

WIPO



SCCR/12/5 Prov.

ORIGINAL: English

DATE: April 13, 2005

WORLD INTELLECTUAL PROPERTY ORGANIZATION
GENEVA

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STANDING COMMITTEE ON COPYRIGHT AND RELATED RIGHTS

Twelfth Session
Geneva, November 17 to 19, 2004

WORKING PAPER ON
ALTERNATIVE AND NON-MANDATORY SOLUTIONS
ON THE PROTECTION IN RELATION TO WEBCASTING

prepared by the Chair of the Standing Committee on Copyright and Related Rights

Introductory Notes by the Chairman of the Standing Committee

1. The Conclusions of the Chairman of the Standing Committee on Copyright and Related Rights, November 17 to 19, 2004, dealing with the preparation of a Treaty on the Protection of Broadcasting Organizations, provide that:

“a second revised version of the Consolidated Text will be prepared by the Chairman of the present session of the Standing Committee;

a working paper on alternative non-mandatory solutions on the protection of webcasting organizations, including simulcasting organizations, will be prepared to accompany the second revised version;...”

2. This Working Paper has been prepared on the basis of the discussions in the November 2004 meeting of the Standing Committee, as well as on the basis of the conclusion above. It has been prepared to accompany the second revised version of the Consolidated Text for a Treaty on the Protection of Broadcasting Organizations.

3. The second revised version of the Consolidated Text and this Working Paper will be the basis for discussions at the regional meetings to be organized by the International Bureau as requested by the Member States. The objective of these documents is to further promote consensus on the various treaty proposals submitted by the Member States.

4. The main purpose of this Working Paper is to facilitate the search of non-mandatory and more flexible solutions on the protection of webcasting organizations, including simulcasting.

5. To accommodate the decision of the General Assembly of WIPO at its September 2004 meeting, and to accelerate and facilitate the deliberations of the Standing Committee on the Treaty on the Protection of Broadcasting Organizations, all text on webcasting and simulcasting has been removed from the second revised version of the Consolidated Text.

6. The preparation of a separate working paper on webcasting and simulcasting is a consequence of the fact that there has been broad opposition to include the protection of webcasting organizations in the Treaty. However, over a longer series of meetings, many Delegations who oppose this protection in this context, have expressed their recognition of the potential economic and other importance of webcasting. An opinion is widely shared that the preparation of the protection of webcasting organizations should take place as a separate process and maybe later. This should be subject to examination and analysis, of its own, of the need and form of the protection in the area of webcasting.

7. The inclusion of protection of webcasts by broadcasting organizations, *i.e.* simulcasts, enjoys a degree of support among the Delegations. It is suggested that the form of protection in the area of simulcasting should be examined in conjunction with the consideration of the general question of protection of webcasting. The reason for this is the fact that simulcasting in the sense of the proposal made by one Delegation, even if done by broadcasting organizations, is webcasting by its nature.

8. The models presented under Alternative Solution 1 and Alternative Solution 2 are based on additional provisions that could be added to the draft Treaty later in the process, possibly in the Basic Proposal. The relevant additional provisions are indicated by broken underlining.

9. Alternative Solution 3 is in the form of an Additional and Optional Protocol that could be attached to the Treaty. The model of a Protocol provides for Delegations the possibility to consider attaching the Protocol to the Treaty at the time of its conclusion or later.

10. If Alternative Solution 3 would be chosen, the Delegations could consider the addition of an article to the Treaty in order to provide for a reference point in the Treaty to the Protocol. Such an article, placed before the Final Clauses of the Treaty, could read *e.g.* as follows:

*“Article 25a (Protocol on the Protection in Relation to Webcasting)
An Optional Protocol on the Protection in Relation to Webcasting has been attached to this Treaty in order to provide the Contracting Parties the possibility to extend the protection of this Treaty to webcasts by any webcasting organizations or simulcasts by broadcasting organizations.”*

11. An important function of this Working Paper is to accommodate the position of those Delegations who recognize the importance of webcasting as part of an international regime of broadcasters and other communicators who use different technological platforms for their transmissions.

