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The WIPO Broadcasting Treaty. A Conceptual Conundrum

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Summary

The Broadcasting Treaty that has been discussed at WIPO for over twenty years, seems to be reaching a dead end. The Treaty that aims at extending the legal protection of broadcasters to the digital realm, suffers from three serious flaws: one economic, one conceptual and one pragmatic. Due to the decreasing technical costs of broadcasting, the economic case for granting special rights to broadcasters is weakening. Moreover, properly defining the act of ‘broadcasting’ that would give rise to legal protection, is highly problematic. Finally, no real and urgent need for a new right seems to exist, in light of current legal regimes that broadcasters already rely on under national law. Perhaps the time has come to abandon work on the WIPO Broadcasting Treaty, and move on.

Broadcasting organizations were late to embrace the Rome Convention on neighboring rights, which was signed in 1961 and established the international framework for protecting the rights of performing artists, phonogram producers and broadcasting organizations.¹ In fact, most broadcasters initially opposed international recognition of neighbouring rights. The broadcasters were generally afraid of the extra costs that rights for performing artists and phonogram producers (record companies) would entail for radio and television broadcasting. In the end, they were lured into supporting the Rome Convention with the promise of a new right of their own – the broadcaster’s neighboring right.

In Europe, any remaining resistance to Rome caved in after the adoption in 1992 of EC Directive 92/100/EEC, which prescribed neighbouring (related) rights for all of the Community’s Member

¹ International Convention for the Protection of Performers, Producers of Phonograms and Broad-casting Organizations, Rome, October 26, 1961. The convention secures international protection for performing artists, producers and broadcasting organizations. While in common law countries these rights are commonly integrated into copyright law, in civil law countries neighboring rights (*droits voisins*) are conceptually distinguished from copyright, and usually codified in separate statutes.

States.² The Rome Convention's norms have spread to many countries outside Europe, although they are still far from universal. Today, just 93 states have ratified Rome,³ fewer than 50% of total WIPO membership (193).

More than half a century after the adoption of the Rome Convention, most broadcasters have fully embraced the neighbouring rights regime, and now pin their hopes on a new treaty that has been discussed at WIPO for many years, the *WIPO Broadcasting Treaty*. If adopted, the new treaty would provide a 'digital update' of the broadcasters' minimum rights currently enshrined in the Rome Convention.⁴ The broadcasters' arguments for extending the Rome minima are deceptively simple: The Rome Convention dates from 1961, so the treaty does not cover digital piracy of broadcast signals – which is omnipresent on the Internet – nor any other digital reutilization of broadcasts, such as online 'catch-up' services. The Convention, so the argument goes, is hopelessly outdated.

The broadcasters go on to point out that the neighbouring rights of performing artists and phonogram producers (their comrades from the Rome Convention) were already extended to the digital realm in 1996, by way of the WIPO Performances and Phonograms Treaty (WPPT). So the broadcasters deserve a similar extension of their rights. In fact, the digital update they want is long overdue.

At first blush, the broadcasters do seem to have a point. The Rome Convention merely protects broadcasting organizations against 'rebroadcasting' (i.e. by wireless means) of their signals,⁵ not against digital uses of broadcasts, which were obviously unforeseen in 1961. Indeed, Rome does not even grant rights against retransmission by cable networks. But if things were really that straightforward, surely the broadcasters would have received their digital rights during the Diplomatic Conference of 1996 that produced the two 'Internet Treaties', the WIPO Copyright Treaty (WCT) and the WPPT. If that had happened the latter treaty would have become the

² Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property, OJ No. L 346/61, 27 November 1992. The Directive was 'odified' in slightly modified form in 2006; Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property, OJ No. L 376/28, December 27, 2006.

³ See WIPO web page on Rome Convention, available at https://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=17.

⁴ Art. 13 Rome Convention currently grants broadcasters the right to authorize the following acts: rebroadcasting of their broadcasts; fixation of their broadcasts; reproduction of such fixations; and communication to the public of their television broadcasts if such communication is made in places accessible to the public against payment.

⁵ Art. 3(g) Rome Convention defines 'rebroadcasting' as "the simultaneous broadcasting by one broadcasting organisation of the broadcast of another broadcasting organisation."

“WPPBT” – protecting the same triad of right holders as does the Rome Convention. But this is 2019, and despite over twenty years of discussion in WIPO’s Standing Committee on Copyright and Related Rights (SCCR), the Broadcasting Treaty is still on the drawing board.

