

Hundred and seventy-first session

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Item 65 of the provisional agenda

PROTECTION OF THE RIGHTS OF BROADCASTING ORGANIZATIONS

SUMMARY

This item has been included in the provisional agenda of the 171st session of the Executive Board at the request of India.

An explanatory note together with a proposed decision are attached.

Decision proposed: paragraph 18.

EXPLANATORY NOTE

1. Among the United Nations agencies, UNESCO is the specialized agency, that works as a “laboratory of ideas and standard setting” to forge universal agreements on emerging ethical issues. It serves as “ a clearing house for the dissemination and sharing of information and knowledge”. Its mandate, *inter alia*, includes, promoting international cooperation in the diverse fields of education, science, culture and communication.
2. It may be added that the Draft Programme and Budget for 2006-2007 (33 C/5) of UNESCO has identified the principal priority for the communication and information sector as: empowering people through access to information and knowledge, with special emphasis on freedom of expression; and that the main thrusts of action under this principal priority shall be: promoting freedom of expression, creating an enabling environment which is conducive to facilitating universal access to information and knowledge, developing effective infrastructures, and stimulating the development of, and access to, diverse contents. It further recommended that the “other priorities” include, *inter alia*, promoting communication development, with special regard to an independent and pluralistic media; and advancing the use of ICTs.
3. There has been, of late, much discussion on the protection of broadcasting in different forums and it is necessary to appraise the rights and role of UNESCO in this regard. As per the core mandate of UNESCO, broadcasting is a part of the activities of the Communication and Information Sector of UNESCO. Besides, UNESCO is engaged in activities aimed at building a knowledge society. While bridging the digital divide, UNESCO has been promoting freedom of expression and freedom of access to information. It also serves as a watchdog for press freedom. All these issues are relevant and must be factored into the ongoing discussions on the protections of broadcasting rights.
4. The World Intellectual Property Organization (WIPO) is currently engaged in the drafting of a separate treaty to protect broadcasting rights. The distribution of information in the form of works can be done through various means of transmission, including wireless media such as satellite, radio or television, or through wireless communications such as cable networks or through simulating and webcasting using the Internet. At present, broadcasting organizations are granted legal protection only over those transmissions made through wireless means.
5. Broadcasters are generally not the creators of the works they transmit. They distribute the information embodied in the created works. Creators, on the other hand, are granted protection over their works through the various acts pertaining to copyright. Thus, broadcasters who are not the creators of the works as such are not awarded rights over the content of the programmes they transmit, but only over the use of their signals. This separation between content and content-carrying signal is crucial for maintaining a proper balance between the rights of copyright-holders as creators of works, and broadcasters as transmitters. It is vital to maintain this distinction between the rights of copyright-holders as creators of works, and of broadcasters as mere transmitters of signals. Signal protection introduces a new layer of IP-like rights over and above the IP rights of copyright-holders, thus impacting on the rights of both the copyright-holder(s) and the rights of the public at large.
6. The protection granted to broadcasting organizations is intended to be limited to the signals of the broadcasts they transmit in order to prevent third parties from using these without their authorization (i.e. signal piracy) that could cause economic losses for broadcasters particularly in the cases where they receive payment for their emitted transmissions of works. Some additional rights have been granted to them over the use of their signals in recognition of the investments they make in providing for the transmission of works that benefit the eventual consumers.

7. Protection of broadcasting organizations is already provided for in several international treaties, namely the 1961 Rome Convention on the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, and in the TRIPS Agreement. The Rome Convention 1961, *vide* Article 6, provides for national treatment to broadcasting organizations subject to certain conditions. Article 7 gives the right to performers to prevent broadcasting or communication to the public, fixation, reproduction of fixation and describes the relation between the performers and broadcasters. It allows domestic law to regulate such protection. However, the domestic law is not to operate to deprive the performers of the ability to control their relations with a right to authorize or prohibit rebroadcasting, fixation and reproduction and communication of television broadcasts in public places accessed by paying a fee.

8. The Berne Convention of 1971 provides authors of literary and artistic works the exclusive right of authorizing the broadcast of their work or communication to the public by wire and wireless, rebroadcast by an organization different from the first and public communication by loudspeaker, etc. of the broadcast. It allows for compulsory licensing. The members can legislate to allow ephemeral recordings by broadcasters and it allows for preservation for documentary purposes.

9. The Brussels Convention (Satellite Convention) of 1974 protects broadcasters' rights by allowing members to prevent distribution of programme-carrying signals by any distributor for whom the signals are not intended. The duration is to be decided by national law. However, the restriction does not apply where signals are to be received directly by the public. This also allows fair practice use for information, education or scientific research in developing countries. This provision does not limit the rights of authors, performers, etc. It allows members to prevent abuses of monopoly. The TRIPS Agreement, on the other hand, provides less protection for broadcasting organizations than that given under the Rome Convention. It establishes that broadcasters have the right to prohibit – but not to authorize – the fixation, reproduction of fixation, and the rebroadcasting by wireless means of broadcasts and live performances. Where members do not grant such rights to broadcasters, the copyright-owners may be provided such rights subject to the provisions of the Berne Convention.

10. The current proposals being mooted in the new broadcasting treaty under consideration in WIPO are to extend protection to traditional broadcasts – wireless means of transmissions, cablecasts, wired transmission, transmission, and to even include webcasting transmissions over the Internet computer networks. The exclusive rights that are proposed are normally reserved for creators of works and not in respect of the signals, as these would create a new layer of rights over those existing in copyrights, whereby the separation between signal protection and content could be blurred.

