

Open-Ended Consultations on the Protection of Audiovisual Performances

Geneva, April 13 and 14, 2011

Proposal on the Draft Text of the WIPO Treaty on the
Protection of Audiovisual Performances

Proposal by the Delegation of Brazil

1. On January 31, 2011, the Secretariat received the proposal of the Government of Brazil on the WIPO Treaty on Protection of Audiovisual Performances.
2. The Proposal is annexed to this document.

[Annex follows]

Preamble

A new paragraph is proposed to be inserted into the preamble to take account of the adoption of WIPO's Development Agenda. The new paragraph should be inserted between current paragraphs 4 and 5 (it would become paragraph 5 in the preamble) and would read as follows:

"Recognizing the 45 Recommendations adopted by WIPO Member States in the Development Agenda, particularly those, under Cluster B, regarding norm setting, flexibilities, public policy and public domain"

Article 1

Relation to Other Conventions and Treaties

(1) Nothing in this Treaty shall derogate from existing obligations that Contracting Parties have to each other under ~~the WIPO Performances and Phonograms Treaty or the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations done in Rome, October 26, 1961~~ **and the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions.**

(2) Protection granted under this Treaty shall leave intact and shall in no way affect the protection of copyright in literary and artistic works. Consequently, no provision of this Treaty may be interpreted as prejudicing such protection.

(3) This Treaty shall not have any connection with **any other** treaties ~~other than the WIPO Performances and Phonograms Treaty~~, nor shall it prejudice any rights and obligations under any other treaties.

Article 2

Definitions

The definitions of "performers" and "audiovisual fixation" should be reviewed in order both to ensure a more precise language and to avoid misinterpretation. New definitions should be restricted to what is necessary to guarantee the protection of audiovisual performers and allow Member States to give effect to these provisions in accordance with their own legal system and practice.

The definition of "performers", for example, should be reviewed to guarantee that the protection to be offered by the treaty will be benefitting only those performers who act professionally. A broad definition might contribute to hampering the future management of rights conferred by the new treaty, especially within the digital environment. Brazil also suggests that a more detailed analysis be undertaken on what cases are covered by the present definition of "performer". Clarification on the matter should be submitted by the Secretariat during the consultations to be held in Geneva, in accordance with paragraph 7 of the relevant section of the "Conclusions by the Chair" at the 21st session of the SCCR.

The definition of "audiovisual fixation" must also be reviewed with the same objective of achieving more precise language and avoiding the risk of misinterpretation. It should make clear reference to the concepts of "literary and artistic work or expressions of folklore", as in the definition of "performers". Moreover, it is not clear who is the right holder of the fixation, nor if it includes related rights, such as in the phonogram. Clarification on these issues should also be submitted by the Secretariat during the forthcoming consultations to be held in Geneva.

An alternative solution to the current lack of precision in draft treaty could be an interpretative declaration on the definitions of "performers" and "audiovisual fixation", which would be then agreed upon by Member States.

Finally, the following deletion is suggested to the definition of "broadcasting":

(c) “broadcasting” means the transmission by wireless means for public reception of sounds or of images and sounds or of the representations of sounds; such transmission by satellite is also “broadcasting”; ~~transmission of encrypted signals is “broadcasting” where the means for decrypting are provided to the public by the broadcasting organization or with its consent.~~

Article 4

National Treatment

Brazil proposes the following amendment to Article 4.2 to keep it in line with another amendment under article 10:

A Contracting Party shall be entitled to limit the extent and the term of the protection accorded to nationals of another Contracting Party under paragraph (1), with respect to the rights granted in *Article 10(2)*, Article 11(1) and 11(2) of this Treaty, to those rights that its own nationals enjoy in that other Contracting Party.

Article 10

Right of Making Available of Fixed Performances:

A new paragraph (2) is suggested to be added to Article 10:

(1) Performers shall enjoy the exclusive right of authorizing the making available to the public of their performances fixed in audiovisual fixations, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them.

(2) Contracting Parties may in a notification deposited with the Director General of the World Intellectual Property Organization (WIPO) declare that, instead of the right of authorization provided for in paragraph (1), they establish a right to equitable remuneration for the direct or indirect use of performances fixed in audiovisual fixations for making them available to the public in such a way that members of the public may access them from a place and at a time individually chosen by them. Contracting Parties may also declare that they have set conditions in their

legislation for the exercise of the right to equitable remuneration, which shall be exercised by a compulsory collective management

Article 13

Limitations and Exceptions

(1) Contracting Parties may, in their national legislation, provide for the same kinds of limitations or exceptions with regard to the protection of ***audiovisual*** performers as they provide for, in their national legislation, in connection with the protection of copyright in literary and artistic works.

(2) Contracting Parties shall confine any limitations of or exceptions to rights provided for in this Treaty to certain special cases which do not conflict with a normal exploitation of the performance and do not unreasonably prejudice the legitimate interests of the performer, ***such as:***

a) The reproduction, the distribution, the communication and the making available of audiovisual performances to the exclusive use of persons with disabilities, without commercial purpose, and who, due to that disability, need an accessible format in order to access a copyrighted work to substantially the same degree as a person without a disability;

b) The use solely for purposes of teaching or scientific research';

c) The use of audiovisual performances by libraries and archives to allow consultation and borrowing by the public and for purposes of preservation, conservation and archiving;

Article 15

Obligations concerning Technological Measures

A new paragraph (2) is suggested to be added to Article 15:

(1) Contracting Parties shall *may* provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by

¹ Language from Article 10 of the Treaty of Rome

performers in connection with the exercise of their rights under this Treaty and that restrict acts, in respect of their performances, which are not authorized by the performers concerned or permitted by law.

(2) Technological measures shall not prevent nor restrict the exercise of exceptions and limitations or the use of interpretations already fallen into the public domain. Technological protection measures shall also:

- i. have limited effect in time corresponding to the period of protection of economic rights;***
- ii. allow that performers or other rights holders cancel such measures at any time, and;***
- iii. allow the exercise of limitations and exceptions provided under this treaty.***

Article 8 Reservations and Notifications

(1) Subject to provisions of Article 11(3), no reservations to this Treaty shall be permitted.

(2) Any declaration under *Article 10(2)*, 11(2) or 19(2) may be made in the instruments referred to in Article (...), and the effective date of the declaration shall be the same as the date of entry into force of this Treaty with respect to the State or intergovernmental organization having made the declaration. Any such declaration may also be made later, in which case the declaration shall have effect three months after its receipt by the Director General of WIPO or at any later date indicated in the declaration.

New Articles

Brazil proposes the inclusion of two new articles, as follows:

Article X (new article 2)
GENERAL PRINCIPLES

Nothing in this Treaty shall limit the freedom of a Contracting Party to promote access to knowledge and to information as well as national education and scientific objectives, nor to take any action that it may deem necessary to promote the public interest in sectors of vital importance to its social, economic, scientific and technological development.

Article Y (new article 16, before Article 17— "Formalities")

DEFENSE OF COMPETITION

(1) Contracting Parties shall take adequate measures, especially when formulating or amending their laws and regulations, to prevent abuse of intellectual property rights or recourse to practices which unreasonably restrain trade or adversely affect the international transfer and dissemination of technology;

(2) Nothing in this Treaty shall prevent Contracting Parties from defining in their legislation any licensing practices or conditions that may, in specific cases, constitute an abuse of intellectual property rights having adverse effects on competition in the relevant market;

(3) Contracting Parties may also take appropriate measures that are consistent with the Agreement on Trade-Related Aspects of Intellectual Property Rights to prevent or control any such practices and conditions.

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