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The Trouble With the WIPO Broadcasting Treaty

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THE TROUBLE WITH THE WIPO BROADCASTING TREATY

James Packard Love

ABSTRACT

The World Intellectual Property Organization (WIPO) is a specialized UN body that provides forums to discuss intellectual property policies and practices, provides technical assistance to its member states and engages in norm setting. Since 1997, WIPO has engaged in a series of activities to evaluate proposals advocated by some companies that are engaged in broadcasting. There is yet another effort to bring this proposal to a diplomatic conference. This article (i) provides background on the negotiations including the evolving rationales for broadcast right; (ii) describes the differences between the thin temporary signal protection model and the far more problematic vision of a layer of durable post-fixation rights; (iii) highlights the failure of WIPO to undertake and evaluate any economic analysis of the impact of a treaty on the distribution of income between countries and between qualifying broadcasting organizations and authors, performers and audiences, and (iv) identifies the most troubling features of the current proposal.

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INTRODUCTION

I. BACKGROUND ON THE BROADCASTER RIGHT

The World Intellectual Property Organization (WIPO) is a specialized UN body that provides forums to discuss intellectual property policies and practices, provides technical assistance to its member states and engages in norm setting. WIPO was created by a treaty in 1967 and was designated as a specialized agency within the UN system in 1974.¹ Since 1997, WIPO has engaged in a series of activities to evaluate proposals advocated by some companies that are engaged in broadcasting. There is yet another effort to bring this proposal to a diplomatic conference. This article (i) provides background on the negotiations including the evolving rationales for broadcast right; (ii)

¹ Convention Establishing the World Intellectual Property Organization (As Amended on September 28, 1979).

describes the differences between the thin temporary signal protection model and the far more problematic vision of a layer of durable post-fixation rights; (iii) highlights the failure of WIPO to undertake and evaluate any economic analysis of the impact of a treaty on the distribution of income between countries and between qualifying broadcasting organizations and authors, performers and audiences, and (iv) identifies the most troubling features of the current proposal.

The broadcast treaty proposal has been offered both as an update to and expansion of the economic rights broadcasters already have in some countries and as a solution to piracy concerns. The broadcasters' economic rights were the subject of the 1961 Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations.

Concerns over piracy have been addressed in several treaties dealing with authors, performers, and producers of phonograms, as well as a 1974 Brussels Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite. A 1971 Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms (the Phonograms Convention) did not address the rights of broadcasting organizations but illustrates different approaches that can be taken as regards the protection of a related right. A review of the Rome, Brussels and Phonograms conventions is helpful in evaluating the proposal for a new WIPO treaty for broadcasting organizations.

*A. The International Convention for the Protection of Performers,
Producers of Phonograms and Broadcasting Organizations (Rome,
1961)*

The history of copyright and related rights is also a history of changes in information technologies and the political influence of current and potential stakeholders, and the shifting relationships between creative communities and commercial distributors of works. Before copyright was associated with authorship, several European countries assigned exclusive rights to printers. In more recent years, new technologies have created political demands to create exceptions or remunerative compulsory licenses for the use of works on jukeboxes, radio, television, and satellite broadcasts, for use in recorded musical performances and in streaming of recorded music.

This broadcaster right became a global norm in 1961 with the Rome Convention.² The version published on the WIPO webpage in English is nine pages long, with 34 Articles. The diplomatic conference that produced the 1961 Rome Convention was convened jointly by two UN agencies: the International Labor Organization (ILO) and the United Nations Educational, Scientific and

² The International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, Done at Rome on October 26, 1961. Available at <http://www.wipo.int/treaties/en/text.jsp?file_id=289757>

Cultural Organization (UNESCO), as well as the United International Bureaux for the Protection of Intellectual Property (BIRPI), a private organization that became the specialized UN agency for intellectual property in 1974 under its current name, the World Intellectual Property Organization (WIPO).