11. The ability to access information is crucial in promoting the dissemination of knowledge and production of more creative works, including new technological developments. For developing countries in particular, the question of accessing information is of primary importance. Most of the cutting-edge research is done in developed countries and thus the ability to access this information is a key determinant for their development. Information in the public domain, free for public use, benefits developing countries in that the costs of access are either non-existent or low. It is in this context that broadcasting organizations call for an “update” of their rights, which while initially couched as a call for the protection of their signals may go beyond this and extend to include exclusive rights, essentially aimed at the protection of their investments.

12. If there has to be an understanding on broadcasters' rights, it must at the very least ensure that it promotes access to knowledge and its dissemination in the digital environment. Such rights must

not interfere with the rights of the public and of other stakeholders to protect and preserve the public domain.

13. The issue has implications for public policy goals, ethical issues, economic, social and cultural rights, education and access to knowledge and technology. They would require a broader perspective and discussions with the participation of all stakeholders including civil society, NGOs, academics and performers/artists/writers.

14. As previously mentioned, UNESCO's mandate includes standard setting. It has previous experience in issues that are directly related to intellectual property rights and education. In 1952, UNESCO adopted the Universal Copyright Convention, which served to extend copyright protection to numerous States, not then party to the Berne Convention, for the protection of literary and artistic works. The Universal Copyright Convention was revised in 1971 to extend intellectual property protection from scientific and literary texts to films and sculpture. Given its experience with this instrument, UNESCO is eminently qualified to address the concerns of broadcasters in a digital society, while recognizing ethical issues such as access to knowledge, societal interests, and issues of the basic economic, social and cultural rights of all the stakeholders. One of UNESCO's programmes for creative content seeks to stimulate innovation in the legal content of protection for television, radio and news media in developing countries by promoting cultural and linguistic diversity. For all these reasons, UNESCO is uniquely placed to address all the related issues of broadcasters.

15. It is clear from the foregoing that the treaty for protection of broadcasting organizations being formulated by WIPO seeks to create a broad range of new rights that do not exist anywhere in any national law by the creation of pseudo rights. It is likely to have a damaging impact on the free flow of information. It attempts to superimpose a new layer of rights on top of the rights of copyright owners. There is thus a risk of privatization of information and knowledge currently in the public domain. Moreover, the treaty intends to extend the term of protection to 50 years against the currently existing 20 years.

16. The main question arises as to whether the protection of broadcasting signals is at all an issue of copyright alone. The Rome Convention involved UNESCO, ILO and WIPO while the Brussels Convention involved ITU in addition to the other three agencies. Hence there is a need for UNESCO to be watchful in this area, which in any case relates to its core mandate and operations.

17. It may be concluded that the protection of the rights of broadcasting organizations, to the extent it is warranted, is already provided in several international treaties. It can be argued, therefore, that there is perhaps no need to have a separate treaty and that a convention could very well address the issues at stake. However, if some additional work remains to be done in this area, then UNESCO can fully address these issues given its wide mandate on core areas of communication, information, culture and education. UNESCO should be involved in these efforts together with organizations like WIPO. We propose that these ideas could form the basis for a discussion paper for the forthcoming meeting of the Executive Board and subsequently at the General Conference later this year.

Proposed draft decision

18. Taking into consideration the above-mentioned points, the Executive Board may wish to adopt a decision along the following lines:

The Executive Board,

1. Having examined document 171 EX/59,
2. Noting that the issue related to broadcasting comes within UNESCO's core mandate as part of the activities of the Communication and Information Sector,
3. Recalling that the principal priority identified for the Communication and Information Sector is "empowering people through access to information and knowledge", with special emphasis on freedom of expression,
4. Further recalling the Rome Convention on the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, the WIPO Performance and Phonograms Treaty (WPPT), the WIPO Copyright Treaty (WCT) and the TRIPS Agreement which already provide protection to the rights of broadcasters,
5. Takes note of the developments at World Intellectual Property Organization (WIPO) aimed at finalizing a new convention on broadcaster's rights;
6. Recognizing that attempts to impose another layer of rights over and above the intellectual property rights of copyright holders impact the rights of both the copyright holder(s) and the rights of public at large and act as impediment to preservation of information and universal access to it and participation of all in the emerging global information society,
7. Stresses the importance of promoting and enhancing the public domain as a vital means of providing access to information and knowledge and ensuring that any convention on broadcasting does not curtail access to public domain materials that are accessible only through broadcast;
8. Also recognizing that such regulations have a negative impact on the free flow of information essential to building of knowledge societies and that the separation between content and content-carrying signals is crucial for maintaining the distinction between the rights of copyright-holders as creators of works and broadcasters as transmitters of signals,
9. Reaffirms that UNESCO is committed to promoting freedom of expression, creating an enabling environment, which is conducive to facilitating universal access to information and knowledge, developing effective infrastructures and stimulating the development of and access to, diverse contents;
10. Thanks the Government of India for taking an initiative on this issue of immense concern to UNESCO;
11. Invites the Director-General to ensure that UNESCO, as the specialized agency within the United Nations system dealing with the issue of communication and information, plays an active role at any deliberations that impact its mandate;
12. Further invites the Director-General to place before the General Conference at its 33rd session a roadmap for the preparation of a convention on broadcasting and emerging technologies to protect and enhance access and sharing of knowledge and information.