

Groundhog Day in Geneva: The WIPO Broadcasting Treaty is on the Agenda Once Again.

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1. Introduction

In these turbulent, war and pandemic plagued times it is comforting to see that some things forever stay the same. In May 2022, for the 42nd consecutive time, the WIPO Standing Committee will discuss a possible Treaty on the Protection of Broadcasting Organizations. The draft treaty, which has featured high on the Committee's agenda since its inception in 1998, would offer international protection to broadcasting organizations against unauthorized retransmission and related uses.

Despite many years of discussion, stern opposition, countless redrafts and political setbacks, the controversial treaty project has never been abandoned. A newly Revised Draft Text published in March 2022, is now on the Committee's agenda.¹

This paper critically discusses the history, rationales, and substantive content of the draft treaty – with a special emphasis on limitations and exceptions.²

2. Brief history of broadcaster's rights

The draft treaty would not be the first international convention to protect the rights of broadcasters. Both the Rome Convention on neighboring rights of 1961 and the Brussels Satellite Convention of 1974 set minimum standards for protecting broadcasters. Rights of broadcasters have also found their way in the TRIPs Agreement.

¹ SCCR/42.

² Parts of this paper are based on a keynote speech delivered at the KEI Seminar, "Appraising the WIPO Broadcast Treaty and its Implications on Access to Culture", Geneva, 3-4 October 2018.

Rome Convention

Broadcasting organizations were relatively late in embracing neighboring rights. In the years preceding the adoption of the Rome Convention, many broadcasters actually opposed international recognition of neighboring rights. The broadcasters were generally afraid of the extra costs that rights for performing artists and phonogram producers (record companies) – the intended beneficiaries of the treaty – 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.³

The International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations eventually saw the light in Rome in 1961.⁴ Article 13 of the Rome Convention grants several minimum exclusive rights to “broadcasting organisations” with respect to their “broadcasts” – terms that the Convention does not attempt to define. The Rome minima comprise the rights to authorize the rebroadcasting, fixation and reproduction thereof and the communication to the public in public places. Importantly, protection under Rome does not extend to acts of cable (re)transmission or other forms of *wired* transmission. The Convention defines ‘rebroadcasting’ as “the simultaneous broadcasting by one broadcasting organisation of the broadcast of another broadcasting organization”, where ‘broadcasting’ means “the transmission by wireless means for public reception of sounds or of images and sounds” (Article 1 (f) and (g) Rome Convention).

Contracting States are to protect the rights granted for a minimum term of twenty years computed from the end of the year in which the broadcast occurred (Article 14 (c) Rome Convention). Article 15 (1) Rome Convention lists permitted exceptions, such as, private use, reporting on current events, ephemeral fixation, and use for teaching and scientific research, roughly in line with Articles 10, 10bis, and 11bis of the Berne Convention. Additionally, Article 15(2) generally allows Contracting States to provide for limitations similar to those provided for in national copyright law.

The Convention has become a template for national provisions on the protection of neighboring rights in many countries across the world. Nevertheless, adherence to the Rome Convention is still far from universal. In 2022, 96 states have ratified Rome,⁵ half of total WIPO membership (193). Non-Rome states include major countries such as the United States, China, the Republic of Korea, Indonesia and South Africa.

Nevertheless, even countries that have not embraced the Rome Convention’s neighboring rights model might still offer broadcasters protection under a variety of legal doctrines, such as

³ Sam Ricketson, *The Berne Convention for the protection of literary and artistic work: 1886-1986*, (1987) Kluwer Queen Mary College, University London, p. 3; Guibault & Melzer, p. xxx.

⁴ International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, Rome, October 26, 1961.

⁵ See WIPO web page on the Rome Convention, available at https://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=17.

copyright law, unfair competition law or telecommunications law. For example, in the United States broadcasts are protected by copyright under the US Copyright Act.⁶ Because the US Act requires fixation as a precondition for protection, live broadcasts that are not previously fixed would not be protected. The U.S. Copyright Act has solved this problem by defining the term “fixed” in such a way that live broadcasts are eligible for copyright protection when the broadcast signal is fixed simultaneously with the broadcast.⁷

Brussels Satellite Convention

The first WIPO Convention to deal exclusively with the rights of broadcasters is the Brussels Satellite Convention of 1974.⁸ The Convention obliges Contracting States to prevent the unauthorized distribution by satellite of any program-carrying signal prior to its being broadcast. The Convention solely protects so-called “pre-broadcast signals” transmitted by satellite – on their way from (mobile) studio to broadcaster, from one broadcaster to another or to cable distributors or other intermediary recipients. The Convention does not apply to signals directly broadcast via satellite (DBS). In other words, protection is limited to the uplink and downlink segments of the satellite-based communication chain.⁹

The Brussels Convention complements the Rome regime that protects broadcasts only insofar as the signals are intended for the general public. These differences in scope and focus explain why the number of contracting states to the Satellite Convention has remained small. Just 38 states have adhered, notably including the United States.

Yet, the Brussels Convention does present an interesting model for the international protection of broadcasters, which differs from the neighboring rights approach of the Rome Convention in several respects.¹⁰ Article 2 of the Brussels Convention protects against distribution of program-carrying signals¹¹ rather than against distribution and subsequent uses of the signal’s content, the broadcast.¹² Moreover, Article 2 does not oblige states to create any exclusive rights in the protected signals. The “adequate measures” required by Article 2 may include private rights

⁶ Goldstein/Hugenholtz, *International Copyright*, 4th ed., p. 222.

⁷ U.S. 1976 Copyright Act §101: “A work consisting of sounds, images, or both, that are being transmitted, is ‘fixed’ for purposes of this title if a fixation of the work is being made simultaneously with its transmission.”