Evidently, the arguments of the broadcasters for a new treaty are not as convincing as they initially appear. Note that the WCT took only seven years from initial drafting to adoption.⁶ Even the Beijing Treaty for audiovisual performers, which covers much more controversial ground than any treaty on broadcasters’ rights, was adopted in 2012.⁷ But this seemingly straightforward update of neighbouring rights protection for broadcasters is taking decades to complete. The lack of progress in this dossier is particularly striking since there seems to be almost universal consensus that broadcast signal piracy deserves qualification as an unlawful act, and should accordingly give rise to appropriate legal remedies.

So why is this taking so long? Historians that one day look back at this protracted process will probably identify a variety of reasons. Unquestionably, the WIPO Development Agenda⁸ has turned the tide against unlimited proliferation of rights at the expense of developing nations. Surely, international IP policy making at WIPO has moved away from its mission of unequivocally promoting international IP protection. Certainly, at WIPO and other international fora the voices of user groups, intermediaries, and ‘civil society’ are better heard and factored into policy development. And yes, the general climate for reaching agreement on any multilateral instrument in the field of IP has soured, in this Trumpian age of increasing trade protectionism and bilateralism.

Still, this does not explain why an apparently uncontroversial proposition (giving broadcasters international protection against digital piracy) should lead to such prolonged debates and staunch opposition. So perhaps there is something wrong with the proposition itself. Over the years, opponents of the treaty have indeed raised a number of substantive issues against the treaty, reflecting diverse concerns over access to culture, freedom of expression, consumer rights and development-related issues.⁹ I will focus here on three general weaknesses of the draft treaty: one economic, one conceptual and one pragmatic.

Economic rationales

⁶ See J. Reinbothe & S. Von Lewinski, *THE WIPO TREATIES ON COPYRIGHT*, 2nd ed. (2015), p. 7 ff.

⁷ Beijing Treaty on Audiovisual Performances, adopted by the Diplomatic Conference, Beijing, June 24, 2012.

⁸ The WIPO Development Agenda, which was formally adopted in 2007, ensures that development considerations form an integral part of WIPO's work. See <https://www.wipo.int/ip-development/en/agenda/>.

⁹ See. e.g. James Love, ‘WIPO Carves Up the Internet (and the Broadcast Spectrum)’, Huffington Post, 4 May 2006, available at https://www.huffingtonpost.com/james-love/wipo-carves-up-the-intern_b_20336.html?guccounter=1

The first concerns the economic reasons for granting neighbouring rights to broadcasters. IP rights do not come naturally with conducting a business. Most entrepreneurial activities, such as running a restaurant, operating a taxi fleet or providing an online flower delivery service, do not give rise to IP rights that prohibit privacy or parasitic behavior, even if running the business requires substantial investment making it vulnerable to free riding. This is freedom of competition. Even among the creative industries, not all entrepreneurs enjoy international IP protection (consider, for example, content distributors, book publishers and concert organizers). From an economic standpoint, a grant of IP rights is an exception to freedom of competition that requires solid economic justification.

The standard economic explanation for granting IP rights is that intangible goods that are produced at substantial cost can be reproduced at marginal (near-zero) cost. The grant of a temporary right of intellectual property that prevents unauthorized uses will allow the producer to recoup these costs during the period of exclusivity. IP rights thus serve as an economic incentive to invest in the production of intangible goods.

This investment rationale underlies the neighbouring rights granted to phonogram producers and broadcasters by the Rome Convention. In the 1960's, both record manufacturing and broadcasting were high-investment industries, while their output in the form of sound recordings and broadcasts were becoming increasingly vulnerable to piracy. Broadcasting was a particularly capital-intensive industry requiring massive up-front investment in production facilities (recording and broadcasting studios, microphones, camera's, mobile units, technicians, etcetera), and broadcasting transmission infrastructure (terrestrial transmitters, gateways, cables, microwave transmitters, etcetera).

All this has radically changed. With the proliferation of low-cost but high-quality digital recording technologies, the technical costs of radio and television broadcasting have spectacularly decreased. And with the advent and rapid rise of broadband Internet, the costs of distributing audiovisual content are now approaching zero. Today, all one really needs to be in broadcasting is a smart phone and a broadband Internet connection with access to a content streaming channel. See the myriad of video channels on YouTube and other social media. Listen to the countless web radio stations and podcasts available online. And note, that many of these low budget (or no-budget) broadcasting-like operations reach out to sizeable audiences and make considerable amounts of money – without the incentive of a broadcaster's right.

In the realm of traditional broadcasting, the technical costs of operating a radio or television station have also dramatically decreased. Radio broadcasting no longer requires expensive studios and studio technicians, and high-cost television transmitters are rapidly being substituted by existing cable infrastructure.

