

COMMENTS ON THE
PROTECTION OF BROADCASTING ORGANIZATIONS: TECHNICAL BACKGROUND PAPER
PREPARED BY THE WIPO SECRETARIAT

By

NEHAA CHAUDHARI AND AMULYA PURUSHOTHAMA

For

THE CENTRE FOR INTERNET AND SOCIETY, INDIA

I. PRELIMINARY

1. This submission presents preliminary comments by the Centre for Internet and Society (“CIS”) on the Technical Background Paper prepared by the WIPO Secretariat in relation to the Proposed WIPO Treaty on the Protection of Broadcasting Organisations (“Broadcast Treaty”).
2. This submission is based on the Technical Background Paper Submitted By the Secretariat at the Seventh Session of the Standing Committee on Copyright and Related Rights (“SCCR”) held at Geneva from May 13 to 17 2002 (SCCR/7/8) dated April 4, 2002.¹
3. CIS commends the Ministry of Information and Broadcasting, Government of India for its efforts at seeking inputs from various stakeholders prior to framing India’s response to this document. CIS is thankful for the opportunity to provide this detailed submission.

II. OVERVIEW

Governing Principles

4. CIS is a non-governmental organization engaged in research and policy work in the areas of, inter alia, access to knowledge and openness.² CIS values the fundamental principles of justice, equality, freedom and economic development. This detailed submission is

¹ Hereafter “Technical Background Paper”

² See www.cis-india.org (last accessed 25 June, 2015) for details about CIS’ work.

consistent with CIS' commitment to these values, the safeguarding of general public interest and the protection of India's National Interest at the International Level. Accordingly, the comments in this submission aim to further these principles and are limited to those sections of the document in question that most directly have an impact on these values.

Adoption of a Signals-Based Approach

5. CIS has consistently recommended the adoption of a Broadcast Treaty consistent with the signals based approach,³ in consonance with the 2007 mandate of the WIPO General Assembly, binding on the SCCR. In this submission as well, we re-iterate our commitment to the same.

III. DETAILED COMMENTS

On the 'Introduction'

6. The Technical Background Paper was prepared twelve years ago, in 2002. Accordingly, more recent legal and technological developments, national approaches and industry practices would need to be addressed. Accordingly, it is submitted that at SCCR 30, the Indian delegation request that the SCCR be presented with an updated study. This would be in line with the stated aims of the Technical Background Paper itself, i.e., to focus on technological changes that affect the activities of broadcasting organizations.⁴ Further CIS believes that the current Technical Background Paper reads as a justification for the Broadcast Treaty as opposed to a neutral study. It is submitted that an updated version of this paper with including *inter alia*, some of the safeguards discussed later in this submission might address this imbalance.
7. The Technical Background Paper excludes from its scope the rationale for protection as well as the scope of protection for broadcasters.⁵ CIS is of the opinion that this limits the

³ WIPO General Assembly, 34th (18th Ordinary Session, Geneva, September 24- October 3 2007,WO/GA/34/16, p. 55-56;

⁴ Protection of Broadcasting Organisations, Technical Background Paper Prepared by the Secretariat, WIPO, Seventh Session, Geneva , April 4 2002, SCCR/7/8, p.3.

⁵ Id at p.2.

Technical Background Paper - issues such as the justification/ need for the treaty, the scope of protection to be offered and the kind of protection, go to the very heart of the issue and must be discussed in the Technical Background Paper if it is to inform a meaningful debate on the subject.

8. CIS further believes that the very need for a Broadcast Treaty has not been clearly established in the Technical Background Paper. As we have indicated earlier,⁶ investments made by broadcasters in broadcasting infrastructure, licensing of copyrighted works and creation of copyrighted works are already protected under existing legal systems. While the licensing and creation of copyrighted works are protected under copyright law, the investment in broadcasting infrastructure might be construed to be a “broadcast right”, which is enshrined⁷ in the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, 1961.⁸ A detailed discussion on the existing legal framework is available in the next section of this submission.

