules for the legal deposit of television productions (as regards the conditions governing the deposit, see Article 7 of the Protocol.)

26. The obligation of legal deposit is made subject to the provisions of paragraphs 2 and 3 of Article 3, which are hence to be read together with paragraph 1.

27. Legal deposit shall be implemented "by legislative or other appropriate means". A public obligation on natural or legal persons will typically require national law, which can comprise legislation by national parliament or secondary law. Paragraph 1 of Article 3 allows the contracting Parties to select also "other appropriate means", such as administrative measures or contractual arrangements between the Parties and the depository bodies. This may also include a system of self-regulation which is binding upon the respective natural or legal persons and which has sufficient means of enforcing the obligation, similar to an obligation under law.

28. The obligation of legal deposit applies to all television productions which fulfil certain requirements:

29. (i) The television productions must be part of the audiovisual heritage of the contracting Party. The Protocol does not attempt to define audiovisual heritage, but leaves it to the contracting Parties.

30. (ii) The television productions must have been transmitted by broadcasters under the jurisdiction of a contracting Party. The stipulation and enforcement of a public obligation usually requires that the obliged is under the jurisdiction of the respective government or public authority. The Protocol thus does not set up a regime which allows for an external application of the obligation of legal deposit. The definition of the jurisdiction is left to national or international law, such as the European Convention on Transfrontier Television.

31. (iii) Furthermore, the television productions must be transmitted "for the first time to the public after the entry into force of this Protocol". The entry into force of the Protocol is regulated in Article 8, paragraphs 2, 4 and 6 of the Protocol. Public transmission is to be understood as in the definition of television productions. Accordingly, transmission on individual demand would not suffice. The obligation of legal deposit applies only to the first transmission. Re-transmissions or later repetitions, even if it were for the first time after the entry into force of the Protocol, would not fall under this obligation. Slight modifications to

television productions, such as the addition of sub-titles or dubbing would generally not be sufficient to regard a modified television production as a new television production which would fall under the obligation of legal deposit when transmitted for the first time.

Paragraph 2

32. The immense amount of television productions which are part of the audiovisual heritage may be such that it would be technically impossible to deposit them all, to preserve them and to offer adequate access to them. Furthermore, not all television productions are worth preserving, in particular where they are of a repetitive nature. Therefore, the Protocol makes it possible for the contracting Parties to "provide for a system of appraising, selecting or sampling of television productions", notably for those which are similar or are part of a wider series of productions. This system shall define and preserve the television elements of the contracting Party's audiovisual heritage "adequately". This definition is necessary in order to make the general obligation under paragraph 1 of Article 3 precise enough for its application. The actual choice by a contracting Party might depend on, for example, the financial resources available to depository bodies in this Party (see also Article 6 of the Protocol) as well as the national tradition.

33. The system of appraising, selecting or sampling can involve national governmental authorities, national archive bodies, cultural, educational or television institutions as well as the television industry and broadcasters. Contracting Parties might create specific bodies or committees for this purpose.

Paragraph 3

34. Paragraph 3 allows the contracting Parties to introduce an exemption from the obligation of legal deposit "if a television production is legally deposited in one of the other Parties". Unless a contracting Party has introduced such an exemption, the obligation of legal deposit applies in this Party to television productions which are legally deposited in other Parties. This exemption from the obligation of legal deposit requires that the respective television production is deposited in another contracting Party, while the deposit in States which have not signed and ratified the Protocol would not be sufficient. The deposit has to be a legal deposit, i.e. it has to comply with the provisions of the Protocol concerning legal deposit. A voluntary deposit would thus not suffice, because voluntarily deposited television productions could, for instance, be withdrawn from the deposit.

Paragraph 4

35. For the implementation of the obligation of legal deposit under Article 3, paragraph 1, it is necessary to define the persons who are under this obligation. Therefore, paragraph 4 provides the obligation for the contracting Parties to "determine who is under the obligation of legal deposit". The contracting Parties have discretion in this respect.