⁸ Convention on the Distribution of Programme Carrying Signals Transmitted by Satellite, signed in Brussels, 21 May 1974.

⁹ Bryan Khan, *An Economic Analysis of the Intellectual Property Rights of Broadcasting Organisations*, diss. Erasmus University Rotterdam, 2019, available at <https://repub.eur.nl/pub/115142>, p. 34-35.

¹⁰ Goldstein/Hugenholtz, *International Copyright*, 4th ed., p. xxx.

¹¹ Article 1(i) of the Brussels Satellite Convention defines “signal” as “an electronically-generated carrier capable of transmitting programmes” and Article 1(ii) defines “programme” as “a body of live or recorded material consisting of images, sounds or both, embodied in signals emitted for the purpose of ultimate distribution.”

¹² Article 2(1) of the Brussels Satellite Convention provides:

“Each Contracting State undertakes to take adequate measures to prevent the distribution on or from its territory of any programme-carrying signal by any distributor for whom the signal emitted to or passing through the satellite is not intended. This obligation shall apply where the originating organization is a national of another Contracting State and where the signal distributed is a derived signal.”

such as national copyright or neighboring rights laws but, according to the Conference Report, may also include penal sanctions, administrative regulations, or combinations of these measures.¹³ As we shall see below, the Brussels Convention's flexible approach has been adopted in the most recent draft text of the WIPO Broadcasting Treaty.

TRIPs Agreement

The TRIPs Agreement, which is integrated into the WTO international law framework, comprises a single, somewhat ambiguous obligation to protect the rights of broadcasters, in Article 14(3):

Broadcasting organizations shall have the right to prohibit the following acts when undertaken without their authorization: the fixation, the reproduction of fixations, and the rebroadcasting by wireless means of broadcasts, as well as the communication to the public of television broadcasts of the same. Where Members do not grant such rights to broadcasting organizations, they shall provide owners of copyright in the subject matter of broadcasts with the possibility of preventing the above acts, subject to the provisions of the Berne Convention (1971).

The rights contemplated in the first sentence of Article 14(3) roughly correspond to the rights enshrined in the Rome Convention.¹⁴ Article 14(5) TRIPs likewise applies the Rome minimum term of protection of 20 years to the rights of broadcasters.

However, according to the second sentence WTO members may instead choose to “provide owners of copyright in the subject matter of broadcasts with the possibility of preventing the above acts protect broadcasters by way of copyright”. Since much if not all content being broadcast will qualify as copyright protected works in most Berne Union countries, this makes Article 14(3) a rather empty obligation.¹⁵ In any case, the TRIPs Agreement does not require WTO states to protect broadcasters by neighboring rights or any other special rights.¹⁶

3. Justifications for special broadcaster's rights

Prior to engaging in an analysis of the latest draft text of a WIPO Broadcasting Treaty, it is important to examine its rationales. What are the policy arguments in favor of giving broadcasters special legal protection?

In a recent position paper, the main proponent of a Treaty, the European Broadcasting Union (EBU) that represents the public broadcasters in Europe, posits no fewer than ten arguments in

¹³ Report of the General Rapporteur, International Conference of States on the Distribution of Programme-Carrying Signals Transmitted by Satellite, in Records of the International Conference of States on the Distribution of Programme-Carrying Signals Transmitted by Satellite (1977).

¹⁴ D. Gervais, *The TRIPs Agreement: Drafting History and Analysis*, 3rd ed., London, Sweet & Maxwell, 2008, p. 258.

¹⁵ S. von Lewinski, *International Copyright Law and Policy*. Oxford: Oxford University Press, 2018, p. 511-525.

¹⁶ Gervais, p. 258.

favor of protection – many of which, however, are circular or repetitive, or simply policy statements.¹⁷

One of the broadcasters' main arguments for extending the Rome minima is 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, it is said, is hopelessly outdated. The broadcasters go on to point out that the neighboring 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 deserve is long overdue.

The broadcasters do have a point. The Rome Convention merely protects broadcasting organizations against 'rebroadcasting' (i.e. by wireless means) of their signals,¹⁸ not against digital uses of broadcasts, which were unforeseen in 1961. Indeed, Rome does not even grant rights against retransmission by cable networks – a right that many national lawmakers, and the European Union, nowadays do provide. But the need to update an admittedly ancient convention cannot as such justify a new treaty, especially if the rationale underlying the Rome protection scheme for broadcasters has become increasingly questionable, as will be demonstrated below.

The documents produced by the SCCR in preparation of the Draft Proposal offer a sounder basis for analysis. Based on these documents, the main justification for broadcasters' rights appear to be to encourage investment, reward broadcasters' for their role in distributing creative works, and the need to provide meaningful protection against signal piracy.¹⁹

In the following these three arguments are assessed:

Investment rationale

The first argument reflects IP law's economic investment rationale. Why grant neighboring rights to broadcasters? Because, it is argued, broadcasters' investment in content production and dissemination must be protected. But absent additional justification, this argument is unconvincing. Investment in entrepreneurial activity cannot as such justify IP protection. 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

¹⁷ European Broadcasting Union, Broadcasters' Rights: Towards A New WIPO Treaty, December 2021, available at <https://www.ebu.ch/publications/strategic/open/legal-policy-focus-broadcasters-rights-towards-a-new-wipo-treaty>.

¹⁸ Art. 3(g) Rome Convention defines 'rebroadcasting' as "the simultaneous broadcasting by one broadcasting organisation of the broadcast of another broadcasting organisation."

¹⁹ Khan, p. 58.

