

## **Informal Consultation Meeting on the Protection of Broadcasting Organizations**

**Geneva, April 14 and 15, 2011**

Proposal on the Draft Treaty on the Protection  
of Broadcasting Organizations

*Proposal by the Delegation of South Africa*

On March 1, 2011, the Secretariat received the proposal of the Government of South Africa on the WIPO Draft Treaty for the Protection of Broadcasting Organizations.

The proposal is annexed to this document.

[Annex follows]

SOUTH AFRICA'S DRAFT TEXT PROPOSAL  
SCCR's Draft Treaty on the Protection of Broadcasting Organizations  
February 2011

INTRODUCTION

- 1.1. The issues of updating and improving the international protection of broadcasting organizations against the illegitimate use of their broadcast signal has been on the agenda of WIPO's Standing Committee on Copyright and Related Rights (SCCR) since 1997.
- 1.2. While there seems to be a general agreement amongst WIPO's Member States that the current treaties are not adequate in dealing with this matter, the point of disagreement among member states has been on the objectives, specific scope and object of protection for a new legal instrument.
- 1.3. In an attempt to drive towards consensus on these areas, WIPO Secretariat has since 2007 undertaken a number of initiatives including: organizing information sessions, undertaking studies and holding regional seminars.
- 1.4. In addition to providing Members States with insights and understanding on the nature of signal piracy, where it occurs and the circumstances under which it occurs, these initiatives have further revealed the following:
  - 1.4.1. signal piracy is increasing at an alarming rate, requiring us to accelerate our discussions on this treaty;
  - 1.4.2. broadcasting has evolved tremendously as it occurs in new platforms such as the Web/Internet, mobile technologies, etc., which are also affected by piracy adversely (see David Price and Lieven Vermaele's presentations at SCCR's 2009 May information session);
  - 1.4.3. signal piracy is driven by deliberate act of theft as it is driven by commercial imperatives than the need to enhance access to information and content of national interest by the public;
  - 1.4.4. signal piracy affects the growth and development of content industries, particularly in the developing and the least developed countries.
- 1.5. At the 21<sup>st</sup> session of the SCCR it was agreed that this agenda item has been on the Committee for quite some time and that there was a need to map out the way forward.
- 1.6. To this end, the Committee:
  - 1.6.1. invited Members States to *“present new proposals on the protection of the broadcasting organizations by March 1, 2011, if possible in Treaty language, in addition to the proposals contained in the document SCCR/15/2 rev., to form the basis of the preparation of a new draft Treaty”*; and

- 1.6.2. that the Secretariat will organize before the next session of the SCCR, an informal consultation meeting of Members, involving technical experts, “to clarify outstanding technical and technological issues, relevant for the updated protection of the broadcasting organizations in the traditional sense, by following the signal-based approach. The Secretariat will prepare a list of issues based on the 2007 mandate of the General Assembly, with regard to the objectives, specific scope and object of protection. The consultation meeting will report its suggestions to the Committee”.
- 1.7. It is on the basis of the above conclusions from the 21<sup>st</sup> session of the SCCR that South Africa submits its proposal.
- 1.8. Using *document SCCR/15/2 rev.*, as a basis, South Africa’s proposal is premised on the following:
  - 1.8.1. Current instruments are not adequate to deal with the complex matter of signal piracy;
  - 1.8.2. Signal piracy is rife and efforts should be made to expedite work on this treaty for the due protection for both the broadcasting and content industries;
  - 1.8.3. Flexible limitations and exception should be built in the treaty to ensure that public value principles relating to access to information and content of national interest are upheld;
  - 1.8.4. The treaty should be technological neutral concomitant with the converging environment of broadcasting;
  - 1.8.5. The draft treaty should be broad to allow compatibility with existing treaties and national legislations, particularly those governing the broadcasting sector;
  - 1.8.6. Rights in this treaty are not necessarily new or additional to existing ones allocated by national laws in respect of broadcasting, but to strengthen them, particularly at trans-national or cross-border levels.