36. The legal deposit as such does not affect the copyright and neighbouring rights to the respective television production, and it is thus not necessary to oblige the rights holders directly. In practice, the contracting Parties might select broadcasters, because they are under the jurisdiction of the respective contracting Party, they are always known to the national authorities through their licence, they themselves know which television production is transmitted for the first time and which is re-transmitted or repeated, and they could also be designated as depository body for their transmitted television productions under Article 5 of the Protocol.

37. When determining who shall be under the obligation to deposit television productions, the Parties should take account of the ownership of the material and should not impose any obligations which cannot be implemented in practice.

Article 4 – Voluntary deposit

Paragraph 1

38. The voluntary deposit takes place outside the obligation of legal deposit. Therefore, voluntary deposit applies to television productions which do not qualify under Article 3 of the Protocol. This can be the case, for example, because the particular television productions are not part of the audiovisual heritage, they have been transmitted for the first time before the entry into force of this Protocol, they have been transmitted for the first time by a broadcaster outside the jurisdiction of a contracting Party, they have been produced but not transmitted, or they are already legally deposited in another contracting Party.

39. The voluntary deposit may even include television productions which are part of the audiovisual heritage but which would have not been appraised, selected or sampled under the system referred to in Article 3, paragraph 2 of the Protocol.

40. Paragraph 1 of Article 4 mentions the possibility to "encourage and promote the voluntary deposit". The individual means of encouraging and promoting are at the full discretion of the Parties. The contracting Parties might, for example, provide specific means and resources to depository bodies or specific incentives for the voluntary deposit (see also Article 6 of the Protocol).

41. The voluntary deposit of television productions requires a voluntary act of making the television production available to a depository body as well as the voluntary agreement of a depository body to accept this television production. The deposit must therefore be based on an expressly or tacitly concluded mutual contract. One effect of such a contractual relation is that the contract could be cancelled later and the voluntarily deposited television production be withdrawn from the deposit.

Paragraph 2

42. Ancillary material may also be included in the voluntary deposit. Typical ancillary material might be, for example, a manuscript by the author, a plan of the stage or camera positions, an advertisement, information on the costs and the realisation of the television production, the contract between the producer and the broadcaster, critiques drafted at the time of the first transmission or the schedule of a television production.

43. The Protocol does not attempt to provide a detailed definition of ancillary material. Ancillary material can only be deposited on a voluntary basis, and it is therefore in the hands of the depositing person and the depository body to agree on what material will be voluntarily deposited.

Article 5 – Designation of depository bodies

44. The designation of one or more depository bodies by a contracting Party is a necessary requirement for the introduction of the obligation of legal deposit. Without the establishment or designation of depository bodies under Article 5, the legal and the voluntary deposit could not be achieved.

45. Article 5 leaves the contracting Parties the choice whether to designate one or more broadcasters as depository bodies or to designate or establish one or more other depository bodies, such as specific archive bodies. Broadcasters do not fall under the definition of Article 6 of the Convention, which requires that the designated bodies "shall not be controlled directly or indirectly by any individual or legal person principally engaged in profit-making activities in the media sector", since many broadcasters do not qualify as non-profit organisations. The provisions of the Convention concerning the legal deposit are, however, limited to

cinematographic works and thus Article 6 of the Convention does not restrict the designation of depository bodies for television productions under Article 5 of the Protocol.

46. The designation of broadcasters as depository bodies requires their agreement. Therefore, the Protocol may not be taken as a basis for a mandatory and unilateral designation of a broadcaster by a contracting Party. This agreement should stipulate the rights and obligations of the broadcaster as depository body, as well as the possible rights and obligations of the contracting Party and its authorities. It should, in particular, specify the requirements for a secure preservation of the deposited television productions and the conditions for accessing them, with due respect for copyright and neighbouring rights (see also Articles 6 and 7 of the Protocol).