The most commonly expressed rationale for the 1961 Rome Convention was concern regarding the welfare of performers, and this was also the earliest issue raised, including by the ILO, dating from 1926. It was also raised during various revisions of the proposed treaty text. The ILO wanted performers to have a right that was separate from the copyright held by authors of music compositions or screenplays, and not dependent upon contracts. With the increasing visibility and affection for performers amplified through markets for recorded music, motion pictures, radio and television, this was a compelling and popular cause.

Phonogram producers sought inclusion in the treaty, in part on the grounds that the producers were part of a creative process, but also on the grounds they provided financial and organizational resources. The primary commercial beneficiaries of the phonogram producers' rights were businesses. Although producers could establish their rights through contracts with authors and performers, they sought separate economic rights, something not in the interests of the performers or authors.

Broadcasting organizations made a discrete case for inclusion in the treaty as a beneficiary, even when making no creative contribution. Backed by sheer lobbying power, broadcasters claimed that, unlike theater owners, record or bookstores, they were tasked with making works available to the public without direct compensation from listeners, often with additional public service obligations, and were entitled to rights, even when none existed for the works broadcast. Several features of the Rome Convention are worth highlighting in connection with the current WIPO broadcasting negotiations.

Equitable remuneration to performers or producers of phonograms (aural fixation of music or other sounds) used in broadcasting was required in Article 12, subject to the possibility of reservations in Article 16. *Broadcasting* is defined as “by wireless means for public reception.” *Rebroadcasting* is defined as “simultaneous broadcasting by one broadcasting organization of the broadcast of another broadcasting organization.” *Communication to the public* of “television broadcasts” is protected with either a “right to authorize or prohibit,” when “such communication is made in places accessible to the public against payment of an entrance fee,” subject to considerable flexibility “for the domestic law of the State where protection of this right is claimed to determine the conditions under which it may be exercised.”³

Exceptions in the Rome Convention

Exceptions to rights in the Rome Convention include a set of specific limitations (Article 15.1), as well as permissive exceptions for the same kind of limitations for copyright in literary and artistic works, except for the limitations on compulsory licenses included in the Rome Convention (Article 15.2). The

³ Article 13(d).

specific exceptions for teaching and scientific research were broader than in the Berne Convention. There is no reference to a three-step test for exceptions, a concept that did not appear in copyright or related rights treaties until the 1967 revision of the Berne Convention.

Formalities in the Rome Convention

Formalities were explicitly mentioned in Article 11 for phonograms, and more generally, unlike the Berne Convention, any of the Rome related rights can be conditioned on formalities. The broadcasters right has remained controversial and the Rome Convention itself has limited membership, particularly in the beginning. According to Delia Lipszyc, “at the end of 1971, ten years after its adoption, only 12 States belonged to the Convention. Countries were reluctant to ratify it, largely because of the objections to the Convention put forward by authors and by the broadcasting organizations.”⁴

The most significant objections to the treaty came from broadcasting organizations, objecting in particular to Article 12 of the Rome Convention, which, when not subject to a reservation, required broadcasters to pay remuneration to performers and/or producers of photograms when broadcasting recorded music. Broadcaster opposition to the treaty was mitigated in 1974, when a model law was approved by the Intergovernmental Committee, under Article 32 of the Convention.

As of June 2022, there were 96 members of the Rome Convention, compared to 181 members of the Berne Convention. Among the countries not members of the Rome Convention is the United States of America. The WTO TRIPS Agreement does not require a related right for broadcasters, when “owners of copyright in the subject matter of broadcasts” can exercise rights in “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.”⁵

B. The 1971 Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms

The Phonograms Convention, adopted in Geneva in October 1971, was motivated in part by the introduction of analogue compact cassette technology in the 1960s, and concerns by the music industry of unauthorized copying of recorded music. The English version of the treaty on the WIPO webpage is four pages long with 13 Articles.

The treaty did not mandate new economic rights to address the piracy issue, nor did it require a term of protection. The treaty obligated contracting states to “protect producers of phonograms who are nationals of other Contracting States against the making of duplicates without the consent of the

⁴ Delia Lipszyc, Copyright and Neighbouring Rights, The United Nations Educational, Scientific and Cultural Organization (UNESCO). 1999. page 883. <https://unesdoc.unesco.org/ark:/48223/pf0000120722>. (English translation of Derecho de autor y derechos conexos, published 1993).