Broadcasters might disagree and point out that even if the technical costs of broadcasting have gone down, the costs of producing and purchasing audiovisual content have risen considerably. Think of highly expensive premium content such as Champions League football and premiere television series. But such an argument would be unsound. Neighbouring rights for broadcasters are meant to protect investment in producing and transmitting broadcast signals, including related organizational efforts, but not the costs of producing or acquiring audiovisual content as such. That is the domain of copyright.

In other words, the economics that justified neighbouring right for broadcasters in the 1960's do not necessarily validate similar (let alone stronger) rights for broadcasters in the digital age. Remarkably, in all the debates surrounding the Broadcasting Treaty, the voice of the economist remains mostly unheard.¹⁰ Obviously, granting IP rights for no good reason can have serious consequences, both for the economy and for society at large. The temporary monopoly that an IP right entails not only creates an obstacle to freedom of competition. Because much of the content that broadcasters transmit is of cultural significance, it also bears the risk of impeding access to culture. More generally, freedom of expression and information is at stake.

In this digital age, the risks of overprotection should not be underestimated. The days when redundant IP rights were simply not exercised by the right holders, and therefore could do little harm, are over. Today, enforcement of rights has become practically automatic, or should I say 'robotic'. Platforms such as YouTube automatically detect and block infringing content, based on content fingerprints provided by right holders. This is why, for example, Champions League football highlights uploaded by enthusiastic football fans, disappear from YouTube so quickly. The forthcoming EU Digital Single Market Directive is expected to make this technology mandatory for YouTube, Facebook and other large content-sharing platforms.¹¹

Definitional problems

This brings me to the conceptual problem that also undermines the case for extending broadcasters' rights: properly defining what is a broadcaster and the act of broadcasting. Since intellectual property regimes create property-type rights it is crucial, if only for the sake of legal certainty, that they be properly delineated. Likewise, it is essential that the holder of a right be clearly identified.

¹⁰ See James Boyle, 'More rights are wrong for webcasters', Financial Times, September 26, 2005, available at <https://www.ft.com/content/441306be-2eb6-11da-9aed-0000e2511c8>.

¹¹ Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market, COM/2016/0593 final, Art. 13.

When the Rome Convention was conceived, the definition of broadcasting was still fairly straightforward; ‘broadcasting’ meant “the transmission by wireless means for public reception of sounds or of images and sounds”.¹² But in the digital environment, where wired and wireless technologies converge, broadcasting has become a very fluid notion. Consequently, much of the intellectual energy and debate in drafting the WIPO Broadcasting Treaty has gone into its definitions. And with every year that brings us newer technologies, the drafting has become more complex, and the legal notion of ‘broadcasting’ ever more fleeting. Consider the many alternatives for defining “broadcast”, “broadcasting organization” and “programme-carrying signal” that have been discussed in the SCCR over the years.¹³

A constant in this definitional quagmire is that broadcasting is conceived as the act of transmitting to the public “programme-carrying signals [...] by wired or wireless means”.¹⁴ While this clearly covers traditional radio and television broadcasting, in this digital age the scope of the definition has become virtually boundless. “Transmitting programme-carrying signals by wired or wireless means” – isn’t that what every vlogger does on YouTube?

Whereas earlier drafts unambiguously extended the treaty’s reach to webcasting (giving reason for its derisive nickname, *The Casting Treaty*), the current proposal more sensibly seeks to limit its ambit to traditional forms of broadcasting. But does it really? The latest Consolidated Text provides: “Transmissions over computer networks shall not constitute ‘broadcasting’.”¹⁵ The text apparently assumes that transmission “by wired or wireless means” can be properly distinguished from the use of “computer networks”. But this completely ignores the digital convergence that has fused traditional means of broadcast transmission with digital broadband Internet infrastructure.

Today’s reality is that the Internet (a “computer network”) has become an essential part of the transmission infrastructure of most if not all broadcasting operations. In the Netherlands, traditional over-the-air (terrestrial) television broadcasting was terminated several years ago. Television broadcasts are now distributed via digital gateways to digital broadband video providers (cable networks) that have over 90% audience penetration. The same is happening in Belgium, Switzerland, and several other countries. So traditional television that triggered the need for a Broadcasting Treaty in the 1990’s, may be extinct in large parts of the world not long after this treaty is adopted (if it ever will be).

¹² Art. 3(f) of the Rome Convention.

¹³ The meeting documents of WIPO’s Standing Committee on Copyright and Related Rights (SCCR) are available online at https://www.wipo.int/meetings/en/topic.jsp?group_id=62.