## **2. THE CONTEXT OF SOUTH AFRICAN PROPOSAL**

- 2.1. South Africa’s proposal is informed by the following:
  - 2.1.1. WIPO studies and information sessions which revealed the rapid increase of signal piracy on other platforms other than the ones used traditionally for broadcasting activities including cable;
  - 2.1.2. Conclusions from the African Group regional seminar hosted by the Government of Nigeria in Collaboration with WIPO (held on 18-20 October 2010, in Abuja, Nigeria); and
  - 2.1.3. Preliminary studies conducted in the South African domestic environment in respect of this matter.

## **3. THE PROPOSAL**

- 3.1. Objectives
  - 3.1.1. The primary objective of the new treaty as contained in SSCR/17/INF11 is to provide a stable legal framework for the activities of broadcasting organization against the illegal or unauthorized use of their broadcast signal.

- 3.1.2. For South Africa the rationale for such a protection is, though primarily intended for broadcasting organizations, also to protect the domestic local content industry from unfair exploitation on one hand, while protecting broadcasting organizations investment related to the broadcasting on the other.
- 3.1.3. Specific Scope
- 3.1.4. South Africa submits that the scope of protection should, as mandated by the General Assembly, be signal-based. This means that the treaty should protect broadcasting organizations against the illegal use of their broadcast signal. This is to ensure that the treaty does not in any way compromise the right to freedom of expression, prevent use of content which is in the public domain and accord broadcasting organizations undue additional rights.

### **3.2. The Object of Protection (Definitions)**

- 3.2.1. The object of protection in terms of the draft treaty is the broadcast signal.
- 3.2.2. The following definition of broadcasting is proposed in place of previous definitions in Article 5 of the draft Treaty:

“Broadcasting means the process whereby the output signal of a broadcasting organization is taken from the point of origin, being the point where such signal is made available in its final content format, and is conveyed to any broadcast target area by means of electronic communications, and ‘broadcast’ is construed accordingly.”

- 3.2.3. It is further proposed that the definition of a **‘broadcast’** should limit the ambit of the protection granted by the draft Treaty, limiting this protection to the broadcast signal and not to the underlying content rights in the broadcast work.
- 3.2.4. South Africa further proposes for the inclusion a definition of a “signal”– an electric current or electromagnetic field used to convey data. Within the context of broadcasting this can be defined as the conveyance of broadcast television information via an electronic means.
- 3.2.5. The above definition then necessitates the inclusion of a new definition in the draft Treaty of what constitutes electronic communications, and the following definition is proposed:

“Electronic communications means the emission, transmission or reception of sounds, visual images or other visible signals whether with or without accompanying sounds by means of magnetism, radio or other electromagnetic waves, optical, electromagnetic systems or any agency of a like nature, whether with or without the aid of tangible conduct.”

- 3.2.6. It is proposed that the definition of “broadcasting organization” in Article 5 of the draft Treaty be amended as follows:

“broadcasting organization” and ~~cablecasting organization~~ means the legal entity that ~~takes the initiative and~~ has the responsibility for packaging, assembly and/or scheduling of program content for which it has legitimate license, or rights of use, for the transmission to the public, sections of the public or subscribers in the form of an unencrypted or encrypted output signal containing ~~of sounds or of images or of images and sounds or representations thereof~~ sounds, visual images or other visible signals whether with or without accompanying sounds ~~and the assembly and scheduling of the content of the transmission;~~

- 3.2.7. The usage of sophisticated technologies to spur signal piracy and the degree to which broadcasting has evolved as we know it, raise a key issue relating to what constitutes a broadcaster who is eligible for protection under this treaty. This is important in view of the exclusion of web-casting/Internet and any other non-traditional broadcasting platforms from the current discussions as per the decision of the may 2006 session of the SCCR endorsed by the General Assembly later in that year (September/October 2006). One thing is clear though that signal piracy is rife across all the platforms including mobile, Web/Internet. This poses another question: Should we continue to be oblivious to the technological development and what will be the relevance of this treaty by the time it is concluded considering the rapid technological developments?
- 3.2.8. In an era of convergence where the activity of 'broadcasting' is no longer confined to traditional platforms, such as satellite, cable and terrestrial frequencies it is proposed that such a definition should be **technologically "neutral"** to ensure adequate protection for broadcasting organizations on all platforms where the activity of broadcasting is carried out.
- 3.2.9. The adoption of technological neutral definitions in this treaty would also create protection not only for traditional incumbents, but also for legal broadcasters who function only in new mediums or platforms.
- 3.2.10. South Africa submits that these technological neutral definitions negate the need to refer specifically to platforms such as cable, satellite, terrestrial frequency or even simultaneous transmissions by broadcasting organizations on the Internet.
- 3.2.11. Accordingly, such references to technological platforms or definitions of such broadcasting platforms such as articles 6(3) should be removed from the draft treaty.

