



Permanent Mission of Brazil in Geneva

71, Avenue Louis-Casaï - Case Postale 165
1216 Cointrin Geneva - Switzerland

Note n^o.

The Permanent Mission of Brazil presents its compliments to the World Intellectual Property Organization and has the honor to present, attached herewith, Brazil's preliminary comments on the "Draft Non-Paper on the WIPO Treaty on the Protection of Broadcasting Organizations", of 8 March 2007, circulated for comments by Mr. Jukka Liedes, Chairman of the Standing Committee on Copyright and Related Rights.

2. Brazil reserves the right to present additional comments on the Draft Non-Paper or on revised versions of it.

3. The Permanent Mission of Brazil avails itself of this opportunity to renew to the World Intellectual Property Organization the assurances of its highest consideration.

Geneva, March 28th, 2007.

Copyright and Related Rights Sector
International Bureau
WORLD INTELLECTUAL PROPERTY ORGANIZATION
Geneva

Brazil's Preliminary Comments

PREAMBLE

Three provisions to which Brazil attaches great importance were unduly included in the preamble of the new Chair's Draft Non-Paper. Their legal nature as operative Articles 2, 3 and 4 of the Draft Treaty contained in document SCCR/15/2 is to remain unchanged, as per decision of the WIPO 2006 GA. These three articles address such fundamental issues as General Principles, Protection and Promotion of Cultural Diversity and Defense of Competition. Agreement reached in the SCCR meeting of last January made it clear that these provisions were not to be tampered with. They are essential to secure a fair and adequate balance between the rights of broadcasters and those of the general public. The inclusion of these three provisions in the Chair's Non-Paper is acceptable only in their current form of operative articles.

ARTICLE 2(2)

Brazil recalls its formal reservation in the SCCR January meeting to any provision likening "cablecasting" to "broadcasting", such as the one in Article 2(2) of the Chair's Draft Non-Paper. The affirmation in Article 2(2) that the treaty "shall apply to the protection of cablecasting organizations (...) in the same way as they apply to broadcasting organizations", requires careful reexamination. Such an article would not be consistent with national legislations that treat "cablecasting" differently from "broadcasting", as is the case of Brazil's.

ARTICLE 4

Paragraphs 4(2) and 4(3) should be suppressed. Regarding paragraph 4 (1), Brazil proposes improving its language as follows: ***“Protection granted under this Treaty shall leave intact and shall in no way affect, limit or prejudice both the protection of copyright or related rights in the programs incorporated in broadcasts, and the access to the public domain. Consequently, no provision of this Treaty may be interpreted as prejudicing the aforementioned protection and access”***. Furthermore, the following paragraph should be included in article 4: ***“Nothing in this Treaty shall derogate from existing obligations that Contracting Parties have to each other under any international treaties addressing copyrights and related rights”***. Those changes would set limits to the application of the treaty, making it clear that the rights created by the treaty will neither encroach on the public domain, nor on copyrights incorporated in the broadcast.

ARTICLE 5

Brazil also reaffirms its reservation in the SCCR of January with regard to the definition of a “broadcast”, and extends such reservation to the definition of “cablecast”. The consistency of both definitions in Article 5 with national legislations of Members, Brazil’s a case in point, needs to be carefully examined.

ARTICLE 7

Brazil supports alternative “K”, based on the Berne Convention Model, which best ensures respect for national treatment, and safeguards Broadcasting Organizations against negative discrimination in countries where protection

levels go beyond that of the Broadcasting Treaty. The TRIPS Model, reflected in Alternative “VV”, could also be considered. Alternative “J” would not be acceptable.

ARTICLE 8

The exclusive rights approach adopted in paragraph 8(1) is not in keeping with the WIPO 2006 GA decision to proceed on the basis of a “signal-based approach”. Therefore, Brazil proposes its deletion.

The following improvement to paragraph 8(2) is proposed: “Contracting Parties may establish adequate and effective legal protection against unauthorized fixation”.

Extending protection to post-fixation (“unauthorized reproduction of their broadcasts”) or to simulcasting (through the formulation “unauthorized retransmission by any means”) would also contravene the decision by the GA on adopting a “signal-based approach”, as well as the agreement of Members to exclude casting over the Internet. This would be detrimental to consensus-building at this late stage in the negotiations.

ARTICLE 10

This article is inconsistent with a “signal-based approach”. It creates unwarranted obstacles to technological development, to access to legitimate uses, flexibilities and exceptions and to access to the public domain. It does not focus on securing effective protection against an illicit act, but rather creates new exclusive rights so that they cover areas unrelated with the objective of the treaty, such as control by holder of industrial production of

goods, the development and use of encryption technologies, and private uses. The prohibition of mere decryption of encrypted signals, without there having been unauthorized broadcasting activity, is abusive. Brazil does not agree with the inclusion of this Article.

ARTICLE 11

Article 11 should be replaced by the following text: “Members shall be free to determine the appropriate method of implementing the provisions of this Agreement within their own legal system and practice”. Article 11, as proposed, is overly broad and might disproportionately impinge upon Member-countries’ latitude for compliance with the Treaty in accordance with their different national regimes and approaches to regulation of broadcasting activities, competition policies, related rights and the public interest. A shorter, straightforward formulation would facilitate consensus. The language proposed is inspired in TRIPS Article 1.1 and leaves member-countries leeway for implementing the treaty according to their legal traditions and practices.

ARTICLE 12

In paragraph 12 (1), replace the verb “may” by “shall”. This change would promote secure, predictable and harmonious application of “exceptions and limitations” by Member-countries, thereby guaranteeing that the Treaty built-in balance of rights, and exceptions and limitations to rights is fully respected in its national implementation by signatories.

Paragraph 12 (2), which attempts to import the Berne Convention three-step test into the treaty, should be deleted. The three-step test is a rule applicable

in the field of copyright and related rights, and, thus, does not fit in a treaty whose focus is “signal-based”.

Regarding paragraph 12 (3), Brazil proposes adding “uses for library and archives” among the limitations and exceptions. Therefore, the following language is proposed: “In accordance with paragraph 1, Contracting Parties shall 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, use for public security and judicial purposes and uses for library and archives”.

ARTICLE 13

Article 13 should be deleted. A twenty-year term of protection is unnecessary. The agreed “signal-based” approach to the Treaty implies that the object of protection is the signal, and therefore duration of protection must be linked with the ephemeral life of the signal itself.

ARTICLE 17

Article 17 should be deleted. Enforcement issues are matters to be left to national jurisdictions.

* * *