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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)

BACKGROUND AND INTRODUCTORY NOTES

1. By November 2008, the question of updating and modernizing the international protection of broadcasting organizations has been dealt with by the Standing Committee on Copyright and Related Rights (SCCR) without interruption in seventeen sessions, since November 1998.

2. The preparatory process was based on proposals made between 1999 and 2003 by the Member States of WIPO and the European Community. As from 2004 the substance of the treaty was compiled, first in more and more refined Consolidated Texts, then in versions of a draft Basic Proposal intended to become the main working document for a diplomatic conference. The preparatory steps regarding those texts culminated by the September 2006 session of the SCCR in a Revised Draft Basic Proposal for a Treaty (SCCR/15/2 rev) which included all proposals presented so far.

3. The contentious matter of possibly extending the protection to webcasting (or "netcasting"), including simulcasting, was provisionally solved in the May 2006 Session of the SCCR. It was decided that the work would first concentrate on the protection of traditional broadcasting and cablecasting, and that all text on webcasting and simulcasting would be removed from the texts on the table. The matter would be dealt with later on the basis of a separate preparation.

4. After the removal of the issue of webcasting from the discussions and on the basis of a recommendation by the SCCR, the WIPO General Assembly in its September/October 2006 session decided to authorize the convening of a diplomatic conference. The decision contained a strong element of conditionality. The diplomatic conference would be organized only if the SCCR would be able to produce a more streamlined text for the basic proposal than document SCCR/15/2 rev. To this end the Assembly decided that two Special Sessions of SCCR would be convened in January and June 2007 to clarify the outstanding issues. The General Assembly furthermore decided that:

> *"…the sessions of the SCCR should aim to agree and finalize, on a signal-based approach, the objectives, specific scope and object of protection with a view to submitting to the Diplomatic Conference a revised basic proposal, which will amend the agreed relevant parts of the Revised Draft Basic Proposal…"*

5. In the First Special Session of the SCCR in January 2007 the method to bring the matter forward was to prepare and consider "non-papers" on core issues. In between the sessions and in the Second Special Session in June 2007 there was an attempt to reduce the number of alternatives using the methods of informal sessions and informal papers. At the Second Special Session, it became evident that it was at that stage not possible to agree on a non-paper and produce a more streamlined basic proposal for a diplomatic conference than document SCCR/15/2 rev. The SCCR decided to report the matter to the General Assembly of WIPO and recommended that the issue should remain on the Agenda of the SCCR.

6. On the basis of this recommendation the General Assembly took note of the matter in its September/October 2007 Session and adopted the following text, including in particular the decision in item (v) below:

"The General Assembly:
(i) took note of the current status of the work in the SCCR on the protection of broadcasting organizations and cablecasting organizations;
(ii) acknowledged that progress was made in the process towards better understanding of the positions of the various stakeholders;
(iii) recognized the good faith efforts of all participants and stakeholder organizations throughout the process;
(iv) expressed the wish that all the parties continue to strive to achieve an agreement on the objectives, specific scope and object of protection, as mandated by the General Assembly;
(v) decided that the subject of broadcasting organizations and cablecasting organizations be retained on the agenda of the SCCR for its regular sessions and consider convening of a Diplomatic Conference only after agreement on objectives, specific scope and object of protection has been achieved."

7. The question on the protection of the broadcasting and cablecasting organizations was reconsidered in the March 2008 session of the SCCR. A decision on a preparatory step was taken:

"The delegations who took the floor expressed their support in continuing the work on this item in consonance with the mandate of the General Assembly, and many delegations showed their interest towards the conclusion of a treaty.

The Chair will prepare an informal paper, based on the mandate of the General Assembly, rendering his understanding of the main positions and divergences, to be dealt with in the next session of the SCCR."

