

**Draft Non-paper
on the
WIPO Treaty on the Protection of Broadcasting Organizations**

*Draft 1.0
March 8, 2007*

Introductory Note

1. The work of the special session of the Standing Committee on Copyright and Related Rights (SCCR) from January 17 to 19, 2007, was based on the decision of the General Assembly of the World Intellectual Property Organization (WIPO) in its thirty-third session in 2006, which stated 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 (document SCCR/15/2). The Diplomatic Conference will be convened if such agreement is achieved.”

2. The Committee requested the Chair to prepare a new non-paper. To facilitate this process, the Chair, through the e-mail address <copyright.mail@wipo.int>, will invite the Coordinators of the Regional Groups, Member States, and the European Community, to submit their comments for developing the non-paper before its finalization. The focus of the non-paper will be on the provisions that are relevant in the light of the objectives, specific scope and object of protection of the treaty being under preparation. The new non-paper should be distributed by May 1, 2007.

Notes on the Draft

3. This draft non-paper has been prepared by the Chair maintaining the structure of document SCCR/15/2, and respecting both the proposals made earlier by Governments and groups of Governments, but at the same time recognizing the positions differing from these proposals, expressed later in the debates in the SCCR.
4. The draft non-paper endeavors to lend full recognition to the “signal-based” approach, and to the focus determined by the General Assembly and the SCCR.
5. What is now presented is a narrow model. It accommodates both those countries granting and wanting to grant (exclusive) rights to the beneficiaries of protection, and those that want to establish a narrower and specific protection against signal theft. If Member States so wish, a provision may be added allowing for optional wider protection, notably of post-fixation rights, which would enable international protection, linked to the flexible clause on national treatment and reciprocity regarding optional rights.
6. The following elaboration and drafting has the objective to achieve broader acceptance and to fulfill the focus set by the General Assembly and the SCCR:
 - the signal-based approach covers the whole instrument through the definition of “broadcast”;
 - the object of protection, the “broadcast,” is explicitly defined as the program-carrying signal; the denomination of that object, the “broadcast”, is maintained in this non-paper to secure coherence with the TRIPS Agreement and the Rome Convention; however, the terminology may still be reconsidered;
 - the main objective against signal theft is determined in the new Article 1;
 - the object of protection and the scope of application are determined in detail in new Articles 2 and 3;
 - the Rome safeguards have been further developed;
 - definitions are tailored for the more precise and narrow scope of application;
 - the scope of protection is narrow;
 - the treaty provides for minimum norms only (providing more protection than the treaty requires is allowed);
 - the number of rights and protection clauses, and the amount of text, is reduced;
 - an effective minimum is defined in the rights and protection clauses.
7. As there is no obligation to provide exclusive rights and as there is no obligation to provide any protection concerning post-fixation uses (except reproduction), it is far more clear that the implementation of the Treaty would in no instance affect public interest, access to information, consumer interests or technology innovation.
8. In this light, and in order to maintain the public interest safeguards contained in Articles 2 to 4 in document SCCR/15/2, these principles have been moved to the preamble, and adapted to fit the reduced text.
9. Provisions on limitations and exceptions are still maintained in the draft. With the reduced scope of the Treaty, perhaps even some of these provisions would become superfluous.
10. This model would allow conclusion of a treaty that could gain broad acceptance because it would leave room for the different approaches to rights and protections.

Round of Comments of this Draft Non-Paper

11. The deadline for comments on this draft is March 28, 2007. The draft exists only in English.
12. The non-paper will be finalized after the round of comments.
13. The “final” non-paper for the second special session of the SCCR will be issued in all working languages of WIPO on May 1, 2007.

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Preamble

The Contracting Parties,

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

Recognizing the need to update 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 broadcasts both within and across borders,

Recognizing the need to maintain a balance between the rights of broadcasting organizations and the interests of the general public and *noting* that nothing in this Treaty shall limit the freedom of a Contracting Party to promote access to knowledge and information and national educational and scientific objectives, to curb anti-competitive practices or to take any action it deems necessary to promote the public interest in sectors of vital importance to its socio-economic, scientific and technological development,

Emphasizing that this Treaty shall neither limit nor constrain the freedom of a Contracting Party to protect and promote cultural diversity, the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions provides a framework for those who are parties to it.)

Acknowledging that Contracting Parties may take appropriate measures, when applying this Treaty and specifying in their legislation licensing practices or conditions, to prevent the abuse of the protection granted under this Treaty or the recourse to practices which unreasonably restrain trade or adversely affect the international transfer of technology,

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

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

Have agreed as follows:

GENERAL PROVISIONS

Article 1 *Objective*

The objective of this Treaty is to provide adequate and effective legal protection for broadcasting organizations against **unauthorized use of their broadcasts.**

The wording of “unauthorized use of broadcast” will lead toward broader scope of use of broadcasts, which is not the case. Indonesia prefer to be consistent to the aim of the treaty, as mandated by SCCR and General Assembly of the WIPO in its 33d session in 2006, that is to protect the program carrying signal of broadcasting from theft or piracy

(“The work of the special session of the Standing Committee on Copyright and Related Rights (SCCR) from January 17 to 19, 2007, was based on the decision of the General Assembly of the World Intellectual Property Organization (WIPO) in its thirty-third session in 2006, which stated 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 (document SCCR/15/2). The Diplomatic Conference will be convened if such agreement is achieved.”