12. Parallel examination and deliberations on the Working Paper with the Consolidated Text would provide for a possibility to an early start of preparation and consideration of this new area of protection.

**Working Paper on Alternative and Non-Mandatory Solutions
on the Protection in Relation to Webcasting**

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ALTERNATIVE SOLUTION 1

First model based on the provisions of the Scope of Application of the Treaty (“Opt in by notification”)

Explanatory Comments

1.01 The first alternative solution presented in this Working Paper is based on the provisions on webcasting and simulcasting that were found in the Consolidated Text and put in square brackets in the first revised version thereof. This model is designed to offer a basis to the Delegations to consider the re-introduction of provisions on webcasting and simulcasting in a non-mandatory and flexible way already during the on-going preparation of the Treaty.

1.02 According to this alternative the scope of the Treaty would cover simulcasting and webcasting. However, no Contracting Party would automatically be bound to apply the protection of the Treaty to simulcasting and/or webcasting. If a Contracting Party would ratify the Treaty without a notification on simulcasting and/or webcasting, it would be bound to extend protection to traditional broadcasting and cablecasting only.

1.03 This model has been developed into a three-tier structure. Thus, the following options are available for Contracting Parties:

- (1) to extend no protection of the Treaty in the area of webcasting and simulcasting; in this case a Contracting Party would simply ratify the Treaty without any notification,
- (2) to extend protection to simulcasting by broadcasting organizations only; in this case a Contracting Party would notify that it applies the Treaty to simulcasting, or
- (3) to extend protection to all webcasting, including simulcasting; in this case a Contracting Party would make the relevant notification to this effect.

1.04 Furthermore, the model has been complemented by introducing in Article 5 provisions on reciprocity in order to adjust the obligations of the Treaty to situations where Contracting Parties opt in for different scopes of protection.

Article 2 (Definitions)

1.05 If a possibility to extend protection to the area of webcasting would be introduced, a definition of “webcasting” would be necessary. The definition presented in the Consolidated Text is found in *paragraph (x) of Article 2*.

1.06 The definition of “webcasting” is based on the proposal of the United States of America. Its structure follows the definitions of “broadcasting” and “cablecasting.” The operative term of the definition is not “transmission” but “making accessible to the public of transmissions.” This expression implies the modicum of interactivity in today’s technological environment that is necessary to access the streaming of a program-carrying signal. It is the receiver who activates or instigates the transmission over a telecommunications path. The elements “to the public” and “at substantially the same time” serve to limit the definition to accessibility of real-time streaming that may be received by several receivers at the same time. The receiver may log in to the program flow at a given point of time and receive what follows but cannot influence the program flow otherwise. The definition confines the making

ALTERNATIVE SOLUTION 1

First model based on the provisions of the Scope of Application of the Treaty

Article 2 Definitions

(x) “webcasting” means the making accessible to the public of transmissions of sounds or of images or of images and sounds or of the representations thereof, by wire or wireless means over a computer network at substantially the same time. Such transmissions, when encrypted, shall be considered as “webcasting” where the means for decrypting are provided to the public by the webcasting organization or with its consent.

accessible of transmissions to such activity over computer networks, which by nature may take place by wire or wireless means. In the end of the definition, the explicit exclusion of “webcasting” and “other computer network transmissions” from “broadcasting” and “cablecasting,” as proposed by the United States of America, has been omitted in view of the fact that in the draft Treaty the definitions of “broadcasting” and “cablecasting” include explicit clauses to this effect.

Article 3 (Scope of Application)

1.07 In this model the extension of the protection of the Treaty to webcasting and simulcasting would be achieved by using the provisions on the scope of application. Such a formula was presented in a mandatory way in the Consolidated Text in Article 3, in Alternatives E and F. The explanatory notes in paragraphs 1.08 and 1.09 are the same as in the Consolidated Text. The effect of Alternative G (no protection for simulcasting or webcasting) of the Consolidated Text would be achieved by simply ratifying the Treaty without a notification.