8. This informal paper is prepared to carry out the task referred to above. The objective of the recording of an understanding of the main positions and divergences is to contribute to the efforts to establish common ground on the outstanding issues, to find a way out of the impasse, and to arrive at a positive solution. The common goal of the project is to update and modernize the international regime of the protection of broadcasting and cablecasting organizations by establishing a balanced new instrument that achieves the necessary protection objectives in the complex and evolving communications environment.

9. In order to point out to positive directions, two possible options concerning the way forward are presented in the end of the paper.

10. During the preparatory process of the new treaty the development of the communications environment has accelerated and completely new perspectives have opened. Digitalization of the traditional broadcasting activities has opened a new existence and future for broadcasting in general. Its effects extend to satellite broadcasting, cablecasting and now also to terrestrial broadcasting. Digitalization of broadcasting has led to convergence of the whole field of information and communications technology. Information networks, with Internet and the Internet Protocol in the lead, provide for new dimensions for broadcasting. Internet-originated Internet Protocol radio and television are growing in an environment where there is no scarcity of bandwidth. Terrestrial and other broadcasts may be both simulcast and retransmitted over the Internet.

11. This development is one of the reasons why many governments have argued that the work on the protection of traditional broadcasting should be concluded expeditiously within WIPO.

Relation of the project to the Development Agenda

12. It should be pointed out that the project to establish a new updated, modernized and balanced standard for the international protection of broadcasting and cablecasting organizations is in line with the Development Agenda of WIPO. By promoting a vibrant broadcasting industry, capable of fulfilling its unique cultural, educational and informational role in modern society and in particular in developing countries, a new treaty may contribute to strengthening national development, especially by narrowing the knowledge gap and the digital divide. The project does not interfere with or affect any of the positive goals of the Development Agenda, and it is an integrated part of the global agenda of the Organization.

THE MAIN POSITIONS AND DIVERGENCES – ASSESSMENT AND DISCUSSION

Main general observations

13. First of all it should be recalled that all delegations participating in the preparatory process have expressed their agreement on the need for updating the international protection of the traditional broadcasting and cablecasting organizations, and explicitly confirmed their willingness to negotiate and conclude a new treaty. Concerning the overall timing, one remark has been made to the effect that the project could be let to rest for a while to allow for a moment of reflexion.

14. The consideration of a new treaty has been eased by the fact that the issue of extending protection to webcast signals (including simulcasting) has been provisionally set aside for later separate discussions.

15. Second, between 1999 and 2003 some 16 proposals were made. All of them were based on intellectual property rights related to copyright, and included proposals to grant broadcasters a longer or shorter series of exclusive rights. In two proposals the formula of a “right to prohibit” was suggested in addition to exclusive rights. The proposals came from all geographical areas and legal traditions of the world. In the consolidation process the broad scope of variations in the initial proposals necessitated the presentation of a relatively large number of alternatives. The number of alternatives grew further as a result of the proposals made by some delegations in 2006. The alternatives represent different positions on issues that are sometimes very crucial and sometimes minor details.

16. It seems to be the general opinion that there are too many alternative solutions to present a viable basis for final negotiations. This appears to be the main reason why a diplomatic conference has not been convened. Several methods have been tried to reduce their number during the ordinary and special sessions of the SCCR but to no avail. Accordingly, practically all proposals made by delegations, including those on single issues submitted after the initial round, have been carried on into document SCCR/15/2 rev, to be dealt with later in a final negotiating stage.

17. Third, in spite of the fact that all delegations agree on the general need for a new instrument, differences concerning the desirable level of protection continue. Many proponents of an extensive catalogue of individually enforceable exclusive rights consider such a model natural and complementary to the existing solutions in their national legislation. Others are looking at the matter from another angle, irrespective of prevailing national solutions, and concentrate on the main objective of the new instrument. A very short list of rights or protections, or a model that is not based on individual rights at all, could also achieve the protection objective, at least the prevention of signal theft. The positions vary from a long catalogue of (IP type) exclusive rights, through a very limited number of rights, possibly complemented by other forms of protection, to protection provided by other means than IP rights, *e.g.* by sanctioning misappropriation or prohibition through telecommunications legislation.