Article 2 *Object of Protection*

- (1) The provisions of this Treaty shall apply to the protection of broadcasting organizations in respect of their broadcasts.
- (2) The provisions of this Treaty shall apply to the protection of **cablecasting organizations** in respect of their cablecasts in the same way as they apply to broadcasting organizations and broadcasts.
 - Indonesia prefers to stay with definition of broadcasting organization in a narrow sense, that is traditional broadcasting, as also proposed by some other delegations. The narrower definition of 'broadcasting' has been proposed for consistency with existing treaties in the field of copyright and related right. Thereby we only accept the paragraph 1 and 3 of this article.
- (3) The provisions of this Treaty do not give rise to any rights in the programs that are transmitted by broadcasting organizations.

Article 3 *Scope of Application*

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

- (i) mere retransmissions;
- (ii) any transmissions where the time of the transmission and the place of its reception may be individually chosen by members of the public (on-demand transmissions); or
- (iii) any transmissions over computer networks (transmissions using the Internet Protocol, “webcasting”, or “netcasting”).

We agreed. - Indonesia

Article 4 *Relation to Other Conventions and Treaties*

- (1) Protection granted under this Treaty shall leave intact and shall in no way affect, limit or prejudice the protection of copyright or related rights in the programs incorporated in broadcasts. Consequently, no provision of this Treaty may be interpreted as prejudicing such protection.
- (2) Nothing in this Treaty shall derogate from existing obligations that Contracting Parties have to each other under the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations done in Rome, October 26, 1961 (hereinafter the Rome Convention).
- (3) Contracting Parties, who are Contracting States of the Rome Convention, will apply the provisions of the Rome Convention between themselves when that Convention provides for an obligation which is more extensive than the obligations of this Treaty.

Article 5 *Definitions*

For the purposes of this Treaty:

- (a) “broadcast” means an electronically generated signal transmitted by wireless means and carrying assembled and scheduled programs for the reception by the general public;
 - such signals transmitted by satellite are also “broadcasts”;

To the extent that the broadcast is under the concept of free reception for general public, and in consistency of the phrase (a) and (d)

- such signals are also “broadcasts” when encrypted, if the means for decrypting are provided to the public by the broadcasting organization or with its consent; *This clause will only open for extension and broader interpretation, suggest to omit*
- (b) “program” means live or recorded material consisting of images, sounds or both;
 - (c) “broadcasting organization” means the legal entity that takes the initiative and has the responsibility for the transmission of a broadcast for the reception by the general public;
 - (d) “cablecast” means the same as “broadcast” but transmitted by wire and excluding transmission by satellite;

- (e) “retransmission” means the simultaneous transmission for the reception by the public by any means of a broadcast by any other person than the original broadcasting organization; simultaneous transmission of a retransmission shall be understood as well to be a retransmission;
- (f) “communication to the public” means making the programs perceptible to the public;
- (g) “fixation” means the embodiment of a broadcast on a physical support from which the programs carried by the broadcast can be perceived, reproduced or communicated through a device.

Article 6
Beneficiaries of Protection

- (1) Contracting Parties shall accord the protection provided under this Treaty to broadcasting organizations that are nationals of other Contracting Parties.
- (2) Nationals of other Contracting Parties shall be understood to be those broadcasting organizations that meet one of the following conditions:
 - (i) the headquarters of the broadcasting organization is situated in another Contracting Party, or
 - (ii) the broadcasts are transmitted from a transmitter situated in another Contracting Party. In the case of satellite broadcasts, the relevant place shall be the point at which, under the control and responsibility of the broadcasting organization, the program-carrying signals intended for direct reception by the public are introduced into an uninterrupted chain of communication leading to the satellite and down towards the earth.

Article 7
National Treatment

Alternative J (“WPPT Model”)

- (1) Each Contracting Party shall accord to nationals of other Contracting Parties the treatment it accords to its own nationals with regard to the rights specifically granted and the protection provided for in this Treaty.

Alternative K (“Berne Model”)

- (1) Each Contracting Party shall accord to nationals of other Contracting Parties the rights that their respective laws do now or may hereafter grant to their nationals, in respect of broadcasts for which such nationals are protected under this Treaty, as well as the rights specifically granted and the protection provided for in this Treaty.