On ‘Broadcasting Organizations and the Rome Convention’

The Legal Framework Applicable to Broadcasting

9. This part of the Technical Background Paper discusses in detail the various provisions of the Rome Convention. However, it is noted that there is a very limited discussion of legal developments that have happened since the Rome Convention.⁹
10. CIS believes that for a complete understanding of the legal framework applicable to broadcasting, it is important that the Technical Background Paper document the evolution of international law on the subject since the Rome Convention. This is particularly critical when the need for this treaty itself is disputed.¹⁰ In this regard CIS believes that the Technical Background Paper is inadequate and must be revised and updated to include other legal developments¹¹ including but not limited to the WIPO Copyright Treaty, 1996

⁶ See for Instance CIS’ Statement at SCCR 24 on the WIPO Broadcast Treaty, Available at: <http://cis-india.org/a2k/blog/cis-statement-sccr24-broadcast-treaty> (last accessed 25 June, 2015).

⁷ Id.

⁸ Hereafter, the Rome Convention.

⁹ Protection of Broadcasting Organisations, Technical Background Paper Prepared by the Secretariat, WIPO, Seventh Session, Geneva , April 4 2002, SCCR/7/8, p.4-5

¹⁰ See ‘Overview’ of this submission.

¹¹ See for instance CIS Submission to the Expert Committee: Protection of Broadcasting Organisations under the Proposed Treaty as Compared to Other International Conventions, CIS, Available at: <http://cis->

(“WCT”), WIPO Performances and Phonograms Treaty, 1996 (“WPPT”), the Convention Relating to the Distribution of Programme -Carrying Signals Transmitted by Satellite, 1974, (“Brussels Convention”) and the Beijing Treaty on Audio-Visual Performances, 2012 (“Beijing Treaty”).

11. CIS further believes that for a complete understanding of the legal framework applicable to broadcasting, it is imperative for the Technical Background Paper to document national level legal developments in all member countries on this issue. Precedent for this exercise exists in the form of the study conducted in related to the Proposed International Legal Instrument on Limitations and Exceptions for Libraries and Archives.¹² In this regard CIS calls for a comprehensive study on legislation surrounding broadcasters rights - both as related rights and as a separate right - and on the nature and extent of protection offered to broadcasters under the national legislations of all member states.
12. CIS believes that for a complete understanding of the legal framework applicable to broadcasting, it is important for the Technical Background Paper to further document any other widely followed industry practices and contractual arrangements that might have developed in the field. In this regard CIS believes that the present Background Paper should be edited and the above mentioned information be made available to the SCCR.

Signal, Content and Program

13. This part of the Technical Background Paper documents how a signal is defined and how it is different from the content carried on the signal. Further this part also states that it has been generally indicated that protections should be granted to broadcasting organisations for their signals independent of the copyright and related rights protection of the content.¹³ In this regard CIS submits that definition of a signal is well settled under various international legal instruments, which have adopted uniform terminology that excludes

india.org/a2k/blogs/protection-of-broadcasting-organisations-under-proposed-broadcast-treaty#_ftn79 (last accessed 25 June, 2015) ; See Also CIS Submission to the Expert Committee: Comment on the Broadening of Definitions in the Proposed Broadcast Treaty Compared to Other International Conventions, C IS, Available at: http://cis-india.org/a2k/blogs/the-broadening-of-definitions-in-the-proposed-broadcast-treaty-compared-to-other-international-conventions#_ftn1 (last accessed 25 June, 2015).

¹² See for example, Study on Copyright Limitations and Exceptions for Libraries and Archives, Available at: www.wpio.int/copyright/en/limitations/libraries_and_archives.html (last accessed 25 June, 2015).

¹³ Protection of Broadcasting Organisations, Technical Background Paper Prepared by the Secretariat, WIPO, Seventh Session, Geneva , April 4 2002, SCCR/7/8, p.5

content underlying the signal.¹⁴ It is submitted that the Technical Background Paper must be edited to include all of this information to allow for informed debate on the matter. It is further submitted that technologically neutral terminology must be avoided and only terminology based on the “signals based approach” decided at the 2007 WIPO General Assembly must be adopted.¹⁵ It is lastly submitted that any deviation from the signals based approach would lead to a Para-copyright regime for broadcaster’s rights which would substantially harm public interest and increase costs to access to knowledge.¹⁶