⁵ TRIPS, Article 14.3.

producer and against the importation of such duplicates.” In Article 3, contracting states were given four options for doing so, including: (1) protection by means of the grant of a copyright, (2) protection by the grant of an “other specific right,” (3) protection by means of the law of unfair competition, and (4) protection by means of penal sanctions. This menu of options reflected the considerable flexibility in the treaty to address the piracy issue, and influenced the approach taken in 1974 for the anti-piracy treaty on Programme-Carrying Signals Transmitted by Satellite.

Exceptions in the 1971 Phonograms Convention

The 1971 Phonograms Convention included limitations on protection in Article 6. The Convention permits but does not mandate that a Contracting State can provide “the same kinds of limitations as are permitted with respect to the protection of authors of literary and artistic works,” subject to three conditions that must be satisfied for any compulsory license.

There is no three-step test in the 1971 Phonograms Convention.

Formalities in the 1971 Phonograms Convention

Regarding formalities, Article 5 of the Phonograms Convention specifically permits a contracting party to require compliance with formalities. This can be satisfied by providing on the container of the recording “a notice consisting of the symbol (P), accompanied by the year date of the first publication, placed in such manner as to give reasonable notice of claim of protection; and, if the duplicates or their containers do not identify the producer, his successor in title or the exclusive licensee (by carrying his name, trademark or other appropriate designation), the notice shall also include the name of the producer, his successor in title or the exclusive licensee.”

C. The 1974 Brussels Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite

The 1974 Brussels Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite (the Brussels Convention) was also motivated by concerns of piracy; this time, when television programmes were transmitted by space satellites between broadcasters or cable stations. Similar to the current WIPO discussion of signal piracy, broadcasters maintained that some of the programmes “were not protected by copyright since many of them broadcast sporting events of major international economic significance (such as the Olympic Games, the World Football Cup, boxing matches, etc.) or public events of general interest (coronations, processions, etc.).”

The response to the piracy concerns was a treaty that required that “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.” (Article 2) The convention did not extend Direct Broadcast Satellite (DBS) services. The English version of the Brussels Convention has 12 Articles and is just three pages long.

The à la carte approach to measures

The Brussels Convention did not specify a term of protection, and no new economic rights were granted to broadcasters. Contracting states were given a mandate to prevent signal piracy but given flexibility in determining how to accomplish this. “According to the Report of the Conference, it became clear that the Contracting States were left with complete freedom to satisfy this fundamental requirement in whatever manner they felt appropriate. While the obligation of the Convention might well be performed within the legal framework of intellectual property laws granting protection to signals pursuant to the theories of copyright or neighboring rights, a Contracting State could just as rightly adopt administrative measures, penal sanctions, or telecommunications laws or regulations on the subject.”⁶ For some countries, the implementation was through telecommunications law rather than through copyright or related rights.

Exceptions in the 1974 Brussels Convention

The Brussels Convention provided for four types of exceptions, all of which were permissive and not mandatory. These included three exceptions in Article 4: (i) Reports of current events, but only to the extent justified by the informatory purpose of such excerpts; (ii) Quotations, provided that such quotations are compatible with fair practice and are justified by the informatory purpose of such quotations; (iii) An exception for a developing country, where “the distribution is solely for the purpose of teaching, including teaching in the framework of adult education, or scientific research.” The convention also declared in Article 7 that it “shall in no way be interpreted as limiting the right of any Contracting State to apply its domestic law in order to prevent abuses of monopoly.”

Formalities in the 1974 Brussels Convention

Formalities are not addressed one way or another in the 1974 Brussels Convention.

