

Report on the Fourteenth Session of the WIPO Standing Committee on Copyright and Related Rights (SCCR) in Geneva, May 1-5, 2006

Dr. Silke von Lewinski

The discussions at this session referred exclusively to the topic of a possible treaty on the protection of broadcasting organisations. Upon the understanding expressed at the end of the preceding session in November 2005, the chairman had prepared a new revised consolidated text on the basis of the previous text and the discussions at the last session. This document (SCCR/14/2 of February 8, 2006) was presented in the form of a “draft basis proposal” for the relevant treaty, similar to the “basic proposals” submitted to the WIPO Diplomatic Conference 1996. This document contains a “clean text” of draft articles without any alternatives, and a draft appendix dealing with the controversial issue of webcasting. In addition to this draft basic proposal, the chairman had prepared a working paper (Doc. SCCR/14/3 of February 8, 2006) which included the alternative provisions and elements from new proposals submitted at the preceding session in November 2005, including those of Brazil and Chile mentioned in the preceding report by the undersigned. In addition, a proposal by Peru regarding limitations and exceptions, obligations concerning technological measures and rights management information as well as webcasting (Doc. SCCR/14/6 of April 28, 2006) was considered, as well as a new proposal by Columbia (Doc. SCCR/14/4 of March 17, 2006) containing a new paragraph to Article 16 on technological measures according to which the circumvention of an imposed effective technological measure for the purpose of non-infringing use of the broadcast shall not constitute an infringement.

1. General Statements

After the delegations of Brazil, Chile and other countries had claimed that all proposals made in the past should be treated on an equal footing, the Committee decided to discuss all proposals regarding the same subject matter from the different documents (i.e. the “clean text” in doc. 14/2 and alternative proposals in docs. 14/3,

14/4 and 14/6) in parallel. Apart from the related discussion on the procedure, the general statements reflected continuous concern about the balance between rights of broadcasting organisations and the protection of authors, performers and phonogram producers and about a proper balance between the rights of broadcasting organisations and public interest. Many delegates claimed that the treaty should focus on signal piracy only but not provide for further reaching rights. Also the proposed protection of web-casting organisations was widely opposed, as beforehand. More clarity and transparency was claimed in particular by developing countries, and the need to have additional meetings before proceeding to a Diplomatic Conference was stated by a number developing countries. Many developing countries in this context stated their preference for a duration of protection of 20 years as a minimum rather than the proposed 50 years. In general, all delegations spoke in favour of working on further progress to be made; Japan seemed to be most interested in going forward in a fast speed, while in general, the enthusiasm even of other industrialised countries seemed relatively moderate, as compared to the atmosphere before the convocation of the Diplomatic Conference 1996.

2. Content of the Draft Basic Proposal and Parallel Proposals

a. Proposals on General Principles, Cultural Diversity and Defence of Competition (“General Public Interest Clauses”)

Different proposals made by Member States regarding access to knowledge and information and the like, the protection and promotion of cultural diversity and measures against anticompetitive use of intellectual property rights (in general) (doc. SCCR/14/3, pp. 5-6) were first discussed. Their mostly quite general and vague wording would probably allow far-reaching restrictions of broadcasters’ rights, which was criticized by a number of delegations. Also, it was controversial whether these proposals should be made part of individual articles (for examples on limitations and exceptions) or, as general principles, of the preamble. Regarding cultural diversity, it was also mentioned that no conflict would arise between intellectual property rights and cultural diversity. In respect of all three proposals regarding public interest clauses, concerns were expressed regarding the repercussions on the interpretation

of preceding treaties, such as the WCT and the WPPT which did not contain such clauses. In any case, the re-drafting of the proposals was considered to be necessary not only by industrialised but also by developing countries.

b. Term of protection

Article 13 of the Draft Basic Proposal proposes a period of 50 years from the end of the year in which the broadcast took place, while another proposal is limited to 20 years. Only a few countries spoke in favour of the one or the other term; Korea announced that it had changed positions and now would agree with a term of 50 years. Brazil, followed by a number of other developing countries, pointed at the fact that the term of protection is linked to the taking place of each broadcast and thereby to the signal. In this context, Brazil claimed that the entire draft basic proposal should be consistent and deal with signals only also in respect of the scope of protection and rights and should exclude the contents of the broadcasts.

c. Scope of Application/Webcasting (Article 3 of the Draft Basic Proposal)

