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STANDING COMMITTEE ON COPYRIGHT AND RELATED RIGHTS

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**PROPOSAL BY PERU
ON THE TREATY FOR THE PROTECTION OF
BROADCASTING ORGANIZATIONS**

Document prepared by the Secretariat

The Annex to this document contains a proposal put forward by Peru on the Treaty for the Protection of Broadcasting Organizations, received together with a note dated April 28, 2006.

[Annex follows]

ANNEX

PROPOSAL BY PERU
ON THE TREATY FOR THE PROTECTION OF
BROADCASTING ORGANIZATIONS

Standing Committee on Copyright and Related Rights

Introduction

This document contains the proposal put forward by Peru with respect to the adoption of the Treaty on the Protection of Broadcasting Organizations, which it submits for consideration by the Standing Committee on Copyright and Related Rights of the World Intellectual Property Organization (WIPO), the fourteenth session of which will take place in Geneva from May 1 to 5, 2006.

The proposal has been prepared by the National Institute for the Defense of Competition and Protection of Intellectual Property (INDECOPI), the competent national authority for copyright and related rights in Peru, on the basis of a process of consultations and discussion with various sectors linked to broadcasting activity in the country, including representatives of actual broadcasting organizations; representatives of artists and performers; representatives of organizations linked to the defense of copyright and related rights; representatives of trade unions and the general public which use broadcasting services; representatives of organizations linked to the study of the information society; and recognized professionals in these sectors.

This process of consultations and discussions within the country has taken place, taking into account the *Second Revised Consolidated Text for a Treaty on the Protection of Broadcasting Organizations* (SCCR/12/2Rev.2) and the *Working Paper on Alternative and Non-Mandatory Solutions on the Protection in Relation to Webcasting* (SCCR/12/5Prov.); and also the most recent *Draft Basic Proposal for the WIPO Treaty on the Protection of Broadcasting Organizations including Non-Mandatory Appendix on the Protection in Relation to Webcasting* (SCCR/14/2).

General Remarks

The so called “digital era”, and the new forms of communication, content and distribution which result from it, in what has become known as the information society, make it necessary to revise and update the existing international standards on copyright and related rights. In that regard, the Berne Convention for the Protection of Literary and Artistic Works was complemented in 1996 by the WIPO Copyright Treaty (WCT), while the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations was, to a certain extent, complemented by the WIPO Performances and Phonograms Treaty (WPPT), also in 1996, which left pending the adaptation of the rights of

performers in audiovisual productions. In particular, the rights envisaged in the Rome Convention for the Protection of Broadcasting Organizations could be complemented, taking into account the repercussions which the latest technological advances have and will have in relation to the theft of signals, which has a significant economic impact and brings into question the effective application of legal standards. Lack of protection for signals clearly gives rise to a lack of protection for the content. The protection of signals should not of course hamper the defense of the rights in the content; while the first is more part of the sphere of free and fair competition, the defense of the rights in the content lies within the field of intellectual property.

The possible adaptation of the protection of broadcasting organizations should not give rise to new rights beyond those recognized and widely accepted over the past 45 years, when the Rome Convention was adopted. In other words, new rights should be envisaged only insofar as they are the counterpart of new creations of the human intellect.

A basic principle which should be maintained in the discussion of a possible treaty for the protection of broadcasting organizations as a new international standard is the need to ensure an appropriate balance between the protection of the rights of broadcasting organizations already enshrined and the public interest, without neglecting the rights of other owners of copyright and related rights, in the sense that without appropriate protection for the owners of the latter rights, no effort will produce the results hoped for. A treaty such as the proposal should not restrict the circulation of information, nor limit access to knowledge or delay technological innovation, nor should it damage or weaken the public domain through the exclusion of segments thereof for the benefit of private interests, just as it should not affect cultural diversity.

In this connection, since UNESCO is the body responsible for promoting education, science and culture through the dissemination of information and knowledge, let us share what was expressed by that Organization in Decision 171 EX/59 on the Protection of Broadcasting Organizations on April 8, 2005.

“If there has to be an understanding on broadcasters’ rights, it must at the very least ensure that it promotes access to knowledge and its dissemination in the digital environment. Such rights must not interfere with the rights of the public and of other stakeholders to protect and preserve the public domain”.

UNESCO has also spoken of the need to protect and promote cultural diversity. The Organization has approved the *Convention on the Protection and Promotion of the Diversity of Cultural Expressions*, an instrument which enshrines the aims of protection and promotion of cultural diversity as a global undertaking of the international community, which must be taken into account when negotiating a treaty such as that under discussion. For these reasons, we propose that in the process of negotiating the Treaty on the Protection of Broadcasting Organizations, due consideration is given to the possible granting of rights that may harm the achievement of the aims promoted by UNESCO.