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 aggregators, 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 argument 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. Absent the prospect of recoupment and possible profits, producers would cease their investments, and the market would 'fail'. IP rights thus serve as measures to cure this market failure by offering an incentive to invest in the production and dissemination of intangible goods.

This investment rationale largely underlies the neighboring 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 became 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).

But all this has radically changed in recent decades. 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 hertzian 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 expensive premium content such as Champions League football and premiere television series. But such an argument would be unsound. Neighboring 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 neighboring right for broadcasters in the 1960's do not necessarily justify similar (let alone stronger) rights for broadcasters in the digital age.

Remarkably, in all the debates surrounding the WIPO Broadcasting Treaty, the voice of the economists has gone mostly unheard. In an excellent PhD dissertation on the law and economics of IP protection of broadcasting organisations,²⁰ which was defended in 2019 at Erasmus University Rotterdam, economist Bryan Khan thoroughly examined the economic case for IP protection of broadcasting originations. His findings do not support the case for strong protection. According to Khan, a properly calibrated copyright system would make neighboring rights for broadcasters redundant. Broadcast signal protection could be achieved under the law of unfair competition. Thus, broadcasters' signals would be protected without imposing on society the costs of property rights in broadcast signals.²¹ In any case, according to Khan, special protection of broadcasters would have to be considerably weaker than copyright and leave much more room for limitations and exceptions.²²

Obviously, granting IP rights for no good reason can have serious consequences, both for the economy and for society at large.²³ 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 '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 EU's Digital Single Market Directive of 2019 has made this technology mandatory for YouTube, Facebook and other large content-sharing platforms.²⁴

Reward broadcasters' for their role in distributing creative and artistic works

The second argument advanced in support of special broadcasters' rights is that a grant of rights rewards broadcasters for their role in disseminating 'cultural' content to the general public. This argument combines two arguments that traditionally underlie copyright protection: on the one hand, the Lockean argument that every person has a natural right to the fruits of his

²⁰ Bryan Khan, *An Economic Analysis of the Intellectual Property Rights of Broadcasting Organisations*, PhD dissertation defended at Erasmus University Rotterdam, 2019, available at <https://repub.eur.nl/pub/115142>.

²¹ Khan, p. 316.

²² *Ibidem*.

²³ 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-00000e2511c8>.

²⁴ Directive of the European Parliament and of the Council on copyright in the Digital Single Market, Art. 17.

or her own labor; on the other, the ‘cultural’ rationale that a grant of rights stimulates the creation and dissemination of creative works to the benefit of the general public.

Neither argument, however, offers a convincing justification for granting special rights to entities that do not themselves create. First, the Lockean argument only applies where an immediate connection between personal labor and output can be established.²⁵ Extending the Lockean theory to generally justify rights of entrepreneurs in the fruits of their activities would squarely conflict with freedom of competition.

The dissemination argument likewise assumes that rights vest in the person or entity that creates the content. The initial grant of rights ‘incentivizes’ creators to transact with content aggregators or intermediaries, such as publishers or broadcasters, by way of copyright licenses or transfers. The transferred copyright, in turn, is monetized by the intermediaries on the market for creative content. In this market-oriented copyright model intermediaries compete for acquiring rights from creators, and the winners become rights holders themselves. Consequently, no need for a separate neighboring right for intermediaries exists.

The preceding is not to say that broadcasters are never creatively involved in the broadcasts they produce. Indeed, broadcasting organizations often engage in a variety of creative activities that go well beyond mere content dissemination: editing, (co)producing, translation, subtitling, et cetera. While these activities may give rise to legitimate claims of (co)authorship and copyright protection, they do not justify special protection.

In respect of the public service broadcasters that make up the membership of the EBU, both the inventive and the reward arguments are particularly weak. Public broadcasting in Europe is publicly funded, either by way of special taxes (often in the form of broadcast license fees) or general state funding. In return for public funding, broadcasters are legally mandated to broadcast informational, cultural, educational and entertainment content to the general public. No need for additional incentives or rewards in the form of special rights should arise.

Signal piracy argument

The third argument is by far the most powerful. There is overwhelming consensus that the unauthorized retransmission of broadcast signals for commercial purposes – for example, by offering illegal live streams of sports broadcasts – ought to be unlawful. So-called ‘signal piracy’ distorts competition, undermines markets for legitimate content services and prejudices the rights in the content of the broadcast.

But protecting broadcasters against signal piracy does not necessitate a grant of special IP rights. Misappropriation of broadcast signals is, in essence, an act of unfair competition, subject to the remedies that unfair competition law already provides in many jurisdictions of the world.²⁶ In

²⁵ Khan, p. 61-62.

²⁶ See below.

addition, ‘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.

Moreover, 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 content 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. All in all, broadcasters in most countries already enjoy legal protection against signal piracy and other unauthorized uses in some legal form.

What broadcast protection regimes – whether grounded in copyright, neighboring right, unfair competition, criminal law or telecommunications law – cannot provide is immediate enforcement against illegal streaming of live broadcasts of sports events.²⁷ This is a problem that has been plaguing broadcasters and sports organizers for many years. Effectively enforcing rights against illegal live streaming would require far-reaching, controversial legal measures and procedures, such as live blocking orders (injunctions), well beyond the enforcement measures currently mandated by the TRIPs Agreement and other international conventions.²⁸ For this reason, no such measures are contemplated in the various drafts of the Broadcasting Treaty.

4. The proposed WIPO Broadcasting Treaty

The proposed WIPO Broadcasting Treaty has its origin in the international negotiations that led to the two “WIPO Internet Treaties” in 1996, the WIPO Copyright Treaty and the WIPO

²⁷ See European Audiovisual Observatory, Mapping report on national remedies against online piracy of sports content, Strasbourg 2021, available at <https://rm.coe.int/mapping-report-on-national-remedies-against-online-piracy-of-sports-co/1680a4e54c>.