At the beginning of the discussion on this point, the chairman summarised the discussion in preceding sessions by stating that it is known that only the USA wishes to see webcasting included in the future treaty, and the EC only wants to see simulcasting to be protected, while a very broad opposition has been expressed against the inclusion of webcasting and simulcasting into a future treaty. The discussion on this point showed an ongoing opposition to these issues even in form of a non-mandatory proposal. Most delegations considered the inclusion of these issues to be premature and asked for more time to study them. The USA and the EC clarified that phenomena such as weblogs, blogs, e-mails and websites would not be covered by webcasting and considered to choose in the future a different word for the relevant activities of webcasting and simulcasting in order to make it sound more familiar to traditional broadcasting. A number of delegations were also disturbed about the following fact: Article 3(1) of the Draft Basic Proposal states that the protection shall extend only to signals rather than to the protected subject matter carried thereby, while Article 3(2) states that the treaty shall apply to the protection of broadcasting organisations "in respect of their broadcast" (rather than signals).

d. Rights

In the context of rights to be granted to broadcasting organisations, the discussion extended again to the object of protection: It was argued that, where only signals were to be protected, rights referring to acts *post* fixation would not be justified. Many other delegations continued to favour a mere right to prohibit as opposed to an exclusive right for *post* fixation acts, including the USA. A frequent remark was the claim that the retransmission right should not cover retransmission over computer networks as proposed in Article 6 of doc. SCCR/14/2.

e. Limitations

Regarding limitations, the main two approaches taken were, on the one hand, the provision of a general reference to limitations under national copyright law which should also be applicable to the rights of broadcasting organisations, to be supplemented by the three-step-test and, on the other hand, a list of examples for limitations, or an exclusive list of permitted limitations in different ways of combination with the three-step-test. On the whole, delegations were flexible about the different approaches.

f. Technical Measures

While the USA considered the inclusion of a provision on obligations concerning technological measures as critical, and Colombia stated that such provisions were developed extensively in the Free Trade Agreement with the USA, other countries were less enthusiastic or even favoured the exclusion of any such provision. In this context, the underlying question of whether the signal or also the program/content of the broadcast is protected according the Draft Basic Proposal came up again and a more consistent approach in this respect was claimed to be taken in the Draft basic Proposal.

g. Eligibility to become Party to the Treaty

Most delegations, including the EC which thereby changed its position, were in favour of opening the future treaty to any Member State of WIPO and the EC, while some, including the USA, continued to opt for the condition that only Member States of the WCT and the WPPT (or, as an alternative, the Rome Convention) should be eligible for becoming a party to the treaty.

h. Webcasting

In a separate discussion on webcasting and simulcasting, the overall majority of delegations continued to reject any reference to webcasting in the basic proposal, partially because it was considered as premature or as never having been included by the Committee's mandate, partially due to the need to gain further experience and explanations on this matter. Many delegations were against the inclusion even of a non-mandatory appendix on webcasting and simulcasting.

i. Further procedure

While a number of countries, both industrialised and developing, were in principle in favour of proceeding to a Diplomatic Conference, many others expressed their support in rather weak words (by stating that they were "not opposed" to doing so or claimed the need to organise at least one more meeting of the SCCR before the General Assembly 2006). On the basis of the discussions, the chairman proposed that one more meeting of the SCCR should take place before the General Assembly of 2006, and should deal only with traditional broadcasting and cable casting. Also, the chair would prepare by August 1, 2006, a revised Draft Basic Proposal on the basis of all proposals now contained in docs. SCCR/14/2, SCCR/14/3 and the additional, existing proposals. This should be on the understanding that there would be a recommendation to the General Assembly to convene a possible Diplomatic Conference at a suitable time in 2007. Also, regarding webcasting and simulcasting, proposals could be submitted until August 1, 2006; a revised document on webcasting and simulcasting would then be prepared on the basis of the doc. 14/2, the discussions to date and the submitted proposals. This matter would then be taken to a session of the SCCR after the General Assembly 2006. The USA reluctantly accepted this proposal to split traditional broadcasting from webcasting

but did so with the understanding that webcasting would be re-included into the discussions of the SCCR if the General Assembly 2006 would not recommend the preparation of a Diplomatic Conference for traditional broadcasting organisations. The EC then agreed to the chair's proposal upon the condition that simulcasting should be integrated into the main package of traditional broadcasting, thereby provoking the claim by the USA that in that case, also webcasting should be included in the main package of traditional broadcasting. The chairman stated in the end that the next meeting of SCCR would deal only with traditional broadcasting and that the wishes of the USA and the EC were recorded in the report and subject to the decision by the Committee.

On the whole, the discussions at that meeting were somewhat more strongly related to the substance and a little less of a purely political character, as compared to the preceding meeting. In particular, the delegates of Brazil and India very often spoke much more to the point and on substance than in respect of procedural or similar issues only. This time, the NGO's were not given the floor but were offered the possibility to submit written comment to the Secretariat. At this point of time, it is quite difficult to predict what the outcome of the whole project will be.

(End of Report)