

Standing Committee on Copyright and Related Rights

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REPORT ON THE INFORMAL CONSULTATIONS ON THE PROTECTION OF BROADCASTING ORGANIZATIONS

*prepared by the Chair of the Informal Consultations on the Protection of Broadcasting
Organizations*

INTRODUCTION

At its 23rd session in June 2011, the Standing Committee on Copyright and Related Rights (SCCR) reaffirmed its commitment to continue work, on a signal based approach, consistent with the 2007 General Assembly mandate, towards developing an international treaty to update the protection of broadcasting and cablecasting organizations in the traditional sense, and it approved a work plan in order to maintain the momentum regarding a draft treaty on the protection of broadcasting organizations.

In accordance with the work plan, an informal consultation on the protection of broadcasting organizations took place on November 26, 2011. The aim of the consultation was to progress the work on a draft treaty with a view to making a recommendation to the 2012 WIPO General Assembly on the possible scheduling of a Diplomatic Conference. The consultation was open to the participation of all Members and observers of the SCCR. The following documents formed the basis of the discussions: (1) Revised Draft Basic Proposal for the WIPO Treaty on the Protection of Broadcasting Organizations (document SCCR/15/2); (2) Proposal on the Draft Treaty for the Protection of Broadcasting Organizations: Proposal by the Delegation of South Africa (document SCCR/22/5); (3) Proposal on the Draft Treaty for the Protection of Broadcasting Organizations: Proposal by the Delegation of Canada (document SCCR/22/6); (4) Comments on the Draft Treaty for the Protection of Broadcasting Organizations: Proposal by the Delegation of Japan (document SCCR/22/7); (5) Elements of the Draft Treaty on the Protection of Broadcasting Organizations prepared by the Chair of the Informal Consultations on the Protection of Broadcasting Organizations held in Geneva on April 14 and 15 April, 2011 (document SCCR/22/11); and any other document presented to the Committee. The meeting was opened by the Assistant Director General, Mr Trevor Clarke. Ms. Alexandra Grazioli from Switzerland was elected Chair.

Based on a "Proposed list of issues for consideration for a draft treaty on the protection of broadcasting organizations" presented by the Chair of the consultations (see annex), the Members of the SCCR including NGOs had an extensive exchange of views on the different issues.

The following report, requested during the consultations, sets out the main views and outcome of the consultation presented for the consideration of the SCCR/23:

(I) Objectives

General remarks were made concerning the objectives of the draft treaty. Delegates shared the views that the draft treaty shall have for main objective to fight against increasing global phenomenon of signal theft and piracy taking into account technological developments, in order to update the protection of broadcasting organisations.

There was no discussion on the reopening of the 2007 General Assembly mandate. However, views were exchanged on the concepts of "broadcast", "broadcasting" and "broadcasting organisations" in the traditional sense and the importance that the draft treaty sticks to such concepts. At the same time some concerns were raised to such a limitation due to technological developments that had occurred in the recent years and future ones. The importance of adopting a technologically neutral approach for the treaty was also highlighted as being a central element to be followed in the draft treaty.

The view was also expressed that the draft treaty shall be developed in a flexible manner, which will enable to take into account the different approaches existing in national legislations concerning the protection granted to broadcasting organisations. Reference was made to possible tools that could either limit the rights conferred; or raise the level of protection on an optional basis.

Relation to other treaties, in particular the WIPO International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (1961)

The view expressed recognized the need for the treaty to be open to all WIPO Members. However, the utility to build upon the Rome Convention was highlighted (notably for certain definitions), while recognizing the obsolete character of the Rome Convention and the fact that not all WIPO Members are party to the Convention. It was said that the Rome Convention could not be the sole and unique point of reference. The draft treaty on the protection of broadcasting organizations may therefore be seen as complementary to the Rome Convention, but it had to be developed as a standalone treaty, without prejudice to other rights and obligations under other existing treaties.

Other interventions mentioned the importance to take into account rights and obligations arising from other treaties, such as the Agreement on Trade-Related Aspects of Intellectual Property Rights of the World Trade Organization (1994) or the WIPO Performances and Phonograms Treaty (1996); the Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite (1974) was also mentioned for reference.

The distinction between platform of origin and the platform of exploitation

The Delegations expressed the views that it was not necessary to make a distinction between the platform of origin and the platform of exploitation.

Differentiated approaches for the scope of application and the scope of protection

The option to grant different levels of protection or the possibility to follow different models of protection was presented for consideration. Further consideration of the various options available for differentiated approaches may be taken into consideration when drafting the detailed substantive provisions.

(II) Object of protection

Discussions took place on the object of protection of the draft treaty and how to define it. A delegation presented detailed views on the object of protection and highlighted that defining its scope was a preliminary step before discussion on the other elements of the draft treaty. There was an exchange of views on whether the object of protection should have as main focus the *signal* or the *broadcast*, as in the Rome Convention and the TRIPS Agreement; while others expressed the view that the two concepts should be seen as interlinked, since the object of protection shall be a *programme-carrying signal* and not a mere signal.

Views were expressed on the opportunity to take into account the definitions set in the Rome Convention and to update them on the basis of technological developments.

The need to make a clear difference between the definitions of terms and the content of the rights granted was highlighted as an important element to take into account for the drafting of the detailed provisions.