### **3.3. Beneficiaries of protection**

- 3.3.1. South Africa is of the view that the requirement for protection provided in Article 7 is sufficiently clear, but in order to obtain technological neutrality it is proposed that the following text be substituted for Article 7(2)(ii):

*"the point of origin of the broadcast output signal intended for direct reception by the public, sections of the public or subscribers is situated in another Contracting Party."*

### **3.4. National Treatment**

- 3.4.1. South Africa supports Alternative VV in Article 8 of the draft Treaty for the purposes of national treatment. Namely, that

*"(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 recognized expressly under this Treaty."*

### **3.5. Rights of Broadcasting Organizations**

- 3.5.1. South Africa proposes the removal of the right of fixation in the Treaty as this is addressed in the Rome Convention in any event for the purposes of broadcasting organizations.

- 3.5.2. Furthermore it is proposed that a new Article 9 be inserted and the current Articles 9, 10, 11,12, 14, 15 and 16 be deleted with consequent changes in the numbering of articles that follow. South Africa welcomes draft text distributed by broadcasters in the form of a discussion draft to move the discussion on the draft Treaty forward, and has extracted from this a section of text which it is proposed be inserted as Article 9 in the draft Treaty as follows:

“(1) Broadcasting organizations shall enjoy the right to authorize:

(a) The communication of their programs and/or the program signals to the public, by any means, including the making available to the public of their programs in such a way that members of the public may access them from a place and at a time individually chosen by them;

(b) The performance in public of their programs for commercial advantage; and

(c) The use of pre-broadcast transmission intended for them.

(2) With respect to the acts under paragraphs (1)(b) and (c), in this article, it shall be a matter for the domestic law of the Contracting Party where protection of this right is claimed to determine the conditions under which it may be exercised, provided that such protection is adequate and effective.”

### 3.6. Limitations and Exceptions

- 3.6.1. One of the concerns raised by Member States in the early discussions on the draft treaty has been on its impact on access to information and other copyrights laws of Member States.
- 3.6.2. It is therefore important that the draft treaty builds a **strong limitations and exceptions** to guard against it undermining certain exceptions to copyright protections enshrined in the copyright laws of many member countries and public interest values.
- 3.6.3. South Africa is of the view that at a bare minimum those exceptions (also currently recognized under Article 15 of the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (“the Rome Convention”)), such as private use, reporting of news/current events, ephemeral recordings and the use for teaching and scientific research should be specifically mentioned to provide guidance to member countries, but also that some leeway be provided to allow domestic legislators to set out more detailed provisions and, if required, provide for further exceptions and limitations that are reasonable and in accordance with in accordance with a fair usage doctrine/ test. This would create a balance between broadcaster’s rights on one hand and freedom of expression and public interest values relating to access on the other.
- 3.6.4. South Africa proposes, in line with Article 15 of the Rome Convention, the following text be substituted for the text currently under Article 17 of the draft Treaty:

“(1) Any Contracting State may, in its domestic laws and regulations, provide for exceptions to the protection guaranteed by this Treaty as regards:

(a) personal or private use;

(b) use of short excerpts in connection with the reporting of current events;

(c) ephemeral fixation by a broadcasting organization by means of its own facilities and for its own broadcasts;

(d) use solely for the purposes of education, scientific research or for the purposes of preservation by libraries, archives or non-profit research centers.

(2) Notwithstanding the contents of paragraph (1) of this Article, any Contracting State may, in its domestic laws and regulations, provide for further limitations or exceptions as contained in paragraph (1) above, - in connection with the protection of copyright in copyrightable works to the extent such provisions are of general application and do not conflict with paragraph (1) in this Article.”