²⁸ See European Parliamentary Research Service, Challenges facing sports event organisers in the digital environment, December 2020, available at [https://www.europarl.europa.eu/thinktank/en/document/EPRS_STU\(2020\)654205](https://www.europarl.europa.eu/thinktank/en/document/EPRS_STU(2020)654205). See also European Parliament resolution of 19 May 2021 with recommendations to the Commission on challenges of sports events organisers in the digital environment (2020/2073(INL)), available at https://www.europarl.europa.eu/doceo/document/TA-9-2021-0236_EN.pdf; Gianluca Campos, The Resolution of the European Parliament on protection of live sport events, Kluwer Copyright Blog, available at <http://copyrightblog.kluweriplaw.com/2021/06/28/the-resolution-of-the-european-parliament-on-protection-of-live-sport-events/>.

Performances and Phonograms Treaty. While the WPPT was meant to ‘update’ the Rome Convention in the light of recent digital developments, the rights of broadcasters were not included. Various factors contributed to this exclusion. First, notwithstanding the compromise once reached in Rome, broadcasters were never easy bedfellows with performing artists and phonogram producers. Second, the difficulties in agreeing on substantive standards on the protection of broadcasters in the TRIPs Agreement also played a role.²⁹

Shortly after the conclusion of the WIPO treaties, broadcasters began to press for a separate WIPO treaty. Soon the issue was included on the agenda of the WIPO Standing Committee on Copyright and Related Rights (SCCR), which was established in 1998. It has remained on the Committee’s agenda until today.

Since 1998 countless proposals, working documents, non-papers and other documents have been discussed in the SCCR. As Rafiei wryly observes, “no other IP area has received such vast amounts of submissions in treaty language, consuming time and energy from all sides without any real success”.³⁰

Following its inception, eight years of difficult discussions in the SCCR ensued. In 2006 the Chairman of the SCCR finally concluded that the Draft Basic Proposal was sufficiently consensual for it to be discussed in a diplomatic conference. But at the subsequent meeting of the WIPO General Assembly in 2007, several delegations, including the United States, Brazil and the African Group, contradicted this apparent consensus. Nevertheless, the General Assembly approved the convening of a Diplomatic Conference aimed at concluding a WIPO Treaty on the protection of broadcasting organizations, including cablecasting organizations. The scope of the Treaty, however, would be confined to the protection of broadcasting and cable casting organizations “in the traditional sense.” In other words, any convention should not deal with the highly contentious issue of extending protection to webcasters. To this end the SCCR was put to work for two additional sessions, under the instruction that the draft proposal be based “on a signal-based approach”.³¹ To no avail; the special SCCR sessions held in the course of 2007 did not produce a consensus.

Undeterred by this major setback, the SCCR has continued its discussions until this very day. At the 42nd meeting of the Committee, which is to take place in Geneva from 9 to 13 May 2022, the protection of broadcasting organizations is once again the first substantive issue on the agenda.³²

²⁹ S. von Lewinski, *International Copyright Law and Policy*. Oxford: Oxford University Press, 2018, p. 512.

³⁰ Gholamreza Rafiei, *The possibility of granting new legal protection and IP rights to broadcasting organizations against the unauthorized exploitation of their broadcasts*, dissertation University of Neuchatel, 2015, available at http://doc.rero.ch/record/256499/files/Thesis_Gholamreza_RAFIEI.pdf, p. 131. See timeline of the treaty, <https://www.keionline.org/wipo/sccr/timeline-broadcasting>. See also summary of SCCR proceedings at Rafiei, p. 131 ff; S. von Lewinski, *International Copyright Law and Policy*. Oxford: Oxford University Press, 2018, p. 513-517.

³¹ Rafiei, p. 138. See WIPO press release https://www.wipo.int/pressroom/en/articles/2007/article_0039.html.

³² SCCR/42/1 PROV.

Over the years, two recurring issues have informed much of the discussions in the SCCR: one conceptual, the other structural.

Webcasters

The first concerns properly defining the concept of a “broadcasting organization” 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 these notions be properly delineated. When the Rome Convention was conceived, the definition of broadcasting was fairly straightforward; ‘broadcasting’ meant “the transmission by wireless means for public reception of sounds or of images and sounds”.³³ 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.

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”.³⁴ While this clearly covers traditional radio and television broadcasting, in the age of the Internet the scope of the definition has become virtually boundless. Whereas earlier drafts unambiguously extended the treaty’s reach to webcasting (giving reason for its derisive nickname, *The Casting Treaty*), more recent draft sensibly exclude mere webcasters from the protection of the treaty. However, as will be discussed, this exclusion might have unintended consequences.

Signal-based or ‘post-fixation’ rights

Another contentious, and often confusing, issue has been – and to some degree remains – the scope of the protection to be offered to broadcasting organizations.³⁵ Whereas the 2007 General Assembly decision instructed the SCCR to protect broadcasters solely against acts of “signal piracy” – i.e. unauthorized retransmission of (‘live) broadcast signals – earlier treaty drafts contemplated granting to broadcasters a package of full-fledged rights well beyond the Rome Convention minima, including various ‘post-fixation’ rights. For example, the 2004 consolidated text envisaged granting not only retransmission rights, but also various rights of exploitation, including rights of communication to the public of broadcasts, fixation of their broadcasts, direct or indirect reproduction of fixations of broadcasts, and the making available to the public or the original and copies of fixations of their broadcasts, through sale or other transfer of ownership.³⁶

A distinct but related issue is the legal nature of the protection. In line with the conventional neighboring rights model of the Rome Convention and the WPPT, early drafts sought to protect broadcasters by way of granting exclusive private *rights*. In line with the Brussels Convention,

³³ Art. 3(f) of the Rome Convention.