¹⁴ Revised Consolidated Text on definitions, object of protection, rights to be granted and other issues, Geneva, 30 November 2008, SCCR/37/8, I.Definitions (a) defines ‘broadcasting’ as “the transmission either by wire or wireless means for reception by the public of a programme-carrying signal; [...]”.

¹⁵ Document SCCR/37/8, I.Definitions (a).

To be fair to the drafters, crafting a definition of ‘broadcasting’ that protects traditional broadcasters but does not extend to digital ‘casters’, is a conundrum. Digital transmission technology has nowadays become so pervasive that any definition that excludes modes of digital delivery risks throwing away the baby with the bathwater. Conversely, if the definition of broadcasting would extend to digital transmissions, the consequences may be catastrophic. Do we really want to grant strong exclusive rights to any intermediary that electronically disseminates audiovisual content? Are we sure that we are not inventing a right that will make the ‘Big Five’ – the giants of the Internet that already dominate the global media – even more powerful?¹⁶

So the choice is really between a definition of broadcasting that is almost certainly too narrow, and one that is far too broad.

Pragmatic objections

I come, finally, to the pragmatic perspective. Is there really a need for this new treaty? Yes, say they broadcasters, look at what’s happening on the Internet. Look at all the illegal sites streaming sports and other broadcast content without permission. Something should be done about this. The broadcasters are right. Illegal streaming of broadcast signals is a serious problem. But does addressing this require a whole new treaty? Is the legal protection that broadcasters presently derive from existing bodies of law not enough?

I believe in most cases it is. Broadcasters already enjoy protection against unauthorized rebroadcasting based on the laws of copyright that are internationally secured in the Berne Convention, TRIPs and the WIPO Copyright Treaty. Broadcast content, with few exceptions, will qualify as audiovisual works or cinematographic works protected under the laws on copyright or author’s right. Broadcasters may invoke copyright protection for these works under a variety of doctrines: either as employers of the creators, under a ‘work for hire’ rule, as film producers benefiting from statutory presumptions of transfer or license, or simply as transferee of copyright pursuant to film production agreements. Even in cases where broadcasters cannot rely on copyright, because the content was produced by a third party, the broadcasting license will usually include a power of attorney giving the broadcaster standing in court against signal pirates.

But what about copyright for events broadcast in real time (‘live’)? Doesn’t copyright require prior fixation of a work? Well, in countries like the United States and the United Kingdom it does. In most countries of the civil law tradition, however, fixation is not required, and live

¹⁶ The ‘Big Five’ are Google, Apple, Netflix, Amazon and Microsoft.

coverage of a sporting event will qualify as a protected audiovisual work if it is the product of creative choices. For example, live coverage of a Champions League football match that involves, at the very least, multiple camera operators, several commentators and a director, will easily pass this test. Even in countries where fixation is a prerequisite, broadcasters may invoke copyright protection for ancillary content such as leaders, graphics, animations, replays and other (pre)recorded audiovisual content included in live sports broadcasts.¹⁷

Leaving copyright aside, broadcasters in many jurisdictions can rely on the general law of unfair competition to support claims against signal pirates. Moreover, theft of pre-broadcast signals will in many countries qualify as a criminal act, punishable under general criminal statutes or special laws on telecommunications secrecy or cybercrime.

All in all, broadcasters in most countries already enjoy solid legal protection against signal piracy and other unauthorized uses. And even if existing protection may not be perfect, this is no good reason for concluding an international treaty that would create rights of uncertain scope for a poorly circumscribed group of intermediaries, which would negatively affect access to culture and have other (as yet unforeseeable) consequences as well. A treaty, moreover, that would be tragically outdated shortly after its adoption.

Conclusion

In sum, the WIPO Broadcasting Treaty does not pass the litmus test of good treaty making. The economic case for giving special legal protection to broadcasters is weak, while properly defining 'broadcasting' is conceptually impossible. Last, not least, there is no real need for a new right in light of existing legal regimes that broadcasters can already rely on.

There is, in my opinion, one obvious way out of this conundrum. Abandon work on the Broadcasting Treaty,¹⁸ and move on to other, more pressing issues in international IP

¹⁷ See Football Association Premier League and Others, Court of Justice EU, Case C-403/08, para. 149.

¹⁸ A possibly face-saving alternative solution was recently presented at WIPO by the United States. The proposal would allow contracting states broad discretion to meet the treaty's protection minima in a variety of ways, e.g. by copyright, related (neighbouring) rights, law of unfair completion, telecommunications law, administrative law or criminal law. Proposal of the United States of America, SCCR/37/7, Geneva, 19 November 2018.