The duration of measures

Article 2 of the Brussels Convention required the duration of protection, if any, to be fixed in domestic law, without providing further guidance. For all of its flexibility, the Brussels Convention left ambiguity as to what it means to protect a “programme-carrying signal” separately from the underlying content being transported. The report of the General Rapporteur described the question of the duration of measures as “a very tough nut to crack” as well as concerns that works in the public domain would be

⁶ Delia Lipszyc, Copyright and Neighbouring Rights. The United Nations Educational, Scientific and Cultural Organization (UNESCO). 1999. page 883. <https://unesdoc.unesco.org/ark:/48223/pf0000120722>. (English translation of Derecho de autor y derechos conexos, published 1993).

protected.⁷

D. The 1974 ILO/UNESCO/WIPO Model Law on the protection of performers, producers of phonograms and broadcasting organizations

While the 1974 Brussels Convention was being concluded, a nearly simultaneous negotiation took place for a model law concerning the protection of performers, producers of phonograms and broadcasting organizations, under the auspices of the Intergovernmental Committee established by Article 32 of the Rome Convention. A draft of a model law was published in 1973,⁸ and a revised version was adopted in Brussels at the Second Extraordinary Session of the Intergovernmental Committee held May 6 to 10, 1974, the first four days of the Diplomatic Conference on the Satellite Convention (held in the same city).⁹

The records of the Brussels Convention¹⁰ make several references to the

⁷ Report of the General Rapporteur. "Paragraph (2): Duration of Measures 85. Throughout the preparatory work on the Convention, from its earliest beginnings in Lausanne, there had been a division of opinion as to whether a minimum limit should be attached to the length of time a Contracting State must take the measures required. At Nairobi, because of the fundamental change in philosophy, additional questions were raised as to whether a provision establishing a minimum term remained appropriate since the treaty was no longer based on private rights. The question finally had to be decided at Brussels, and it proved a very tough nut to crack. Formal proposals dealing with the matter were put forward in the following documents: UNESCO/WIPO/CONFSA/9 (Switzerland); 12 (Italy); 14 (Mexico); 15 (United Kingdom); 17 (Australia); 1-3 (France); 19 (Japan); 21 (Working Group); and 33 (Algeria, Brazil, Central African Republic, Czechoslovakia, Arab Republic of Egypt, Ghana, Guatemala, Hungary, Ivory Coast, Mexico, Morocco, Senegal, Tunisia, Union of Soviet Socialist Republics, Ukrainian Soviet Socialist Republic). 86. The debates on this question began with a series of general statements iterating the various points of view. Those favouring the retention of a minimum term took the position that, without a provision such as Article 3 or the Nairobi draft the Convention could be interpreted either as imposing a permanent obligation with respect to signals that have been recorded, or as presenting the opposite danger: that States might regard their obligation to take "adequate measures" as fulfilled shortly after the satellite emission. Some concern was also expressed as to whether countries party to the Rome Convention could adhere to a convention not requiring a minimum term or twenty years for broadcasts; however, this problem appeared to have lost much of its importance in the context of the Nairobi compromise. 87. Several delegations urged complete deletion of the article on the ground that a provision creating a minimum term would be inconsistent with a treaty carrying no obligation to protect private property rights and leaving States free to decide for themselves the most effective means for preventing distribution of satellite signals by unintended distributors. It was also argued that, although a specified minimum term may be relevant when it comes to the programme-content of a signal, it becomes difficult to apply logically if one is speaking only of the signal as such. Some delegates were also troubled by a legal situation in which new terms would start for particular signals upon each new emission, even though the programme contained in the signal might be old or even in the public domain."

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⁸ Draft Model Law Concerning the Protection of Performers, Producers of Phonograms and Broadcasting Organizations. ILO-UNESCO-WIPO/MLRC/2, June 1, 1973. <https://unesdoc.unesco.org/ark:/48223/pf0000006547?2>.

⁹ Model law concerning the Protection of Performers, Producers of Phonograms and Broadcasting Organizations with a commentary on it, International Labour Organization [1221], World Intellectual Property Organization [661], Published 1981. <https://unesdoc.unesco.org/ark:/48223/pf0000215524>

¹⁰ Records of the International Conference of States on the Distribution of Programme-carrying Signals Transmitted by Satellite. Brussels 6-14 May 1974. Published in

model law negotiations, and in particular, to efforts to moderate or eliminate the opposition of broadcast trade associations to both the Rome and the Brussels convention. The verbatim records included in the Brussels Convention report included several colorful exchanges between representatives of governments, broadcasters, performers, and producers; some are included in ANNEX A.