14. This part of the Technical Background Paper also avers “during the discussions in the Standing Committee, it has generally been indicated that protection should be granted to broadcasting organizations for their signals independently of the copyright and related rights protection of the content.”¹⁷ It is submitted that this statement is not entirely accurate. Several Member States and Observers have submitted at various sessions of the SCCR that any protection granted must be limited to signal to address signal theft only; and that any other sort of protection would create a legal fiction that would lead to uncertainty, the creation of multiple rights holders, a Para-copyright regime and increased costs for legitimate use of copyrighted material.¹⁸

¹⁴ CIS Submission to the Expert Committee: Comment on the Broadening of Definitions in the Proposed Broadcast Treaty Compared to Other International Conventions, C IS, Available at: http://cis-india.org/a2k/blogs/the-broadening-of-definitions-in-the-proposed-broadcast-treaty-compared-to-other-international-conventions#_ftn1 (last accessed 25 June, 2015).

¹⁵ WIPO General Assembly, 34th (18th Ordinary Session, Geneva, September 24- October 3 2007, WO/GA/34/16, p. 55-56;

¹⁶ CIS Submission to the Expert Committee: Protection of Broadcasting Organisations under the Proposed Treaty as Compared to Other International Conventions, CIS, Available at http://cis-india.org/a2k/blogs/protection-of-broadcasting-organisations-under-proposed-broadcast-treaty#_ftn79: (last accessed 25 June, 2015) ; See Also CIS Submission to the Expert Committee: Comment on the Broadening of Definitions in the Proposed Broadcast Treaty Compared to Other International Conventions, C IS, Available at: http://cis-india.org/a2k/blogs/the-broadening-of-definitions-in-the-proposed-broadcast-treaty-compared-to-other-international-conventions#_ftn1 (last accessed 25 June, 2015)

¹⁷ Protection of Broadcasting Organisations, Technical Background Paper Prepared by the Secretariat, WIPO, Seventh Session, Geneva , April 4 2002, SCCR/7/8, p.5

¹⁸ For details see CIS Submission to the Expert Committee: Protection of Broadcasting Organisations under the Proposed Treaty as Compared to Other International Conventions, CIS, Available at: http://cis-india.org/a2k/blogs/protection-of-broadcasting-organisations-under-proposed-broadcast-treaty#_ftn79 (last accessed 25 June, 2015) ; See Also CIS Submission to the Expert Committee: Comment on the Broadening of Definitions in the Proposed Broadcast Treaty Compared to Other International Conventions, C IS, Available at: http://cis-india.org/a2k/blogs/the-broadening-of-definitions-in-the-proposed-broadcast-treaty-compared-to-other-international-conventions#_ftn1 (last accessed 25 June, 2015).

On ‘Legal Issues to be Considered’

15. CIS reiterates the impetus to fully establish the need and the justification for the Broadcast Treaty, before considering other substantive legal issues. CIS strongly believes that the need for the treaty has not been fully established.¹⁹
16. It is also suggested that a recommendation be made for the Technical Background Paper to include a section on limitations and exceptions as ‘legal issues to be considered’, critical from the perspective of the protection of freedom of speech and expression and access to knowledge.

Broadcasting and Piracy

17. This part of the document discusses the signal piracy and its effect on markets in developing and developed countries.²⁰
18. CIS submits that since the justification for this treaty is based on signal piracy, this section of the Technical Background Paper ought to be more detailed. Illustratively, this section must be updated to include studies on the losses that occur due to signal piracy in various countries, and the exact lacunae in the current legal system that render it inadequate to address this issue.

Program-Carrying Signals

19. In this part the Technical Background Paper discusses program carrying signals that are sent from point to point before the broadcast that could possibly be pirated.²¹
20. CIS believes that the claim that pre-broadcast signals have been stolen before²² must be backed up by adequate data and studies. As of this document they remain assertions. CIS further believes that any steps taken in this regard must adopt the ‘signals based approach’

¹⁹ See comments under Introduction in this submission.