A list of possible definitions to be included in the draft treaty (see annex) was examined. Based on the possible definitions set out in document SCCR/22/11, the following comments were made:

“Broadcasting” and “broadcasting organizations”: comments and drafting suggestions were presented on the alternative definitions of “broadcasting” and of “broadcasting organisations” contained in document SCCR/22/11. The need to distinguish between “broadcasting” and “cablecasting”, as well as between “broadcasting organisations” and “cablecasting organisations” was mentioned. The question of the responsibility of the broadcasting organisations was also raised as an important issue to be considered.

“Broadcast”: question was raised on the utility to define the broadcast if the focus of the protection was the “signal”.

“Signal”: comments and drafting suggestions were presented on the definition of what constitutes a signal. As the object of protection, the signal shall be seen as a signal that carries content. Divergent views were expressed on the fact that the concept signal does or does not apply to computer network.

“Electronic communication”: no support was expressed for the inclusion of this definition in the draft treaty.

Finally, delegations expressed an interest to consider the following definitions in the draft treaty: *“rebroadcast”*, *“program carrying signal”*, *“program”* and *“cablecasting”*.

(III) Scope of application

During the consultations, general support was expressed for the four elements mentioned in the “proposed list of issues for consideration for a draft treaty on the protection of broadcasting organizations” presented by the Chair on the scope of application (see annex)¹; nevertheless some concerns were raised on the fourth point.

(IV) Scope of protection

Concerning the scope of protection, several interventions expressed support for exclusive rights to be granted to broadcasting organizations while other supported a more limited approach based on the right to prevent. No SCCR Members indicated a support for the option of the right to authorize.

Due to the different approaches envisaged on the scope of protection, the option of following a differentiated approach may be further considered for the drafting of the detailed substantive provisions.

There was also an exchange of views on the rights mentioned in the “proposed list of issues for consideration for a draft treaty on the protection of broadcasting organizations” presented by the Chair on the scope of protection (see annex) and in particular on the following points:

¹ See also document SCCR/22/11.

“Communication of programs to the public”, “Making available of programs to the public”, “Performance in public of programs for commercial advantage”: comments were raised in relation to their reference in document SCCR/22/11.

“Use of a pre-broadcast transmission”: Wide support was expressed concerning the protection of those transmissions.

(IV) Exceptions and limitations

While recognizing the importance of such an element in the draft treaty, there was no particular discussion on substantive elements; but there was agreement that the further development of such provision would depend of the scope of application and scope of protection of the draft treaty.

(V) Other elements to be considered

Besides the elements mentioned in the “Proposed list of issues for consideration for a draft treaty on the protection of broadcasting organizations” presented by the Chair as other possible elements to be considered as part of the draft treaty (see annex), a delegation proposed to consider in addition the following elements: “General principles”; “Cultural diversity”; “Defense of competition”.

On the “protection of encryption and rights management information”, divergent views were expressed concerning the necessity to provide protection for technical measures under the new treaty..

FINAL REMARKS

Based on the substantive exchanges of views on the different topics, the Chair was requested to prepare a report setting out the main views expressed at the consultations on the possible elements for a draft treaty and to present it at the SCCR/23.

The Delegations of South Africa and Mexico indicated that they would submit for the consideration of SCCR/23 a joint revised proposal that would take into account the results of these discussions

[Annex follows]

ANNEX

Informal Consultations on the Protection of Broadcasting Organizations
November 26 and 27, 2011

Proposed list of issues for consideration for a draft treaty on the protection of broadcasting organizations

(I) *Objectives*

- Relation to other treaties, in particular the WIPO International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations done at Rome in October 26, 1961(?)
- The distinction between *platform of origin* and the *platform of exploitation* (?)
- Differentiated approaches for the scope of application and the scope of protection (?)

(II) *Object of protection*

Proposed list of definitions that might be considered as element of a draft treaty on the protection of broadcasting organisations:

- Broadcasting (?)
- Broadcasting organization (?)
- Broadcast (?)
- Signal (?)
- Electronic communication (?)
- Transmission (?)
- Retransmission (?)
- Fixation (?)
- Other definitions (?)

(III) *Scope of application*

- The protection afforded by the draft treaty should apply both in relation to the visual and sound elements of programs (?)
- The protection granted under the draft treaty should extend only to the transmission of programs by the broadcasting organizations and to pre-broadcast transmissions intended for them, and not to works and other protected subject matter carried by such transmissions, nor to any material in the public domain (?)
- The object of protection under the provisions of the draft treaty should not include mere retransmissions (?)

- The simultaneous and unchanged transmission of its programs over computer networks by a broadcasting organization should be regarded as if it were broadcasting, and shall be afforded the same protection under the draft treaty (?)

(IV) Scope of protection

- Exclusive right or right to prevent (?)
- Right to authorize:
 - Communication of programs to the public (?)
 - Making available of programs to the public (?)
 - Performance in public of programs for commercial advantage (?)
 - Use of a pre-broadcast transmission (?)
 - Fixation (?)
 - Reproduction (?)
 - Retransmission of unencrypted broadcasts prior ratification or accession to the treaty (?)
 - Other rights(?)

(V) Exceptions and limitations

The rights provided by the treaty will be subject to exceptions and limitations and public interest safeguards (?)

(VI) Other elements to be considered

- Protection of encryption and rights management information (?)
- Minimum term of protection (?)
- National treatment (?)
- Enforcement measures (?)
- Operative clauses (?)
- Other provisions (?)

[End of Annex and of document]