1.08 *Paragraph (3) in Article 3* offers the possibility of granting, by *mutatis mutandis* application, the protection of the Treaty to the simultaneous and unchanged webcasting by the broadcasting organizations of their own broadcasts (“simulcasting”). It corresponds to the proposal of the European Community and its Member States, which was based on the legal techniques of assimilating such simulcasting to broadcasting (“as if it were broadcasting”). The provision has been reworded for the sake of preciseness and consistency with the language of the Consolidated Text.

1.09 *Paragraph (4) in Article 3* offers, in line with the proposal of the United States of America, the possibility of granting, by *mutatis mutandis* application, to webcasting organizations the same protection that will be accorded to broadcasting and cablecasting organizations.

1.10 *Paragraph (5) in Article 3* makes clear that the Contracting Parties are initially not bound to apply the Treaty to simulcasting and/or webcasting. To provide for an optional and non-mandatory solution, paragraph (5) offers to the Contracting Parties a possibility to choose between two extensions of the scope: (1) to extend the protection to simulcasting only, or (2) to extend protection to all webcasting, including simulcasting. This operative result would be achieved by making a relevant notification.

Article 5 (National Treatment)

1.11 A clause on reciprocity has in this Working Paper been included as *paragraph (y) in Article 5* on national treatment. Its purpose is to balance the obligations of the Treaty, and to avoid the obligation of those Contracting Parties who opt in for more extensive protection to accord unilaterally this protection to Contracting Parties that provide for more restricted protections.

Article 3 **Scope of Application**

(0) The protection granted under this Treaty extends only to signals used for the transmissions by the beneficiaries of the protection of this Treaty, and not to works and other protected subject matter carried by such signals.

(1) This Treaty shall apply to the protection of broadcasting organizations in respect of their broadcasts.

(2) The provisions of this Treaty shall apply *mutatis mutandis* to the protection of cablecasting organizations in respect of their cablecasts.

(3) The provisions of this Treaty shall apply *mutatis mutandis* to the protection of broadcasting organizations in respect of the simultaneous and unchanged webcasting by them of their own broadcasts.

(4) The provisions of this Treaty shall apply *mutatis mutandis* to the protection of webcasting organizations in respect of their webcasts.

(5) A Contracting Party is bound to apply the provisions of paragraph (3) or both paragraphs (3) and (4) only if it makes a notification to this effect to the Director General of WIPO when becoming Party to this Treaty or at any later time.

(6) The provisions of this Treaty shall not provide any protection in respect of

- (i) mere retransmissions by any means of transmissions referred to in Article 2(a), (c), (d) and (x);
- (ii) any transmissions where the time of the transmission and the place of its reception may be individually chosen by members of the public.

Article 5 **National Treatment**

(y) If a Contracting Party has made a notification according to paragraph (5) of Article 3 of this Treaty on the application of this Treaty the obligations provided for in paragraph (4) or paragraphs (3) and (4) of Article 3 apply only to the extent that another Contracting Party has made a corresponding notification.

[End of Alternative Solution 1]

ALTERNATIVE SOLUTION 2

Second model based on the provisions of the Scope of Application of the Treaty
("Possibility of reservation, and withdrawal of reservation")

Explanatory Comments

2.01 The second alternative solution presented here is a variant of the first alternative solution. This model, as well, is designed to offer to the Delegations a basis to consider the re-introduction into the Treaty of provisions on webcasting and simulcasting in a non-mandatory and flexible way. It is based, in the same way as in the first alternative solution, on the provisions on webcasting and simulcasting that were found in the Consolidated Text and put in square brackets in the first revised version thereof.

2.02 Also in this model simulcasting and webcasting would initially be within the scope of the Treaty. However, any Contracting Party would have the possibility to exclude protection from simulcasting and/or webcasting.