18. A number of Member States of WIPO have from the beginning characterized the broadcasters' treaty as an updating of the regime established by the 1961 Rome Convention on the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (the Rome Convention).[1] This characterization may well and fairly describe the situation for those 86 Member States who are Contracting States of that Convention. For those states the basis against which they consider the need for updating and modernizing the international protection is the Rome Convention. For them it is a question of mending the perceived gaps of the Rome Convention protection level, caused by the development of communications technology since the 1950's. In their opinion the Rome Convention is no longer adequate to protect against signal theft and piracy.

19. Under the Rome Convention, broadcasting organizations are granted exclusive rights concerning rebroadcasting, fixation, reproduction and communication to the public of their broadcasts. This leads the said delegations to consider that the new treaty should also be built on rights, *i.e.* on what already exists. For this school of thought the regime should be complemented by matters that are not covered by the rights under the Rome Convention – retransmission by wire and making available of broadcasts on demand over the Internet. For them, also the protection of pre-broadcast signals and obligations concerning technological measures as well as digital rights management information are indispensable components.

20. For Member States who are not Contracting States of the Rome Convention, the project to establish updated international norms in this area, is a self-standing enterprise. There are more than 100 states that are not parties to the Rome Convention.[2] The model of international protection based on exclusive rights, or generally on IP type rights, is far from self-evident for these states. The precedence of the Rome Convention has no specific value for them, and they consider that the Rome Convention cannot be the main point of reference,

[1] During the preparatory process of the new treaty the number of Contracting States of the Rome Convention has grown from 56 (1997) to 86 (2007).

[2] According to the information gathered by the WIPO Secretariat in the 1998 survey on existing protection (SCCR/1/3), some 23 states which are not Contracting States of the Rome Convention provided protection for broadcasting organisations in their copyright or related rights legislation. As a result, it may be estimated that at a minimum in ca. 110 states there are already provisions on the protection on the national level.

although it might have some relevance. Many consider that the Rome Convention, despite its broad acceptance, is a complex instrument, containing three very different substantive areas.

21. In the preparatory process there have been, during the last few years, especially from a number of non-governmental organizations, rather elaborate analyses and estimations on the potential effects of a new (exclusive, IP type) rights based instrument. According to these, the treaty would represent a new layer of IP rights in the content, it would be likely to harm consumers' position, lock up public domain content, and stifle technology innovation. The treaty would block fixations, transmissions and retransmissions over home or personal networks. Even if webcasting and simulcasting are excluded, a right of retransmission would bring control over unauthorized Internet retransmissions. The treaty could also lead to liabilities for intermediate network service providers for alleged infringements of prohibitions due to actions in the normal course of business actions of their customers.

22. Despite the long preparatory work, and good will of all delegations, reconciliation between the more-rights-approach and the less-rights-approach has not been possible. To accept virtually the content of the Rome Convention on broadcasting organizations, and the Rome-plus elements that have been felt necessary, would, for some non-Rome countries, go beyond what they could support. On the other hand, for the Rome Contracting States in general, a treaty without the well-known enforceable rights is likely to be considered insufficient as a basis for international protection.

Post-fixation rights

23. During the discussions particular interest has been shown regarding the extent to which rights should be granted for any use subsequent to the fixation of the signal. Some delegations have argued that the objective of the treaty under preparation should be to establish a protection of the broadcast signal, enabling the broadcasting organizations to prevent piracy of that signal. A signal exists as it is being emitted, but then disappears, being an electromagnetic pulse. Thus, rights in the signal can logically only relate to the simultaneous retransmission of the signal and, possibly, its fixation. After fixation it is no longer a signal, but a fixation of the broadcast content.

