

# Comments to the MHRD on WIPO Broadcast Treaty (March 2013)

*Centre for Internet and Society* | 2013-03-01

Pranesh Prakash

*The Centre for Internet and Society would like to make the following comments on the draft legal text of SCCR/24/10 (Working Document for a Treaty on the Protection of Broadcasting Organizations) at the stakeholders meeting to be held on March 21, 2013.*

---

- Article 1 – Preamble:** The draft legal text of SCCR/24/10 (“Treaty”) in the Preamble should in clear terms capture the intent of the WIPO General Assembly as to the object of the Treaty. The SCCR reiterated the General Assembly’s mandate for a signal based approach treaty for the protection of broadcasting and cablecasting organizations. In this regard, the SCCR in its report to the 50th Session of the WIPO General Assembly (Oct. 1-9, 2012) noted: “The Committee 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*. The Committee also agreed to recommend to the WIPO General Assembly that the Committee continue its work toward a text that will enable a decision on whether to convene a diplomatic conference in 2014.” [*emphasis added*] Therefore it is submitted that the Preamble should at the very outset establish that the Treaty aims at
  - protection of a related right and a signal based approach is adopted to protect such a related right
  - protection of the broadcasting and cablecasting organizations in the traditional sense.
- Article 2 – General Principles:** It is submitted that the Development Agenda under TRIPS should be declared as general principle under the Treaty where as a balance must be struck between the rights of the broadcasting organizations and the larger public interest.
- Article 5 – Definitions:** The Treaty in its current form proposes alternatives to the definitions. On a general observation, it is submitted that the alternatives are unsatisfactory and waivers from the WIPO General Assembly mandate to adopt a signal based approach. In precise terms, the definition section attributes a broad definition to the “broadcast” and fails to define the means of broadcast. The alternative to 5(b) does reintroduce the phrase,

“general public” instead of “public”, as anything lesser would not constitute a broadcast as it was in the Article 5 of the March, 2007 draft non-paper, but fails to adopt a signal based approach by adding the words, “and specific program”. Similarly definition of “retransmission” under the Alternative A for Article 5 clause (d) uses the words, “transmission by any means” which is again in conflict with the signal based approach. Apart from the instances mentioned above there are many other inconsistencies in the definition section and therefore it is submitted that none of the alternatives to the definition section can be implemented within the mandate of the General Assembly.

4. **Article 6 – Scope of Application:** We agree with the Alternative A of Article 6, insofar as the alternative to clause 1 is adopted.
5. **Article 9 – Protection for Broadcasting Organizations:** In reference to Alternative A for Article 9 it is submitted that the public performance of broadcast signals should not be covered. In many countries, especially lower-income countries, shared viewing of televisions and shared listening to radio are culturally established and it should not be equated with signal theft, which should be the primary focus of this Treaty. Further, free-to-air TV and radio channels and state-sponsored TV and radio channels depend on advertisements and other forms of income, not subscriber payments. Given this, there is no reason why public performance, the wrongfulness of which is very business-model dependent, should be included in this treaty. We strongly suggest that Alternative B to Article 9 should be struck down as it is in contravention of the mandate of the WIPO General Assembly to adopt a signal based approach for the development of the text of the Treaty. There cannot be any fixation or post fixation rights be given to the broadcasting organization if a signal based approach is adopted for the Treaty.
6. **Article 10 – Limitations and Exception:** The limitations and exceptions should be mandatory as well, as not balancing limitations and exceptions with the rights granted to the broadcasters would be violating the spirit of the WIPO Development Agenda. Further, it will also be in contravention of Article 3 of the Treaty in its current form. The UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expression recognizes the principles of equitable access and openness and balance. It also mandates implementation of “measures aimed at enhancing diversity of the media, including through public service broadcasting. It is also reiterated that, reasons for providing exceptions for over broadcast rights are not the same as those for copyright. For instance, a country may wish to make exceptions to signal protection for cases such as broadcast of a national sport, as India has done with the Sports Broadcasting Signals (Mandatory Sharing with Prasar Bharati) Act. This might well be a foul of the three-step test proposed in Article 7(2), especially as it says “provide for the same or further limitations or exceptions...”. Furthermore, a country may wish to limit the application of broadcasters rights for national broadcasters (whose programming is paid for by taxpayers, and thus should be available to them), but may not be able

to do so under the provisions of Article 7(2). Thus, Article 10(2) should be deleted, and Article 10(1) should be expanded to include issues of national interest and for free-to-air broadcast signals.

7. **Article 11 – Term of Protection:** As submitted earlier by CIS, it is reiterated that no term of protection should be provided. As was noted by the US government in its response to the draft non-paper, it is questionable “whether a 20-year term of protection is consistent with a signal-based approach”. The Brazilian delegation also states: “Article 13 [of the previous draft treaty] 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.” Thus, a term is only needed if we stray away from a signal-based approach. As we do not wish to do so, there should be no term of protection.
8. **Article 12 – Protection of Encryption and Rights Management Information:** From our previous submission on this issue we reiterate that, No separate right to prevent unauthorized “decryption” should be granted, since signal-theft is already a crime. For instance, this provision would also cover decrypting an unauthorized retransmission without authorization from the retransmitter. This provides the unauthorized retransmitter rights, even though s/he has no right to retransmit. This leads to an absurd situation. As stated by the Brazilian government with respect to the April 2007 non-paper: “[Article 10 of the draft non-paper and Article 9 of the non-paper] 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.” If even the provision is to be retained, it should not grant the broadcasters any rights over and above that which is otherwise granted by the law, thus the following line is over-broad: “that are not authorized by the broadcasting organizations concerned or are not permitted by law.”