³⁴ See, for example, Article 2(d) of the 2022 Draft Text, discussed below.

³⁵ P. Akester, *The Draft WIPO Broadcasting Treaty and its Impact on Freedom of Expression*, UNESCO Copyright Bulletin, April-June 2006, p. 13.

³⁶ Akester, p. 14 ff.; Guibault & Melzer, p. xxx.

more recent drafts also acknowledge alternative, more flexible approaches towards protecting broadcasters against signal piracy, such as unfair competition, misappropriation and telecommunications regulation.³⁷

5. Revised Draft Treaty Text (March 2022)

In preparation of the 42nd meeting of the SCCR a Revised Draft Text for the WIPO Broadcasting Organizations Treaty was prepared by the SCCR Acting Chair, which was published on March 4, 2022.³⁸ The current draft is a far cry from the ambitious, all-encompassing treaty texts that were discussed in the early stages of the proceedings of the SCCR.

Following the General Assembly's instructions to base future treaty work on a "signal-based" approach, most of these rights have been removed in recent drafts. Nevertheless, residues of the previous right-oriented approach remain throughout the current text.

Another significant difference with early texts is that in the current draft acts of webcasting no longer gives rise to legal protection – with one exception: broadcasters and other platforms offering catch-up services are qualified for protection.

Moreover, in contrast to previous drafts, the present text no longer contains bracketed texts, which makes it considerably better readable. Whether this is an indication that the draft treaty is close to being adopted by the SCCR remains to be seen.

What follows below is a brief article-by-article commentary on the current draft, and the accompanying Explanatory Notes:

Preamble

The Preamble sets out the main objectives of the draft treaty. Importantly, the first paragraph underscores that the international protection of the rights of broadcasting organizations be developed "in a manner as balanced and effective as possible". The Preamble however fails to expressly mention the countervailing interests against which the broadcaster's rights are to be balanced. Here, the Draft could draw inspiration from the Preamble of the WIPO Copyright Treaty, which recognizes "the need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information".

The second paragraph states the primary purpose of the treaty, which is to deal with "the unauthorized use of program-carrying signals of broadcasting organizations". According to the Explanatory Notes this is to emphasize the "anti-piracy function" of the treaty.

³⁷ See below.

³⁸ SCCR/42/1.

Article 1 (Relation to Other Conventions and Treaties)

Article 1 clarifies the draft treaty's relation to other international conventions. In line with similar provisions in the Rome Convention, the WPPT and the Beijing Treaty on Audiovisual Performances (BTAP), Article 1 (1) contains a *non-prejudice clause*, meaning that the rights granted under the proposed treaty shall not prejudice the rights of copyright holders and owners of neighboring rights. For example, as the Explanatory Notes clarify, the rights granted to broadcasters may not be invoked against the holders of copyrights in the broadcast content (e.g. an audiovisual work), and not deprive them of the freedom to enter into licensing agreements.

The proposed non-prejudice clause, however, does not work both ways. Whereas users will always benefit from the mandatory limitations and exceptions enshrined in the Berne convention,³⁹ the draft treaty in its current form does not provide for any such minimum exemptions.⁴⁰

According to Article 1(3) the proposed treaty is not a “special agreement” under Article 22 of the Rome, because the proposed treaty does not build upon the Rome convention minima. While the proposed retransmission right does go beyond Rome, the extent of protection is generally less extensive than the Rome convention minima.

Article 2 (Definitions)

Article 2 provides definitions. The proposed definition of “broadcasting” (Paragraph a) is significantly wider than the corresponding term in the Rome convention, the WPPT and the BTAP. Whereas those conventions limit broadcasting to the transmission by wireless means, the draft treaty extends to transmissions by wire. The definition clarifies that transmissions by satellite and transmissions of encrypted signals may also qualify as acts of broadcasting. According to the Explanatory Notes, “the definition thus covers all types of transmissions, including by cable, satellite, computer networks and by any other means”.

Nevertheless, entities that exclusively transmit “by means of computer networks”, are barred from protection under the treaty due to the definition of “broadcasting organization”. (Paragraph d), which excludes such entities from its definition.⁴¹ While the intention to exclude webcasters from protection under the treaty is laudable, the absence of a definition of “computer networks” raises intriguing questions. Undoubtedly, the drafters have the Internet in mind. But they seem to overlook the digital convergence that has fused traditional means of broadcast transmission with digital broadband Internet infrastructure. Today's reality is that the

³⁹ Art. 2(8) BC (news of the day); art. 10(1) BC (quotation).

⁴⁰ See Article 10 (below).

⁴¹ Article 2 (d) in fine reads: “entities that deliver their programme-carrying signal exclusively by means of a computer network do not fall under the definition of a ‘broadcasting organization’ “.

Internet (a “computer network”) has become an essential part of the transmission infrastructure of most if not all broadcasting operations. In the Netherlands, for example, 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 other countries.

In other words, the exclusion of broadcasters solely using “computer networks” might seriously backfire. It would rule out all but the most old-fashioned broadcasting operations from protection under a future treaty.

A “broadcasting organization” is otherwise defined as “the legal entity that takes the initiative and has the editorial responsibility for broadcasting, including assembling and scheduling the programmes carried on the signal”. Note that this definition encompasses not only traditional broadcasters, but any provider of scheduled content transmitting over the air waves or via cable networks. If, for example, Netflix might one day decide to employ satellite services to distribute its signal, this would qualify Netflix for protection under the treaty.