²⁰ Protection of Broadcasting Organisations, Technical Background Paper Prepared by the Secretariat, WIPO, Seventh Session, Geneva , April 4 2002, SCCR/7/8, p.15

²¹ Protection of Broadcasting Organisations, Technical Background Paper Prepared by the Secretariat, WIPO, Seventh Session, Geneva , April 4 2002, SCCR/7/8, p.15-16

²² Protection of Broadcasting Organisations, Technical Background Paper Prepared by the Secretariat, WIPO, Seventh Session, Geneva , April 4 2002, SCCR/7/8, p.15

mandated by the 2007 WIPO General Assembly²³ and ensure that the underlying content is not subject to an additional layer of protection.²⁴

The Object of Protection

21. This part of the paper provides a cursory overview of the different definitions adopted to define the object of protection, i.e., the broadcast under the Rome Convention, the Brussels Convention, and the WPPT.²⁵
22. CIS believes that a more in-depth study of definitions of broadcast under all international instruments²⁶ is called for. CIS further believes that in keeping with the 2007 WIPO General Assembly mandate as mentioned above, ‘signals based approach’ is to be adopted which would preclude technologically neutral terminology from being adopted in the object of the protection.

The Subject of Protection

23. This part of the paper provides a cursory overview of the different definitions adopted to define the subject of protection, i.e., the broadcast under the Rome Convention, the Brussels Convention, the WPPT and the ITU Radio Regulations.²⁷
24. CIS believes that the mandate of ‘signals based approach’ as mentioned in the 2007 WIPO General Assembly mandate must be adhered to (as stated earlier) and only those entities that broadcast signals and are therefore vulnerable to signal theft must be considered beneficiaries under the Broadcast Treaty. As stated above, technologically neutral terminology would fall outside of this mandate. CIS believes that this should be made clear in the Technical Background Paper.

²³ WIPO General Assembly, 34th (18th Ordinary Session, Geneva, September 24- October 3 2007, WO/GA/34/16, p. 55-56;

²⁴ CIS Submission to the Expert Committee: Protection of Broadcasting Organisations under the Proposed Treaty as Compared to Other International Conventions, CIS, Available at: http://cis-india.org/a2k/blogs/protection-of-broadcasting-organisations-under-proposed-broadcast-treaty#_ftn79 (last accessed 25 June, 2015).

²⁵ Protection of Broadcasting Organisations, Technical Background Paper Prepared by the Secretariat, WIPO, Seventh Session, Geneva , April 4 2002, SCCR/7/8, p.16-17

²⁶ CIS Submission to the Expert Committee: Comment on the Broadening of Definitions in the Proposed Broadcast Treaty Compared to Other International Conventions, C IS, Available at: http://cis-india.org/a2k/blogs/the-broadening-of-definitions-in-the-proposed-broadcast-treaty-compared-to-other-international-conventions#_ftn (last accessed 25 June, 2015).

²⁷ Protection of Broadcasting Organisations, Technical Background Paper Prepared by the Secretariat, WIPO, Seventh Session, Geneva , April 4 2002, SCCR/7/8, p.17-18

IV. CONCLUDING OBSERVATIONS

25. In conclusion, CIS submits the following recommendations on the Technical Background Paper.

- a) Updating the Technical Background Paper to include legal and technological developments to better inform the discussion on the Broadcast Treaty.
- b) Updating the Technical Background Paper with an expanded scope that explores all issues relevant to discussion including the scope for protection and the justification for protection.
- c) Updating the Technical Background Paper to include provisions made under all relevant international conventions, even those that have come into existence after the Rome Convention.
- d) Updating the Technical Background Paper to include widely prevalent industry practices that could affect the discussion around the Broadcast Treaty.
- e) Conducting a comprehensive study on legislations regarding broadcasters' rights and broadcasting under all national regimes to enable a more informed discussion on the possible effects of the proposed treaty.
- f) Updating the Technical Background Paper to include a discussion on limitations and exceptions under the proposed treaty.
- g) Conducting a separate study on the extent of signal piracy and losses incurred due to signal piracy including a section that traces the causes behind signal piracy and explores whether or not a legal lacunae is to blame.
- h) Updating the Technical Background Paper keeping in mind the WIPO 2007 General Assembly mandate on 'signals based approach' especially in parts relating to object, subject and scope of protection.

