Comments to the Ministry on WIPO Broadcast Treaty (March 2011)

Centre for Internet and Society | 2011-03-21

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As a follow up to a stakeholder meeting called by the MHRD on the WIPO Broadcast Treaty, CIS provided written comments on the April 2007 Non-Paper of the WIPO Broadcast Treaty, emphasising the need for a signal-based approach to be taken on the Broadcast Treaty, and making it clear that India should continue to oppose the creation of new rights for webcasters.

On February 22, 2011, the Ministry of Human Resource Development held a meeting to decide on the Indian position on the WIPO Broadcast Treaty. The Ministry asked the participants at the meeting to send in written submissions on four matters. We sent in submissions on those four issues, as well as a few others.

Comments on the non-paper for the WIPO Broadcast Treaty by the Centre for Internet and Society

On February 23, 2011, the Ministry of HRD had asked for comments on four matters:

1. Article 3 of the Non-paper which was circulated earlier
2. Term of protection for signal
3. Nature of limitations and exceptions
4. Protection of signal and retransmission

We have made submissions on those and a few other matters as well. Unless noted otherwise, all comments made in this note pertain to the final non-paper (April 2007) and not the draft non-paper (March 2007).

Article 3

Article 3 of the draft non-paper that was circulated (March 2007) for comments from country delegates stated:

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").

A number of people present at the recent MHRD-organized meeting noted that "mere retransmissions" is a confusing term. In the revised non-paper (April 2007), it has been clarified that protection is not granted to third parties for merely retransmitting another's signal (Art. 3(4)(i)).

3. Specific Scope and Object of Protection

(4) The provisions of this Treaty shall not provide any protection

(i) to retransmitting third parties in respect of their mere retransmissions by any means of broadcasts by broadcasting organizations;

(ii) to any person for 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) to any person for transmissions over computer networks

In addition, Art. 3(4)(iii) is currently ambiguous since it is not clear whether "retransmissions" are subsumed under the word transmission. By allowing for separate rights for retransmission over computer networks, the Treaty allows for the creation of two classes: traditional broadcasters who will have rights over retransmissions over computer networks, and all other persons who will have no rights over transmissions. Thus, if "retransmission" is not subsumed under the word "transmission", it would be advisable to alter that clause to read "*to any person for transmissions or retransmissions over computer networks*".

Lastly, Art. 3(4) should additional prevent protection for persons broadcasting materials for which they have not acquired copyright, or for broadcasting materials in the public domain.

Term of Protection of Signals

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 should be deleted. A twenty-year term of protection is unnecessary. The agreed"signal-based" approach to the Treaty implies that the objected 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.

Limitations and Exceptions

The limitations and exceptions (L&E) currently provided for allow for mirroring of copyright L&E limited by a Berne-like three-step test.

However, reasons for providing protection over broadcasting 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 afoul of the three-step test proposed in Article 10(2). 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 10(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.

Protection of Signal and Retransmission

It should be a sine qua non condition of India's that that this be a purely signal-based treaty with no fixation or post-fixation rights. Thus, it should restrict itself to protection of signals, and simultaneous retransmission.

As a result, 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:

> "[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."

Other comments

Article 7

Article 7 of the non-paper provides broadcasters rights post-fixation ("Broadcasting organizations shall enjoy the exclusive right of authorizing … the deferred transmission by any means to the public of their fixed broadcasts."). This is contrary to a signal-based approach. A signal-based approach would necessarily mean that it is only signal theft (which happens only via unauthorized simultaneous retransmission) that should be protected. Deferred transmission should implicate the rights of the owner of copyright, but not of the broadcasting organization.

Article 4

As suggested by the Brazilian government, Article 4(1) which proposes a non-prejudice clause should be amended to add the words "and access to the public domain" at its end. This is consistent with the WIPO Development Agenda.

Article 5

India should re-iterate its suggestion to add the following to the definition of "broadcast" under Art. 5(a): "'broadcast' shall not be understood as including transmission of such a set of signals over computer networks."

Further, the phrase "general public" should be retained in Art.5 (as was present in the draft non-paper), and should not be made into "public". The danger is that a limited public (say family members) could possibly be covered by the term "public", while they will be excluded from "general public", which in any case is the target audience of all broadcast.