Exceptions in the 1974 Model Law on Related Rights

The approved version of the Model Law included exceptions that tracked Article 15 of the Rome Convention, including both the Specific Limitations and the exceptions Equivalent to Copyright.

In addition, the Model Act included an additional exception for quotations, not limited to the reporting of current events, which - while a mandatory exception in the Berne Convention - was not specifically mentioned in Article 15 of the Rome Convention itself and was not a mandatory exception in the Universal Copyright Convention.

The 1974 approved Model Law provided more robust exceptions than the draft version published in 1973, particularly as regards the 1973 version's omission of any reference to exceptions equivalent to copyright of the general quotation right.

II. WIPO'S POST-1997 EFFORTS AT UPDATING AND HARMONIZING BROADCASTING RIGHTS

Laws and global norms regarding copyright and related rights have consistently faced demands for changes to accommodate new information technologies. The invention of the printing press, radio, phonograms, television, satellite technologies, consumer analogue and later digital reproduction devices and the growing reliance on Internet-related services have each given rise to new debates on the role of copyright and related rights as well as other forms of regulation and penal sanctions.

A. 1997 to 2007 and the initial SCCR meetings on broadcasting

WIPO adopted two "Internet treaties" in 1996: the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). Both provide a combination of new rights and protections of technological measures to control access and copying of digital versions of works. A majority of delegates at the 1996 diplomatic conference opposed extending these new rights to broadcasting organizations, but in 1997, WIPO co-hosted with the government of the Philippines a meeting in Manila to consider both the protection of the rights of broadcasting organizations and possible

1977 by the United Nations Educational, Scientific and Cultural Organization. 7 Place de Fontenoy, 75700 Paris and the World Intellectual Property Organization 32 Chemin des Colombettes, 1211 Geneva 20, Unesco/WIPO 1977, ISBN 92-3-101465-X (Unesco), Publication no. 331(E) (WIPO) https://www.wipo.int/edocs/pubdocs/en/wipo_pub_331.pdf

harmonization of such rights.¹¹ There was no agreement on the means of achieving such harmonization, but this meeting did lead to a workstream at WIPO on “updating and harmonization of the rights of broadcasting organizations.” Today, some 26 years later, WIPO members remain divided on the need for or nature of a new instrument.

The early proponents for a treaty on broadcasting included different regional traditional broadcasting associations, including two major groups from Europe, one representing public broadcasters and the other, their commercial competitors, as well as large media conglomerates such as Paramount, Fox, Time-Warner, Universal, Vivendi, and their trade association, the Motion Picture Association (MPA). These groups sought an extension and enhancement of the broadcaster rights, to be applied to a wider array of platforms. Lining up against the broadcaster/media conglomerates lobby initially were groups representing performers and phonogram producers, and a broad coalition of consumer and user rights groups, as well as several large technology companies. As the negotiations on a broadcast treaty entered the 26th year, the coalitions of governments and stakeholders supporting and opposing the broadcast treaty have evolved, as have the proposals.

The initial SCCR meetings on broadcasting

The first SCCR meeting in November 1998 (SCCR/1) included three items from the so-called digital agenda:

- Protection of Audiovisual Performances;
- Protection of Databases
- Protection of the Rights of Broadcasting Organizations.