24. This view is not just a philosophical exercise or a reduction of the political issue to pure physics. It is based on the view that granting rights to broadcasters beyond the fixation will create an overlapping protection which is not necessary for the effective protection of the broadcasting organizations and which risks making the access to the broadcast content more difficult.

25. Other delegations have taken the view that post-fixation rights are, indeed, necessary in order for the protection of the broadcasting organizations to be effective. Both the Rome Convention and the TRIPS Agreement include post-fixation rights, such as the right of reproduction of fixations of the broadcast, and that right, together with rights regarding deferred retransmission (that is, a new transmission from a fixation) and making available of a fixed broadcast for interactive transmission are important elements in an effective legal safeguarding of the broadcasting organizations' legitimate economic interests. For these delegations, a "signal based protection" only means that it is the assembly of the broadcast content and the transmission of it that causes the protection, as opposed to the protection of the transmitted content.

Right of retransmission via Internet and right of making available

26. The right proposed to be granted to traditional broadcasters to control simultaneous Internet retransmission of broadcasts has been subject to specific discussions. It brings the retransmission through the Internet within the scope of the treaty, but only as an operation against which the broadcaster would enjoy protection. The retransmitting third party ("web retransmitter") would not be granted any protection.

27. The right of making fixed broadcasts available in such a way that members of the public may access them from a place and at a time individually chosen by them has been subject to similar considerations. This interoperable making available may only take place through a digital transmission (in the context of downloading or subscribed streaming) over the Internet or similar networks.

28. Proponents of those rights have argued that an exercise updating the rights of broadcasting organizations would not make sense unless Internet transmissions were included, given the immense importance of that media in today's information and communication infrastructure. Some supporters of the rights have indicated that without those rights, the exercise preparing a new treaty would not be worthwhile.

29. Other delegations have indicated that they could not support any treaty including those rights. They have pointed at the understanding, reached in the SCCR, that webcasting and simulcasting will be dealt with separately, after the instrument relating to traditional broadcasting and cablecasting has been finalized. Such discussions would be indirectly anticipated by dealing with Internet issues in relation to traditional broadcasting, and there would also be a risk that Internet provisions in the treaty presently under discussion indirectly could lead to some level of protection for web- or simulcasters.

Term of protection

30. The positions regarding the minimum term of protection to be granted in a new treaty vary from nil to 50 years. The first position is linked to the view that the protection should be limited to cover the signal, understood as the electromagnetic pulse, and grant no post fixation rights. If the protection is limited in this way, it will only cover acts that are simultaneous to the broadcast and a term will therefore be superfluous. The delegations that support some level of post fixation rights have supported terms of 20 years (as in the TRIPS Agreement) or 50 years (as for performers and producers of phonograms under the TRIPS Agreement and the WPPT).

31. A separate issue is the calculation of the term, where some delegations have argued that a new broadcast of previously broadcast content should not trigger a new term of protection as this could lead to a perpetual protection, if the broadcasting organizations continue to broadcast anew the same content. Other delegations have argued that the protection does not become perpetual, as fixations of the first broadcast, as far as the broadcasters' rights are concerned, will fall into the public domain after the expiry of the term, regardless of a possible continuing protection of fixations of later broadcasts of the same content. Those delegations have also argued that for a signal based protection it should have no importance whether the content has been broadcast earlier by the same broadcasting organization.

Protection of technological measures and the rights management information

32. One of the concrete issues on which the positions diverge are the provisions on the obligations concerning technological measures. The proponents of these provisions argue that the protection of technological measures is indispensable, in fact, one of the added value clauses why the whole new treaty is needed. Their proposals do not contain any obligation or mandate for the broadcasters to use technological measures. The provisions would apply only in cases where technological measures are used. Other delegations, however, oppose the inclusion of such provisions the treaty, and consider *inter alia* that the protection of technological measures could affect the general public's possibility to access information that is already in the public domain. Even if there would be no mandate to employ technological measures, the legislative provisions on them could lead to a *de facto* broad use of them implying unjustified obstacles to access to broadcasts.