### **3.7. Relation to other Conventions and Treaties**

3.7.1. South Africa supports Alternative CCC, namely that:

*“(1) (1) Nothing in this Treaty shall derogate from existing obligations that Contracting Parties have to each other under any international, regional or bilateral treaties addressing copyright or related rights.*

3.7.2. South Africa does not have any objections to clauses (2) and (3) as provided in Article 1 of the draft Treaty.

### **3.8. Articles 2, 3 and 4 of the draft Treaty**

3.8.1. South Africa proposes that the nature of Article 2, 3 and 4 is better suited for placement in the Preamble.

### **3.9. Term of protection**

3.9.1. The intent of Article 18 of the draft Treaty is to protect the investment required to obtain, organize and disseminate content. In this regard, South Africa holds the view that it is sufficient for this purpose to adopt the equivalent Rome Convention provision. However, this provision alone does not address the concern that materials may be broadcast more than one time in order to extend the term of protection, hence the need to insert text that would prevent continual renewal in terms of protection.

3.9.2. Accordingly, South Africa support Alternative EE with the following amendment:

*“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 first took place.”*

### **3.10. Obligations concerning technological measures**

3.10.1. South Africa is of the view that technological measures for the protection of broadcasts is a necessary step, in addition to legal measures, to effectively ensure that the rights of broadcasting organizations and their reasonable return on operational investment are secured. However, this should not be at the cost of the public interest and hence there is a need for express exceptions by authorized users for legitimate purposes or to ensure continued access to materials which are not protected by copyright and are in the public domain.

- 3.10.2. South Africa is in agreement with the text of Alternative MM (1) under Article 19 of the draft Treaty, which reproduces, with the necessary changes (*mutatis mutandis*), the corresponding provisions of the WIPO Performances and Phonograms Treaty (WPPT) which states:

*“(1) 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 and that restrict acts, in respect of their broadcasts, that are not authorized by the broadcasting organizations concerned or are not permitted by law.”*

- 3.10.3. However, South Africa also recognizes the need to balance the rights of broadcasting organizations and the larger public interest, particularly education, research, and access to information and therefore proposes that paragraph 2 of Alternative MM be amended as follows:

“Contracting parties may expressly provide that the legal protection and legal remedies contemplated in paragraph 1 of this Article shall not apply to situations where national laws relating to the protection of the work being broadcast or the broadcast itself would permit the work to be used~~the circumvention of an imposed effective technological measure, used by a broadcasting organization, to obtain access to a broadcast for the purpose of non-infringing use of that broadcast shall not constitute an infringement of the measures implemented by virtue of this article.~~

- 3.10.4. South Africa notes that Alternative V in Article 19 extends the protection of broadcasts beyond the act of circumvention to include the facilitation of such acts, for example the sales of devices or systems capable of decrypting or helping to decrypt an encrypted broadcasting signal. In our view this matter can be left to the discretion of member countries.

### **3.11. Obligations concerning Rights Management information and Formalities**

- 3.11.1. South Africa does not have any objections to any of the clauses as provided in the Article 20 and Article 21 of the draft Treaty.

### **3.12. Reservations**

- 3.12.1. South Africa supports Alternative X in Article 22, namely that:

*“No Reservations to this Treaty shall be permitted.”*

### **3.13. Application in Time**

- 3.13.1. South Africa supports the adoption of Article 18 of the Berne Convention with the necessary changes in this regard.

### **3.14. Provisions on Enforcement of Rights**

- 3.15. South Africa does not have any objections to any of the clauses as provided in Article 20 of the draft Treaty.

**3.16. Administrative and Final Clauses**

- 3.16.1. South Africa does not have any objections to any of the clauses as provided in Articles 25, 26, 28, 30, 31, 32, 33 and 34 of the draft Treaty.
- 3.16.2. The content of Article 29 will be informed by the decision taken in Article 27 and in this regard South Africa supports Alternative Z, namely that:

*“(1) Any Member State of WIPO may become party to the Treaty.”*

[End of annex and of document]