2.03 Three options would be available for Contracting Parties:

- (1) to extend protection of the Treaty to all webcasting, including simulcasting; in this case a Contracting Party would ratify the Treaty without reservation,
- (2) to extend protection to simulcasting by broadcasting organizations only; in this case a Contracting Party would make a reservation and declare that it will not apply the Treaty to other webcasting than simulcasting by broadcasters only, or
- (3) to extend no protection in the area of webcasting and simulcasting; in this case a Contracting Party would make a relevant reservation and declare that it will not apply the Treaty to any webcasting, including simulcasting.

2.04 Furthermore, the model has been complemented by introducing in Article 5 a suitable formula on reciprocity in order to adjust the obligations of the Treaty to situations where Contracting Parties assume by reservations different scopes of protection.

Article 2 (Definitions)

2.05 See paragraphs 1.05 and 1.06 in explanatory comments of Alternative Solution 1.

ALTERNATIVE SOLUTION 2

Second model based on the provisions of the Scope of Application of the Treaty

Article 2 **Definitions**

(x) “webcasting” means the making accessible to the public of transmissions of sounds or of images or of images and sounds or of the representations thereof, by wire or wireless means over a computer network at substantially the same time. Such transmissions, when encrypted, shall be considered as “webcasting” where the means for decrypting are provided to the public by the webcasting organization or with its consent.

Article 3 (Scope of Application)

2.06 This model, as a variant of the first model, is as well based on the provisions on the scope of application. *Paragraphs (0) to (4) of Article 3* are the same as in Alternative Solution 1. See paragraphs 1.07 to 1.09 in explanatory comments of Alternative Solution 1.

2.07 To provide for an optional and non-mandatory solution, *paragraph (5) in Article 3* offers to the Contracting Parties a possibility for two kinds of reservations: (1) to limit the protection to simulcasting only and (2) to exclude all protection from all webcasting, including simulcasting.

2.08 The effect of Alternative G of the Consolidated Text (no protection for simulcasting or webcasting) would be achieved by using a total reservation. It should be reminded that Contracting Parties that have made a reservation excluding the protection from simulcasting and/or webcasting, may at any time later withdraw such a reservation or reduce its scope and extend protection to simulcasting or all webcasting.

2.09 If this solution based on a reservation mechanism would be chosen, the necessary reference to Article 3 should be made in Article 19 on reservations.

Article 5 (National Treatment)

2.10 A clause on reciprocity has in this Working Paper been included as *paragraph (y) in Article 5* on national treatment. Its purpose is to balance the obligations of the Treaty, and to avoid the obligation of those Contracting Parties who assume a broader scope of protection to accord unilaterally more extensive protection to Contracting Parties that by reservation opt out protection of simulcasting and/or webcasting, and thus provide for more restricted protections.

[End of Explanatory Comments on Alternative Solution 2]

Article 3 **Scope of Application**

(0) The protection granted under this Treaty extends only to signals used for the transmissions by the beneficiaries of the protection of this Treaty, and not to works and other protected subject matter carried by such signals.

(1) This Treaty shall apply to the protection of broadcasting organizations in respect of their broadcasts.

(2) The provisions of this Treaty shall apply *mutatis mutandis* to the protection of cablecasting organizations in respect of their cablecasts.

(3) The provisions of this Treaty shall apply *mutatis mutandis* to the protection of broadcasting organizations in respect of the simultaneous and unchanged webcasting by them of their own broadcasts.

(4) The provisions of this Treaty shall apply *mutatis mutandis* to the protection of webcasting organizations in respect of their webcasts.

(5) Any Contracting Party may, in a notification deposited with the Director General of WIPO, declare that it will not apply the provisions of paragraph (4) or both paragraphs (3) and (4).

(6) The provisions of this Treaty shall not provide any protection in respect of
(i) mere retransmissions by any means of transmissions referred to in Article 2(a), (c), (d) and (x);
(ii) any transmissions where the time of the transmission and the place of its reception may be individually chosen by members of the public.