In the same sense, we support the proposal of Brazil (Document SCCR/13/3 Corr. of November 17, 2005) to incorporate two articles on access to knowledge and the protection of cultural diversity in any new treaty on the protection of the rights of broadcasting organizations.

We also express our concern at the implications that the possible rights envisaged in the Treaty on the Protection of Broadcasting Organizations may have on the competitive functioning of markets. The grant of undue intellectual property rights to broadcasting organizations may give rise to practices that impede or severely limit the forces of competition, technology transfer and innovation. In this regard, we support the proposal by Chile (Document SCCR/13/4 of November 22, 2005) to consider legal or regulatory provisions that allow appropriate defense of competition in relation to the obligations that may be stipulated in the Treaty on the Protection of Broadcasting Organizations. It should be recalled that INDECOPI is, at the same time, a competition agency and the national authority for copyright and related rights in Peru.

Considering the enormous repercussions that the content of a treaty for protecting broadcasting organizations may have on the interests of the agents connected with broadcasting, owners of copyright and related rights, and society in general, as well as the need to guarantee an appropriate balance between them, taking into account access to information, knowledge and culture, we reiterate our recommendation, made together with Chile, during the Regional Consultation Meeting for the Countries of Latin America on the Protection of Broadcasting Organizations, held in Colombia in July 2005, to promote the preparation of various studies to analyze the implications and economic effects for broadcasters and users of the obligations that the Treaty on the Protection of Broadcasting Organizations would contain. This task could form part of the international cooperation program promoted by WIPO.

In view of the above, we request WIPO not to hurry to organize and hold a Diplomatic Conference to consider adoption of the draft Treaty on the Protection of Broadcasting Organizations, without previously having conducted the studies which demonstrate the immediate need for such a Treaty. Rather we propose that analyses and exhaustive debates be conducted to study in detail the subjects which are the cause of dispute, especially if we take into consideration that, for the majority of developing countries such as Peru, there are currently other subjects in the sphere of intellectual property which should be dealt with urgently and as a matter of priority, owing to their impact on economic, social, cultural and sustainable development, such as the access to genetic resources and the protection of traditional knowledge and folklore. In this context, it is fundamental that an agenda be defined for WIPO, which takes due account of the development dimension.

Specific Remarks

Further to the above, this section contains a series of specific proposals relating to certain aspects contained in the *Draft Basic Proposal for the WIPO Treaty on the Protection of Broadcasting Organizations including Non-Mandatory Appendix on the Protection in Relation to Webcasting*.

1. *Limitations and exceptions (Article 12 of the Basic Proposal)*. Paragraph 1 of this Article of the Basic Proposal provides that the Contracting Parties may *in their national legislation, provide for the same kinds of limitations or exceptions with regard to the protection of broadcasting organizations as they provide for, in their national legislation, in connection with the protection of copyright in literary and artistic works, and the protection of related rights*. However, in paragraph 2 these limitations and exceptions are *confined to certain special cases which do not conflict with a normal exploitation of the broadcast and do not unreasonably prejudice the legitimate interests of the broadcasting organization*.

We consider it essential to reword Article 12 of the Basic Proposal on the basis of the correct definition and interpretation of limitations and exceptions, with the aim of retaining the balance between the interests of broadcasting organizations; artists and performers; authors whose works are disseminated; and the general public which has right of access to information and culture.

We express our concern regarding the cases relating to works which are in the public domain, the simple transmission of which does not generate a related right that may be protected under the terms of the Treaty. In this regard, our position is in favor of including minimum standards or specific provisions relating to the protection of the public interest, which help to maintain the balance between owners of rights and users, between authors and other owners and even between the same owners, a position which coincides with the proposals made by Brazil and Chile.

In particular, we propose that the following specific clauses are included to provide limitations and exceptions to the application of the Treaty in the case of:

- (a) Use for private purposes;
- (b) Use of fragments for providing information on current affairs;
- (c) Temporary fixation made by a broadcasting organization by its own means and for its own broadcasts;
- (d) Use for exclusively educational or scientific research purposes;
- (e) Use of works with the single aim of making broadcasts accessible to persons with visual or hearing problems, or learning difficulties, or who have other special needs;

- (f) Use by libraries, archives or education centers with the aim of making available to the public copies of works protected by the exclusive rights of broadcasting organizations, for the purposes of preservation, education or research;
- (g) Specific uses made by libraries or museums accessible to the public, or by archives which do not intend to obtain economic or commercial benefit;
- (h) Any use, of whatever type and form, of any part of a broadcast where the program or part thereof, which is the subject of the broadcast, is not protected by a copyright or a related right.