Alternative VV (“TRIPS Model”)

- (1) Each Contracting Party shall accord to the national broadcasting organizations of other Contracting Parties treatment no less favorable than it accords to its own broadcasting organizations in respect of the application of the rights and the protection recognized expressly under this Treaty.

Alternative J or V V (trips Model) relatively acceptable to my country considering that we have adopted those treaties.

- (2) Each Contracting Party may choose to apply the obligation provided for in paragraph (1) only to the extent that the other Contracting Party applies Articles 8(2), 9 and 10 of this Treaty. If a Contracting Party avails itself of the possibility provided for in this paragraph, the Contracting Party shall notify this application to the Director General of the World Intellectual Property Organization (hereinafter WIPO).

We do not quite grasp the above (para 2) scheme of thought. We do not comment until understand the issue

SUBSTANTIVE PROVISIONS

Article 8
Protection of Broadcasts

- (1) Broadcasting organizations shall enjoy the exclusive right of authorizing:
 - (i) the simultaneous or deferred retransmission of their broadcasts by any means;
 - (ii) the fixation of their broadcasts; and
 - (iii) the direct or indirect reproduction, in any manner or form, of fixations of their broadcasts.

- (2) Contracting Parties may, instead of the exclusive rights of authorizing provided for in paragraph (1), establish adequate and effective legal protection for the broadcasting organizations against unauthorized retransmission by any means, against unauthorized fixation, and against unauthorized reproduction of their broadcasts.

To our understanding Article 8 does not address the objective of the treaty as mandated that is signal based approach. These clauses are either extension of or broadening the scope of the agreed objectives

Article 9
Protection of the Pre-broadcast Signal

Broadcasting organizations shall enjoy adequate and effective legal protection against any acts referred to in Articles 8 and 10 of this Treaty in relation to their signals prior to broadcasting.

Article 10
Protection of Encryption and Information Relevant for Protection

Contracting Parties shall provide adequate and effective legal protection against unauthorized

- (i) decryption of an encrypted broadcast;
- (ii) manufacture, importation, sale or any other act that makes available a device or system capable of decrypting an encrypted broadcast; and
- (iii) removal or alteration of any electronic information relevant for the application of the protection of the broadcasting organizations.

Article 11
Means of Implementation of the Protection

The means by which Contracting Parties shall provide adequate and effective protection under the provisions of Article 8(2), 9 and 10 shall be a matter of the legislation of each Contracting Party, and shall include one or more of the following:

- (i) protection by means of the grant of a copyright or other specific right, such as a right related to copyright;
- (ii) protection by means of the law relating to unfair competition, or misappropriation;
- (iii) protection by means of a right of prohibition, or of providing for a prohibition, or of adequate measures to prevent unauthorized acts;
- (iv) protection by means of penal sanctions.

Leave this Article 11 to limitation and exception whereby it will be regulated by national legislation.

Article 12
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 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.
- (2) Contracting Parties shall confine any limitations of or exceptions to the protection provided for in this Treaty 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.
- (3) Subject to the provisions in paragraph 2, and in accordance with paragraph 1, Contracting Parties may provide for limitations and exceptions to the protection provided in this Treaty for such purposes as private use, educational uses, scientific research, uses for the benefit of disabled persons, legal deposit requirements, reporting of current events, and use for public security and judicial purposes.

Article 13
Term of Protection

The term of protection to be granted to broadcasting organizations under this Treaty shall last, at least, until the end of a period of 20 years computed from the end of the year in which the broadcast took place.

This article will not be relevant anymore, as we adopt the signal based approach, there will be no question of the terms

Article 14
Formalities

The enjoyment and exercise of the rights provided for in this Treaty shall not be subject to any formality.

The underlying concept signal based approach – to our comprehension, there is no basis of imitating or adopting copyright principle in this issue.

Article 15
Reservations

No reservations to this Treaty shall be permitted.

The option left is blanket reservation or withdraw from contracting party.?

Article 16
Application in Time

- (1) Contracting Parties shall apply the provisions of Article 18 of the Berne Convention, *mutatis mutandis*, to the rights and the protection of broadcasting organizations provided for in this Treaty.

Again there is no point of returning to right-based approach

- (2) The protection provided for in this Treaty shall be without prejudice to any acts committed, agreements concluded or rights acquired before the entry into force of this Treaty for each Contracting Party.

Article 17
Provisions on Enforcement of Rights

- (1) Contracting Parties undertake to adopt, in accordance with their legal systems, the measures necessary to ensure the application of this Treaty.
- (2) Contracting Parties shall ensure that enforcement procedures are available under their law so as to permit effective action against any act of infringement of rights or violation of any protection covered by this Treaty, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements.

ADMINISTRATIVE AND FINAL CLAUSES

Unchanged (SCCR/15/2):

Article 18 – Assembly
Article 19 – International Bureau
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[End of non-paper]