33. There is no consensus on the provisions on the obligations concerning rights management information.

Limitations and exceptions

34. In the area of the provisions on limitations and exceptions the first observation is that all delegations consider provisions on these matters necessary. There are, however, two schools of thought concerning the form and content of such provisions. The first suggested model of these clauses is parallel to the formula adopted in the WIPO Performances and Phonograms Treaty. It is based on open and flexible provisions allowing the making of the same kinds of limitations and exceptions to the protection of broadcasters that are provided for in the national legislation concerning copyrighted works and requiring that all limitations or exceptions shall pass the well-known so-called three-step test. The other model, suggested by a number of delegations in slightly differing forms in 2006, contains in addition to the three-step test a list of concrete examples of cases of permissible limitations and exceptions, such as (copying for) private use, use of short excerpts in reporting of current events, ephemeral fixations, uses for the purposes of teaching and scientific research, certain uses in libraries, archives and educational institutions etc.

35. The proponents of the second model argue that the exemplification of permissible cases would add in a necessary way to the legal certainty concerning the extent of possible limitations or exceptions. Those advocating for the open general clauses consider a piecemeal listing unnecessary, and refer to the fact that the open clauses in any case would allow the same,

Operative clauses regarding general principles, cultural diversity and defense of competition

36. Some delegations have proposed and/or supported a number of treaty provisions dealing with general principles, cultural diversity and defense of competition, stating that such provisions would ensure that an appropriate balance be struck between the public interest and any new rights conferred to the beneficiaries of the new instrument, so that the social role of broadcasting organizations would be preserved, would be fully in line with the WIPO Development Agenda, and would ensure that the development dimension be taken into account.

37. Other delegations have opposed such provisions or expressed support for provisions along those lines, but as clauses in the Preamble rather than operative clauses. Those delegations have argued that such clauses are not necessary in an intellectual property/related rights treaty, that in the existing dedicated intellectual property treaties there are no such clauses (with the exception of a competition provision in the TRIPS Agreement), and if introduced as operative clauses those provisions would be very difficult to interpret and would leave too much uncertainty regarding the legal requirements of the treaty.

Other clauses

38. Concerning the following other outstanding issues there are alternative proposals. These issues are of such a nature that they could be expected to find their solution when the main issues are settled, and following the solutions on the main substantive questions. They deal with the general framework of the treaty.

Relation to Other Conventions and Treaties
Beneficiaries of Protection
National Treatment
Reservations
Eligibility for Becoming Party to the Treaty

Tasks and objectives set by the General Assembly

39. The WIPO General Assembly decided in 2006 that the protection should be based on a signal-based approach. Furthermore it decided in 2006 and confirmed in 2007 that the SCCR should aim to agree and finalize the objectives, specific scope and object of protection. In the discussions of the SCCR the observation has been made that that mandate represents a very high threshold for convening a diplomatic conference. The considerations in paragraphs 40 to 43 below represent slightly adapted the understanding on those items that the Chair suggested to the SCCR for consideration in a discussion document in January 2007.

"*on a signal-based approach*"

40. The system of protection of the broadcasters' rights has often, in colloquial language, been referred to as the "signal protection". In the discussions in Geneva, "signal-based" seems to refer, however, to something that is narrower than what had been laid down in the proposals to the SCCR. The decision of the General Assembly seems to indicate that the *main focus should be set on the protection of the "live signal"*, as this is the moment when the need for protection is most acute. In order to make the protection practicable and effective, it has been argued that the protection could and should, however, in some cases, extend beyond the live signal, to some post-fixation instances. – It should be stressed that the signal-based approach by no means precludes granting some exclusive rights to broadcasting organizations. The signal-based approach and the question whether the protection is rights-based or based on other legal means, are conceptually different aspects of the protection.