We also submit for possible consideration, for subparagraphs (f) and (g), the following alternative wording:

"The use by libraries, archives, education centers or museums accessible to the public, of works protected by the exclusive rights of broadcasting organizations in order to achieve their aims and provided they have no intention to obtain economic or commercial benefit".

Additionally, we propose that the wording of the final paragraph of Article 12 be as follows:

"Contracting Parties may, in their domestic legislation, establish exceptions in addition to the exclusive rights granted under the present Treaty, provided that these do not conflict with a normal exploitation of the broadcast and do not unreasonably prejudice the legitimate interests of the owners of copyright and related rights".

2. *Obligations concerning technological measures (Article 14 of the Basic Proposal).* The single paragraph in this article of the Basic Proposal states that Contracting Parties shall *provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by broadcasting organizations in connection with the exercise of their rights under this Treaty.*

These obligations should be assessed in the light of their possible impact on the applicability of the limitations and exceptions and, in the final analysis, on access to information for the public and the extent to which they are effective in protecting performers' rights. In this regard, we do not agree with the inclusion of the article as it is drafted, taking into consideration that at the international level the effective application of limitations and exceptions to copyright has been brought into question and is in danger, owing to the increased use of technology protection measures and restrictions on licenses which cause an imbalance in favor of commercial interests and against the users of information, with greater impact in developing countries.

It should be mentioned that various developed countries have updated their legislation on copyright in accordance with the WCT and WPPT, to which Peru is also a party. These processes of legislative adaptation have demonstrated great concern and given rise to a broad debate on exceptions and limitations relating to the application of technology protection measures. Consequently, the dispute generated by this subject with regard to its regulation and practical application¹ is also obvious.

We therefore consider that on the basis of premise that technology protection measures are not used to generate rights where they do not currently exist, this subject is worth debating in greater depth in order to assess the legal and technical implications of its incorporation in the Treaty. In this context, consideration should be given to the “real risks” of technology protection measures with respect to the effective applications of exceptions and limitations that promote access to information and culture, the viability of the standards that it is intended to apply in specific situations, as well as the actions that may be taken by States and civil society organizations in this regard.

3. *Obligations concerning rights management information (Article 15)*. In essence, this Article states that *Contracting Parties shall provide adequate and effective legal remedies against any person knowingly performing acts that facilitate or conceal an infringement of any right covered by this Treaty*. This article and the previous one allow broadcasting organizations to codify the conditions for use of a broadcast and avoid someone not satisfying the conditions established by the broadcaster.

We indicate our concern in the possible case that as a result of this article a broadcast signal is unduly treated as a creative expression and that therefore it is worthy of protection as a result of that condition. In any case, in the Peruvian sphere this is a subject open to debate, for which reason we propose, in the same way as for the previous article, more in depth analysis and discussions.

¹ The United States *Digital Millennium Copyright Act – DMCA* incorporates legal protection for technology protection measures but also updates the exceptions relating to copyright which pertain to the digital environment. Article 1201 of that Law contains a “reservation” clause which prescribes that no new protection for copyright owners affects any existing exceptional limitation, with the inclusion of legal use; moreover, it amends the exception relating to libraries and archives for non-profit making purposes to take account of digital technologies and changes in preservation practices. Similarly, there are various specific exceptions relating to technology protection measures. On the other hand, the European Union Copyright Directive (on the harmonisation of certain aspects of copyright and related rights in the information society), contains various non-mandatory prescriptive exceptions which national governments may include in their legislation, should they so desire. Similarly, Article 6(4) allows the Governments of Member States to intervene, in the absence of voluntary agreements between users and rights’ owners, to give the beneficiary of an exception the possibility to take advantage of it. Other countries such as Australia have updated their copyright systems, taking into consideration new digital technologies and have included numerous extensions to the exceptions in the digital environment.

4. *Webcasting. Non-mandatory appendix on the protection in relation to webcasting* is designed to broaden the sphere of the Treaty's application for Contracting Parties which wish to include webcasting in the sphere of protection; in order to be obliged to apply the Appendix, a Contracting Party shall submit notification.

Webcasting is certainly becoming more and more relevant and, it is to be hoped, growing economic impact. We consider, however, that it is necessary to assess the extent to which the real world can be transferred to the Internet in the identification of activities that are allowed and prohibited as well as the efforts which it will be necessary to make for the enforcement of standards pertaining to copyright and related rights. Insofar as such an assessment is not conducted, it is not appropriate to link webcasting to the Treaty in question and, in any case, it should possibly be the subject of separate treatment.

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