47. Broadcasters can typically operate as depository bodies for their own television productions. However, Article 5, paragraph (a) of the Protocol allows for the designation of a broadcaster as depository body for television productions of other broadcasters "if both sides agree", i.e. the broadcaster acting as depository body and the depositing broadcaster as far as the latter is entitled to act on behalf of the actual rights holders in the television productions which are to be deposited. For different reasons, and in particular due to direct competition, broadcasters might not want to deposit their television productions with other broadcasters. Therefore, it seems inappropriate to oblige broadcasters to accept that the legal deposit is received by another broadcaster.

Article 6 – Financial and technical means of depository bodies

48. Article 6 of the Protocol stipulates the obligation for the contracting Parties to "ensure that depository bodies (...) have the necessary means for carrying out the functions of legal deposit as defined in Article 3" and to "examine the appropriate financial arrangements to this effect". It is in the discretion of each contracting Party to decide on how "the necessary means" of depository bodies can be ensured.

49. In order to carry out the functions related to legal or voluntary deposit in accordance with this Protocol (see Article 1, paragraph b, definition of "depository body"), depository bodies must meet certain requirements as to their ability to preserve television productions and to provide access to them. Such requirements comprise the technical equipment and documentary resources for the receipt and storage of television productions, the knowledge and skills necessary for their secure storing and archiving, a system of documentation as well as the technical and human resources necessary for providing access by third parties to the deposited television productions. This will also entail costs on the side of the depository body. The contracting Parties should include these requirements in the agreement to be concluded under Article 5 of the Protocol and refer to the conditions of deposit under Article 7 of the Protocol.

50. The provision of the means necessary for carrying out the functions related to legal or voluntary deposit by depository bodies will generally entail costs for depository bodies. The contracting Parties are therefore obliged under Article 6 of the Protocol, to "examine the appropriate financial arrangements" in order to allow depository bodies to fulfil their tasks. These tasks are regulated in the Protocol and should be defined in the agreement referred to in paragraph 46 above.

51. The obligation to "examine" the financial arrangements does not imply any obligation for the contracting Parties to provide financial support. It is rather meant that the Parties shall examine and decide, at their own discretion, how to ensure that depository bodies have the necessary financial resources to carry out their functions (see also Article 7 of the Protocol).

Article 7 – Conditions of deposit

52. Article 7 of the Protocol provides the obligation for the contracting Parties to "determine the conditions necessary for the deposit of television productions (...)". With due respect for copyright and neighbouring rights, these modalities might include, for example, whether the depository bodies shall be provided with recorded copies of television productions or be authorised to record them directly when they are transmitted by a broadcaster, which time obligation for the deposit shall apply, which regulations shall apply if the depository bodies become unable to fulfil their functions, in which cases and under which conditions television productions may be removed from the stock of depository bodies as well as which financial support mechanisms shall possibly be established for depository bodies. This indicative list is only intended to provide guidance to the contracting Parties.

53. The respective determination under Article 7 of the Protocol can be made through the "legislative or other appropriate means" referred to in Article 3, paragraph 1 of the Protocol and paragraph 27 above. The contracting Parties might base their determination, for example, on the examination of the "necessary means" and the "appropriate financial arrangements" referred to in Article 6 of the Protocol.

54. The conditions of deposit under Article 7 of the Protocol are an essential part of the obligation of legal deposit as well as the possibility of voluntary deposit. It is therefore indispensable for the contracting Parties to specify the conditions necessary for the deposit of television productions and to determine their particularities.

Article 8 – Final provisions

55. Paragraphs 1 to 10 of Article 8 of the Protocol correspond to the model final clauses for conventions and agreements concluded within the Council of Europe which were approved by the Committee of Ministers of the Council of Europe, as well as to the final clauses of the Convention.

56. Article 21 of the Convention on the relations between the Convention and European Community law is also applicable to the Protocol.