The draft text does not define the term “broadcast”, which is remarkable considering the treaty’s aim to protect broadcasts against unauthorized transmissions. As the Explanatory Notes tautologically observe, “the broadcast represents the output of the activity in which a broadcasting organization is engaged, namely ‘broadcasting’ “, which is a defined term.

Paragraph (b) defines a “programme-carrying signal” as “an electronically generated carrier, as originally transmitted and in any subsequent technical format, carrying a programme”. This is, essentially, the broadcast that is protected. The definition allows for certain technical modifications during the delivery of the signal. A “programme” is defined in Paragraph (c) as “live or recorded material consisting of images, sounds or both, or representations thereof”. This apparently rules out protection of alphanumeric broadcasts of the teletext type.⁴²

Paragraph (e) defines “retransmission” as “the simultaneous transmission for the reception by the public by any means of a programme-carrying signal by any other third party than the original broadcasting organization”. Since protection of the broadcast signal against unauthorized retransmission is at the heart of the draft treaty, this is an important definition. Note that retransmission must be *simultaneous*, and “for the reception by the public”.

The current text sensibly does away with confusing variants on the transmissions theme, such as “near simultaneous transmission” used in previous drafts.

In line with the Brussels Satellite Convention, the current text extends protection to “pre-broadcast signals”. These are defined as programme-carrying signals “transmitted to or by a

⁴² See <https://en.wikipedia.org/wiki/Ceefax>.

broadcasting organization, for the purpose of subsequent transmission to the public” (Paragraph f).

Finally, Paragraph (g) defines “stored programmes” – a term not found in previous drafts of the Treaty. These are previously broadcast programs stored in a “retrieval system” (i.e., a database) from which they can be (re)transmitted or made available to the public online. This concerns so-called catch-up services and other video-on-demand services offering previously broadcast programs.⁴³

Article 3 (Scope of Application)

Article 3 clarifies the intended scope of protection under the draft treaty. Many of these provisions are superfluous, given the substantive provisions elsewhere in the treaty. Paragraph (4) does provide a useful clarification: the Treaty shall not provide protection in respect of “mere retransmissions by any means of transmission”. This rules out protection of cable networks that merely retransmit broadcast programs.

Article 4 (Beneficiaries of Protection)

Article 4 determines the points of attachment for protection under the Treaty, roughly in line with corresponding provisions of the Rome Convention. Note that according to the present draft broadcasting organizations may qualify for protection if the programme-carrying signal is transmitted from a transmitter situated in another Contracting Party. This is more generous than the corresponding rule of the Rome Convention, which allows Contracting States to require that the broadcaster’s headquarters and the transmitter be situated in the same country (Article 6.2 Rome Convention). According to the Explanatory Notes, since this is an “anti-piracy instrument”, there is no need for an equivalent provision.

Article 5 (National Treatment)

Article 5(1) sets out the principle of national treatment (or assimilation), in line with Article 5(1) of the Berne Convention. However, Paragraph 2 unequivocally permits Contracting States to apply national treatment only on condition of material reciprocity.

Article 6 (Right of Retransmission)

Article 6 is the first, and most important, material provision of the draft treaty: “Broadcasting organizations shall enjoy the exclusive right of authorizing the retransmission of their programme-carrying signals by any means.” As the Explanatory Notes explain, this protects broadcasters “against all retransmissions, by any means, including rebroadcasting and retransmission by wire, by cable or over computer networks, when done by any another entity

⁴³ See comments on Article 7 below.

than the original broadcasting organization for the reception by the public.” Recall that the notion of “retransmission” is limited to acts of simultaneous transmission.

Article 7 (Deferred Transmission of Stored Programmes)

In addition, according to Article 7 (1) broadcasting organizations “shall enjoy [the] exclusive right of authorizing the deferred transmission to the public by any means of the programme-carrying signal used when they provide access to the public to their stored programmes, including providing access to the stored programmes in such a way that members of the public may access them from a place and at a time individually chosen by them”. Note that «stored programme» as defined in Article 2(g) refers to previously broadcast programs. Article 7(2) provides for a similar transmission right vis-à-vis third parties (e.g. VOD providers).

The proposed exclusive right of making available previously broadcast programs, which was absent from previous drafts, raises serious questions. First, it is unclear why such a right deserves a place in an instrument that is concerned with “signal piracy”, i.e. the unauthorized retransmission of live broadcast signals. Second, it is hard to understand why broadcasting organizations would deserve a special right to control VOD-delivery of broadcast programs, whereas specialized VOD platforms competing in the same market, such as Netflix and Disney Channel, would not.

In any case, as the badly drafted language of Article 7 already suggests, this provision is a misfit and best deleted from future drafts.

Article 8 (Use of Pre-broadcast Signals)

Article 8 allows broadcasting organizations to control the use of so-called “pre-broadcast signals”, as defined in Article 2(f). Here the protection of the draft treaty goes well beyond the Rome Convention minima, which are limited to broadcast programmes. By encompassing pre-broadcast signals, the draft text follows the example of the Brussels Satellite Convention, which however is limited to satellite transmissions.

Note that Article 9, to be discussed below, allows Contracting States to offer “other adequate and effective protection” instead of an exclusive right of authorizing the (re)transmission of broadcast signals. Most likely, many states would resort to this alternative, since pre-broadcast signals already enjoy protection under telecommunications law in many jurisdictions.