Article 5 **National Treatment**

(y) The obligations provided for in paragraph (4) or paragraphs (3) and (4) of Article 3 do not apply to the extent that another Contracting Party makes use of the reservations permitted by paragraph (5) of Article 3 of this Treaty.

[End of Alternative Solution 2]

ALTERNATIVE SOLUTION 3

Model based on an Additional and Optional Protocol
("Extension of the scope by protocol")

Explanatory Comments

General

3.01 The third alternative solution presented in the Working Paper would consist of a Protocol to be attached to the Treaty.

3.02 A Protocol could be attached to the instrument at the time of the conclusion of the Treaty, or negotiated and attached to the Treaty after its adoption.

3.03 The Protocol would constitute a distinct legal text. It would be subject to ratification, accession or adhesion by the Contracting Parties of the Treaty.

3.04 The necessary flexibility of the solution in this model would be achieved by the fact that the protection of webcasts, including simulcasts, would be created in a separate instrument – but attached to the Treaty. Even if the Protocol would be prepared and adopted in conjunction with the Treaty, there would be no obligation for any Contracting Party of the Treaty to adhere to the Protocol. Contracting Parties would be free to adhere to the Protocol when they feel ready to do so, or remain outside of it.

3.05 The Protocol would contain its own administrative and final provisions. It would contain its own clauses on eligibility for becoming party, signature, entry into force, and effective date of becoming party. The Director General of WIPO would perform the function of depositary of the Protocol.

Preamble

3.06 The draft *Preamble* follows the model of the draft Treaty in the Consolidated Text.

Article 1 (Protocol)

3.07 *Article 1* declares that the Protocol is an integral part of the WIPO Treaty on the Protection of Broadcasting Organizations for those Parties that are Contracting Parties to the Treaty. This is important because the Protocol would operate through the Treaty. The Protocol would modify – extend – the field of application of the Treaty.

3.08 Article 1 of the Treaty would be applicable *mutatis mutandis* on all other aspects concerning the relation of the Protocol to other Conventions and Treaties.

ALTERNATIVE SOLUTION 3

Model based on an Additional and Optional Protocol

Additional and Optional Protocol
on the Protection in Relation to Webcasting
to the WIPO Treaty on the Protection of Broadcasting Organizations

Preamble

The Parties to this Protocol,

Desiring to develop and maintain the protection of the rights of webcasting organizations in a manner as effective and uniform as possible,

Recognizing the need to introduce new international rules in order to provide adequate solutions to the questions raised by economic, social, cultural and technological developments,

Recognizing the profound impact of the development and convergence of information and communication technologies which have given rise to increasing possibilities and opportunities for unauthorized use of webcasts both within and across borders,

Recognizing the need to maintain a balance between the rights of webcasting organizations and the larger public interest, particularly education, research and access to information,

Recognizing the objective to establish an international system of protection of webcasting organizations without compromising the rights of holders of copyright and related rights in works and other protected subject matter carried by webcasts, as well as the need for webcasting organizations to acknowledge these rights,

Stressing the benefits to authors, performers and producers of phonograms of effective and uniform protection against illegal use of webcasts,

Have agreed as follows:

Article 1 Protocol

This Instrument is a Protocol to the WIPO Treaty on the Protection of Broadcasting Organizations (hereinafter “the Treaty”). The Protocol is an integral part of the Treaty for those Parties who are Contracting Parties to the Treaty.

Article 2 (Definitions)

3.09 The definition of “webcasting” presented in *paragraph (a)* in *Article 2* reproduces the corresponding definition in the Consolidated Text. The explanatory comments, see paragraphs 1.05 and 1.06 in Alternative Solution 1.

3.10 A draft definition of “webcasting organization” has been inserted in *paragraph (b)* of *Article 2* in order to provide criteria for the application in respect of the persons enjoying protection according to the Protocol. Tentatively, exactly the same criteria are offered for consideration, as in the definition of “broadcasting organization” and “cablecasting organization” in the Consolidated Text.