V. OTHER RESOURCES

Statements made by CIS to the SCCR on Broadcast Treaty

1. 29th Session of the WIPO SCCR :CIS 2nd (brief) Intervention on the Broadcast Treaty, <http://cis-india.org/a2k/blogs/wipo-sccr-29-cis-second-brief-intervention-on-broadcast-treaty> (last accessed 25 June, 2015)

2. CIS Intervention on Proposed Treaty of Broadcasting Organizations, SCCR 29: <http://cis-india.org/a2k/blogs/wipo-sccr-29-cis-intervention-on-proposed-treaty-for-protection-of-broadcasting-organizations> (last accessed 25 June, 2015)
3. CIS Statement at SCCR 28 on the Proposed Treaty for Protection of Broadcasting Organisations, Available at: http://lists.keionline.org/pipermail/a2k_lists.keionline.org/2014-July/002720.html (last accessed 25 June, 2015)
4. CIS Statement at 27th SCCR on the WIPO Proposed Treaty for the Protection of Broadcasting Organisations, Available at: <http://cis-india.org/a2k/blogs/cis-statement-27-sccr-on-wipo-proposed-treaty-for-protection-of-broadcasting-organizations> (last accessed 25 June, 2015)
5. CIS' Statement at SCCR 24 on WIPO Broadcast Treaty, Available at: <http://cis-india.org/a2k/blogs/cis-statement-sccr24-broadcast-treaty> (last accessed 25 June, 2015)
6. Statement of CIS on the WIPO Broadcast Treaty at the 23rd SCCR, Available at: <http://cis-india.org/a2k/blogs/sccr-23-broadcast-cis-statement> (last accessed 25 June, 2015)
7. Statement of CIS, India on the WIPO Broadcast Treaty at the 22nd SCCR, Available at: <http://cis-india.org/a2k/blogs/sccr-22-broadcast-cis-statement> (last accessed 25 June, 2015)
8. CIS Statement on the WIPO Broadcast Treaty at SCCR 19, Available at: <http://cis-india.org/a2k/blogs/sccr19-broadcast-treaty> (last accessed 25 June, 2015)

Submissions made by CIS on the Broadcast Treaty

1. CIS Submission to the Expert Committee: Protection of Broadcasting Organisations under the Proposed Treaty as Compared to Other International Conventions, 21 December 2014, Available at: <http://cis-india.org/a2k/blogs/protection-of-broadcasting-organisations-under-proposed-broadcast-treaty> (last accessed 25 June, 2015)
2. CIS Submission to the Expert Committee: Comment on the Broadening of Definitions in the Proposed Broadcast Treaty Compared to Other International

Conventions, 11 December 2014, Available at: <http://cis-india.org/a2k/blogs/the-broadening-of-definitions-in-the-proposed-broadcast-treaty-compared-to-other-international-conventions> (last accessed 25 June, 2015)

3. CIS Comments to the Ministry of Human Resource Development on the Proposed WIPO Treaty for the Protection of Broadcasting Organisations, 7 December 2013, Available at: <http://cis-india.org/a2k/blogs/comments-to-hrd-ministry-on-wipo-treaty-for-protection-of-broadcasting-organizations> (last accessed 25 June, 2015)
4. Comments to MHRD on WIPO Broadcast Treaty, March 2013, Available at: <http://cis-india.org/a2k/blogs/comments-on-wipo-broadcast-treaty>
5. Comments on the Broadcast Treaty and Exceptions and Limitations for Libraries and Archives, 29 November 2012, Available at: <http://cis-india.org/a2k/blogs/comments-on-broadcast-treaty-and-exceptions-and-limitations-for-libraries-and-archives> (last accessed 25 June, 2015)
6. Comments to the Ministry on WIPO Broadcast Treaty, March 2011, Available at: <http://cis-india.org/a2k/blogs/wipo-broadcast-treaty-comments-march-2011> (last accessed 25 June, 2015)

On behalf of the Centre for Internet and Society,

Nehaa Chaudhari

Lawyer/Programme Officer

nehaa@cis-india.org

Amulya Purushothama

Lawyer/Research Assistant

amulyaindavar@gmail.com