"*objectives*"

41. The main objective of the new treaty is to provide a stable legal framework for the activities of broadcasting organizations. Its focus is on the *"anti-piracy" function, and against signal-theft*, but it provides also protection against competitors and against unfair exploitation, and *against free-riding*. The rationale of the legal protection is twofold: the investment required for providing program content to the public; and the easiness of exploitation by others of the result of this investment in the new technological environment.

"*specific scope*"

42. The treaty, as it is presented in document SCCR/15/2 rev, would provide *a form of protection, consisting of related rights*, and/or *other specific protections* that are not defined as rights. They are *independent and self-standing rights or protections* in relation to rights of authors and other right holders of the program content. They do not interfere with, nor do they depend on, other rights or rights of others. The "scope", in the most common legal parlance on treaties, refers to the field of application, *i.e.* to the phenomena to which the treaty applies. It does not usually refer to the extent or level of rights and protections. However, in order to provide a comprehensive consideration of the whole "coverage" of the treaty, also the "scope of the protection" would naturally have to be considered.

"*object of protection*"

43. The scope of the instrument is normally dictated by the definition of the object. The *object of protection is the "broadcast"* (and its peer the "cablecast"). The "broadcast" is also the object of protection in the Rome Convention and in the TRIPS Agreement. The term "broadcast" has not been defined in any international instrument. The term should, in order to avoid a very complex international situation, in the new treaty ideally have the same scope as in these treaties, and in any case it should not be narrower. A technologically neutral definition of the "broadcast" and "cablecast" would best serve the purpose. It could possibly be complemented by a definition of the "signal".

CONCLUSION – AND POSSIBLE WAYS FORWARD

44. The main positions and divergences presented above in paragraphs 13 to 38 in this informal paper should not be considered as an obstacle to conclude a new treaty on the matter now under discussion. The same world community has been able, despite differing legal, philosophical and other traditions, to conclude treaties in areas where positions in substance were at the outset very different in many questions. An example of such is the 1996 WIPO treaties.

45. The starting point, and the main point of convergence in the whole preparatory process, is, as stated above, that all delegations, without exception, have recognized the need for a modernized protection of broadcasting organizations, and confirmed their commitment to negotiate and conclude a new treaty.

46. Also the decision by the SCCR and the mandate of the General Assembly justify a reflection and deliberation on how the SCCR could proceed forward in the matter. The

objective is to establish a balanced and modernized international standard for the protection of traditional broadcasting and cablecasting.

47. The following two options arise from the assessment above in this informal paper:

A – A continuation of the process

- Another try could still be suggested on the basis of the document SCCR/15/2 rev.
- In addition, discussions could be based on informal papers.
- This endeavor should be open, inclusive and flexible.
- In the end, there could be an understanding that a new treaty might be established by a clear majority.

B – A possible new avenue

- A model based roughly on Articles 2 and 3 of the Geneva Phonograms Convention of 1971 could be envisaged; similar to that of the Brussels Satellite Convention.
- That model is different from those included so far in the working documents of the SCCR.
- That model could achieve the main objective of an international protection and the prevention of signal theft.
- To provide the delegations with an idea of the structure of such an option, its core provisions might be as follows:

"The Contracting Parties shall protect broadcasting and cablecasting organizations, who are nationals of other Contracting Parties, against unauthorized acts, including:
- retransmission
- fixation
- [other acts that might be agreed on].

The means by which this Treaty is implemented shall be a matter for the domestic law of each Contracting Party. The means shall be adequate and effective, and shall include one or more of the following:
- protection by means of copyright, rights related to copyright, or other specific rights;
- protection by means of the law relating to unfair competition or misappropriation;
- protection by means of administrative legislation or penal sanctions."

48. Finally, if after consideration of the options above (A/B) and possible other options, it will not in the present situation be possible to decide on the establishment of a new treaty, the SCCR should end these discussions through an express decision in order to avoid further spending of time, energy and resources to no avail. Such a decision could include a timetable for later revisiting and reconsidering the matter.

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