Article 9 (Other Adequate and Effective Protection)

In a major departure from the rights-centric approach followed in earlier drafts, Article 9 permits Contracting States to protect broadcasters against acts of unauthorized retransmission by other means than a grant of exclusive rights. States preferring this route should however notify the WIPO Director-General. Alternative regimes must offer “adequate and effective

protection to broadcasting organizations, through a combination of the rights provided for in Article 6 to 8 and copyright or related rights” (Article 9.1).

Contracting States invoking Article 9 “shall include” one or more of the following regimes:
“(i) protection by means of the grant of a copyright or other specific right;
(ii) protection by means of the law relating to unfair competition or misappropriation;
(iii) protection by means of telecommunications law and regulations.” As the Explanatory Notes clarify, this clause is inspired by Article 3 of the Geneva Phonograms Convention, which – like the present provision – leaves Contracting States discretion as to the legal means of protection.

Article 9, which is the result of an amendment drafted by the United States,⁴⁴ gives Contracting States considerable latitude in meeting the minimum standards of the treaty. As previously observed, protecting broadcasters against “signal piracy” does not necessarily require the introduction of full-fledged IP rights. In many jurisdictions, broadcasters will already derive adequate protection from a combination of copyright in the broadcast content, unfair competition, misappropriation or similar doctrines, and telecommunications law.

Article 10. Limitations and Exceptions

According to Article 10(1) of the draft text, “Contracting Parties may, in their national legislation, provide for the same kinds of limitations or exceptions with regard to the protection of broadcasting organizations as they provide, in their national legislation, in connection with the protection of copyright in literary and artistic works, and the protection of related rights.” Similar language can be found in Article 15.2 of the Rome Convention, Article 16(1) of the WPPT, and Article 13(1) of the BTAP.

Unlike the Berne Convention the draft text does not propose any mandatory exceptions. This may lead to the irrational result that broadcasts are subjected to fewer exceptions than the underlying works of authorship. Clearly, this asymmetry should be rectified in future drafts.

The second paragraph subjects exceptions and limitations to the well-known three-step test. While the test has become a staple article in international treaties on copyright and neighboring rights, it is however not immediately evident why it would be appropriate in the present treaty. First, the Rome Convention on which much of the present text is built, does not include a similar test. Second, the alternative approaches towards signal protection expressly validated under Article 9 depart from the rights-based model on which the three-step test is grounded.

See Agreed statement WPPT

⁴⁴ SCCR/37/7.

Concerning Article 16: The agreed statement concerning Article 10 (on Limitations and Exceptions) of the WIPO Copyright Treaty is applicable *mutatis mutandis* also to Article 16 (on Limitations and Exceptions) of the WIPO Performances and Phonograms Treaty.

[The text of the agreed statement concerning Article 10 of the WCT reads as follows: "It is understood that the provisions of Article 10 permit Contracting Parties to carry forward and appropriately extend into the digital environment limitations and exceptions in their national laws which have been considered acceptable under the Berne Convention. Similarly, these provisions should be understood to permit Contracting Parties to devise new exceptions and limitations that are appropriate in the digital network environment.

"It is also understood that Article 10(2) neither reduces nor extends the scope of applicability of the limitations and exceptions permitted by the Berne Convention."]

Article 11 (Term of Protection)

Article 11 requires protection to last "at least, until the end of a period of 20 years computed from the end of the year in which the programme-carrying signal was transmitted." Whereas a term of twenty years corresponds to the Rome Convention minimum (Article 14 (c) Rome Convention), its appropriateness in the present treaty is disputable. If the treaty is indeed primarily intended to protect broadcasters against live transmissions of the broadcast signal, a far shorter term than twenty years (e.g. two years or even just 24 hours from transmission) would be proportionate.⁴⁵ Note that the Brussels Satellite Convention does not establish a minimum term of protection.

Yet another question arises in respect to the alternative approaches permitted under Article 9. Protection schemes not based on rights, such as unfair competition, do not come with terms of protection. It is unclear how the draft deals with this complication.

Article 12 (Obligations Concerning Technological Measures)

Article 12 provides for anti-circumvention protection in line with Article 18 WPPT. A novel – and laudable – counterpoint to this is Paragraph 2 that obliges Contracting Parties to "take appropriate measures, as necessary, to ensure that when they provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures, this legal protection does not prevent third parties from enjoying content that is unprotected or no longer protected, as well as the limitations and exceptions provided for in this Treaty." This provision apparently allows states to choose between implementing

⁴⁵ See Joint NGO letter on the proposed WIPO treaty on broadcasting, May 28, 2018, available at <https://www.keionline.org/wp-content/uploads/2018/05/Joint-NGO-Broadcast-28May2018.pdf>.

exceptions to TPM protection and other ‘measures’, such as those contemplated in Article 6(4) of the Information Society Directive.

Article 13 (Obligations Concerning Rights Management Information)

This provision closely follows Article 19 WPPT.

Article 14 (Formalities)

This provision literally reproduces Article 20 of the WPPT. According to the Explanatory Notes, “Article 14 states the fundamental principle of formality-free protection.” This is a bold statement. Whereas Article 5(2) of the Berne Convention bans formalities in international copyright protection, no such ‘fundamental principle’ exists in the law of neighboring rights. In fact, the Rome Convention expressly allows formalities for the protection of phonograms (Article 11 RC) and is silent on formalities for the protection of broadcasters.

Article 15 (Reservations)

In contrast to the Rome Convention and the WPPT, Article 15 in its present form does not allow reservations by Contracting Parties. Depending on the outcome of the negotiations, this might be a placeholder.

Article 16 (Application in Time)

Article 16 contains provisions of transitory law. According to Paragraph 2, the protection will have no retro-active affect.