Article 3 (Scope of Application of the Treaty)

3.11 The main function of the Protocol would be to extend the protection provided for by the Treaty, and the scope of application of the Treaty, to all webcasting, including simulcasting. *Article 3* is formulated to this effect.

3.12 According to *paragraph (1)* the Parties to the Protocol would take the obligation to extend the application of the substantive provisions of the Treaty to the protection of all webcasts, including simulcasts.

3.13 *Paragraph (2)* would provide for Contracting Parties the possibility to limit the protection only to the broadcasting organizations transmitting their own broadcasts by simulcasting. Such application of this Article would be subject to making a notification to this effect to the Director General of WIPO.

Articles 4 to 9 (Administrative and Final Provisions etc.)

3.14 *Articles 4 to 9* of the provisional draft Protocol are self-explanatory.

[End of Explanatory Comments on Alternative Solution 3]

Article 2 **Definitions**

For the purposes of this Protocol,

- (a) “webcasting” means the making accessible to the public of transmissions of sounds or of images or of images and sounds or of the representations thereof, by wire or wireless means over a computer network at substantially the same time. Such transmissions, when encrypted, shall be considered as “webcasting” where the means for decrypting are provided to the public by the webcasting organization or with its consent.
- (b) “webcasting organization” means 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 representations thereof, and the assembly and scheduling of the content of the transmission;

Article 3 **Scope of Application of the Treaty**

- (1) By this Protocol the Parties shall apply *mutatis mutandis* the provisions of Articles 1 to 21 of the Treaty to the rights of webcasting organizations in respect of their webcasts.
- (2) Any Party to this Protocol may, in a notification deposited with the Director General of WIPO, declare that it will limit the protection granted according to paragraph (1) to the rights and protection of broadcasting organizations in respect of the simultaneous and unchanged webcasting by them of their own broadcasts.

Article 4 **Administrative and Final Provisions**

- (1) The Parties apply to this Protocol the provisions of

- Article 22 (Assembly),
- Article 23 (International Bureau),
- Article 25 (Rights and Obligations under the Treaty)
- Article 29 (Denunciation of the Treaty), and
- Article 30 (Languages of the Treaty)

of the Treaty, subject to provisions in paragraph 2 of this Article and the provisions of Articles 5 - 9.

- (2) The Assembly of the Parties to this Protocol consists of those Parties which are Contracting Parties to the Treaty.

Article 5
Eligibility for Becoming Party to the Protocol

(1) Any Member State of WIPO may become Party to this Protocol, provided that such State a Contracting Party to the WIPO Treaty on the Protection of Broadcasting Organizations.

(2) The Assembly may decide to admit any intergovernmental organization to become Party to this Protocol which declares that it is competent in respect of, and has its own legislation binding on all its Member States on, matters covered by this Protocol and that it has been duly authorized, in accordance with its internal procedures, to become Party to this Protocol.

(3) The European Community, having made the declaration referred to in the preceding paragraph in the Diplomatic Conference that has adopted this Protocol, may become Party to this Protocol.

Article 6
Signature of the Protocol

This Protocol shall be open for signature until by any State that has acceded to or ratified the WIPO Treaty on the Protection of Broadcasting Organizations and by the European Community.

Article 7
Entry into Force of the Protocol

This Protocol shall enter into force three months after instruments of ratification or accession by Parties have been deposited with the Director General of WIPO.

Article 8
Effective Date of Becoming Party to the Protocol

This Protocol shall bind:

(i) the Parties referred to in Article 7, from the date on which this Protocol has entered into force;

(ii) each other Party from the expiration of three months from the date on which the State has deposited its instrument with the Director General of WIPO;

Article 9
Depositary

The Director General of WIPO is the depositary of this Protocol.

[End of Alternative Solution 3 and of document]