Article 17 (Provisions on Enforcement of Rights of Broadcasting Organizations)

In line with Article 23 WPPT, Article 17 requires Contracting Parties to ensure that “expeditious remedies” and other enforcement procedures are available to broadcasters to prevent and deter infringement.

Article 18 (Provisions on Enforcement of Copyright and Related Rights)

Finally, Article 18 prescribes alternative enforcement standards for Contracting Parties that invoke Article 9 – combining copyright or related rights protection with other regimes. In such cases, states are to ensure that broadcasting organizations have legal standing to enforce these rights.

6. Limitations and exceptions

Although the scope and breadth of the draft treaty have been reduced in recent years, and the current text concentrates on protecting broadcasters against acts of unauthorized retransmission, the need for robust limitations and exceptions remains. Broadcast content plays an essential informational, cultural and educational role in our modern sound and image-based society.⁴⁶ Broadcast programs are also important sources of scientific research, in a variety of disciplines ranging from journalism studies to historical research. Radio and television archives are fundamental to our understanding of recent history, and of the present. Broad and immediate accessibility of broadcast content to educators, journalists, scientists and other researchers, without undue legal and financial impediments, is imperative – especially as regards public service broadcasts. Recall that most public service broadcasters are state-funded, and that many public broadcasters operate under a statutory mission to disseminate content for informational, cultural and educational purposes.⁴⁷

While the preamble of the present draft text reflects the intention of the Contracting Parties to protect the rights of broadcasting organizations “in a manner as balanced and effective as possible”, the substantive provisions on limitations and exceptions are disappointing. While Article 10 allows contracting parties to replicate existing exceptions in the field of copyright and related rights, the draft text leaves this entirely to the states’ discretion. Unlike the Berne Convention or the much more recent Marrakesh Treaty,⁴⁸ the draft does not provide for limitations or exceptions that are mandatory. This does not reflect the “balance” the Preamble promises.

Broad – and in some cases mandatory – limitations and exceptions are especially desirable when legal protection of broadcasters is shaped in the form of exclusive rights, which remains the preferred model of the draft treaty. Although neighboring rights are generally less extensive than copyrights, the exercise of neighboring rights might encroach upon user freedoms in incisive ways.

For example, in *Pelham* – a case concerning ‘sound sampling’ – the Court of Justice of the EU interpreted the neighboring right of phonogram producers to extend to every fragment of a sound recording. Therefore, even minute takings of the phonogram were deemed infringing reproductions, “unless that sample is included in the phonogram in a modified form unrecognisable to the ear”.⁴⁹ The decision illustrates that neighboring rights that are granted without any substantive threshold, such as the proposed broadcaster’s right, bear a serious risk of overprotection. It also exemplifies the need for robust limitations and exceptions.

Non-rights approaches, such as the unfair competition regime contemplated in draft Article 9, do not give rise to similar problems. Unfair competition rules generally apply only in

⁴⁶ See Akester, p. 32 ff.

⁴⁷ For the Netherlands, see <https://www.government.nl/topics/the-media-and-broadcasting/media-act-rules-for-broadcasters-and-programming>.

⁴⁸ Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled, June 27, 2013.

⁴⁹ Court of Justice EU, Case C-476/17.

competitive situations, whereas beneficiaries of exceptions and limitations would in many cases have no competitive aims. Concomitantly, the need for statutory limitations and exceptions would be less evident.

Since the primary focus of the proposed treaty is on protecting broadcasters against unauthorized retransmission, limitations and exceptions should particularly allow uses that involve acts of retransmission. Educational uses immediately come to mind.⁵⁰ Since the COVID-19 pandemic, online (distance) education has become normal in many fields of education. With admirable foresight, the SCCR already prioritized distance education in its work on a possible instrument on limitations and exceptions.⁵¹ The present draft treaty should anticipate this development, by mandating limitations and exceptions that allow the retransmission of broadcasts by online educators.

Acts of unauthorized retransmission of broadcasts could also be legitimate for news reporting purposes, or in cases of pandemics or other national emergencies. Retransmission of broadcast programs might also occur in the context of legitimate research activities, for example in large collaborative text and data mining operations. Note that text and data mining for scientific research purposes necessarily involves archiving and making available of source materials for scientific verification purposes.⁵²

7. Conclusion

In conclusion, the case for an international treaty for the protection of broadcasting organizations remains weak. The only convincing argument in support of protection is the need to remedy signal piracy. However, such protection is already widely available in national law under a variety of legal regimes: copyright, unfair competition law, telecommunications law and criminal law.

As the protracted discussions in the SCCR have demonstrated, granting special rights to broadcasters also presents international law makers with conceptual challenges, since the notions of “broadcasting” and “broadcasting organization” are increasingly elusive.

Nevertheless, the current Draft Treaty Text, while far from flawless, is much improved over earlier versions. Following the “signal-based” approach mandated by the WIPO General Assembly, its main focus is now on protecting traditional broadcasters against acts of unauthorized retransmission. Moreover, the latest draft allows states considerable flexibility in the way protection is implemented: by creating a special right or through alternative legal means.

⁵⁰ See R. Xalabarder, Copyright and Digital Distance Education: The Use of Pre-Existing Works in Distance Education Through the Internet, *Columbia Journal of Law & the Arts*. Vol,26 No. 2, (spring 2003), 101-178.

⁵¹ SCCR/42/4.

⁵² Cf. Article 3(2) of the EU Digital Single Market Directive.

Still, the Draft Text's treatment of limitations and exceptions leaves much to be desired. Broadcast content plays an invaluable role in our information society. This should be reflected not only in legal protection, but also in robust limitations and exceptions guaranteeing access to broadcast content for educational, cultural, and research purposes.