The paper on broadcasting was SCCR/1/3, titled “Existing International, Regional and National Legislation Concerning the Protection of the Rights of Broadcasting.” By the second meeting of the SCCR in 1999, eight papers were presented on broadcasting.¹²

As reflected in the report from the meeting (SCCR/2/11), a wide range of views were expressed, setting the stage for more than two decades of negotiations on a topic that still divides stakeholders and government negotiators. In 1999, the discussions focused primarily on debates over which new economic rights, if any, broadcasters would be entitled, with considerable pushback and opposition from groups representing authors, performers and

¹¹ WIPO World Symposium on Broadcasting: New Communication Technologies and Intellectual Property, organized by the World Intellectual Property Organization (WIPO) in cooperation with the Government of the Philippines and with the assistance of the Kapisanan ng mga Brodkaster ng Pilipinas (KBP) (National Association of Broadcasters of the Philippines) Manila, April 28 to 30, 1997. https://www.wipo.int/edocs/pubdocs/fr/wipo_pub_757.pdf

¹² SCCR/2/5, Member States of WIPO and the European Community; SCCR/2/6, ABU, ACT, AER, IAB, ASBU, CBU, EBU, NAB, NANBA, OTI and URTNA; SCCR/2/6 ADD, NAB-JAPAN; SCCR/2/6 REV; SCCR/2/7 Mexico; SCCR/2/8 United Nations Educational, Scientific and Cultural Organization (UNESCO); SCCR/2/10 Rev, Bosnia and Herzegovina, Bulgaria, Croatia, the Czech Republic, Hungary, Lithuania, Romania and the Slovak Republic; SCCR/2/12, Cameroon

producers of phonograms and audio-visual works. The Digital Media Association (DiMA) asked that any new treaty extend benefits to webcasting organizations. While issues regarding signal piracy were discussed, they were not the leading concerns.

In the decades since the 1997 meeting in Manila, WIPO has hosted several technical meetings, regional consultations and negotiating sessions, and has considered more than one hundred papers, reports and drafts of treaty text relating to broadcasting. These are referred to in the Annex, “KEI Briefing Note: WIPO Documents on Broadcasting from 1997 to 2022.”

B. Broadcasters vs. everyone else

The initial proposals for a broadcast treaty largely focused on creating new related rights for broadcasters, including on content that broadcasters did not create, own, license, or remunerate, with terms that would last for decades and begin with every broadcast. Broadcasters also wanted to have the right to commercialize fixations of those broadcasts. Authors, performers, and producers of phonograms were generally opposed to granting broadcasters such rights, which they saw as a threat to their own interests and control over works.

Consumer and user rights groups, libraries and some technology firms opposed the broadcasters’ proposals for an additional layer of rights on the grounds that it would make it more difficult and more expensive to clear rights, creating new risks of infringement even when works were in the public domain or otherwise available from copyright holders. The provisions on digital rights management and technical protection measures, the prohibition on formalities and the narrow exceptions permitted also received criticism from these stakeholders.

The different views of stakeholders were illustrated most starkly in the first decade of the negotiations as illustrated, for example, in the following documents: (i) The Secretariat report from the 11th Session of the SCCR (SCCR/11/4), held June 7 to 9, 2004, provides a useful reference to the argument of the broadcasters as well as the opposition to the treaty from a broad coalition of NGOs representing authors, performers, filmmakers and producers, as well as consumer, library and digital rights groups. Excerpts from the statements are included in ANNEX 1.

In June of 2004, 13 organizations representing rights holders sent a joint letter to delegates, reacting to the then-current Consolidated Text for the Protection of Broadcasting Organizations drafted by the Chairman of the SCCR. A link to and excerpts from the joint letter are attached in ANNEX 2.

A 2004 Open Letter to WIPO delegates from 20 technology firms opposing the treaty. The signatures on the letter included Mark Cuban, then-owner of \$500 million in copyrighted video works, and the technology publisher Tim O’Reilly. The 2006 statement on the WIPO Broadcast Treaty by Intel, attached as ANNEX 3. At the 15th SCCR meeting held September 11 to 13, 2006, SCCR Chair Jukka Liedes provided accredited NGOs the opportunity to submit written statements for the record. These were published as SCCR/15/4 and

include several joint position papers.

C. 2008 to 2013

From 2008 to 2013 the broadcast treaty took a back seat to negotiations on new treaties for performers and persons with disabilities. In 2012 WIPO held a successful diplomatic conference for the WIPO Beijing Treaty on Audiovisual Performances. In 2013 a diplomatic conference produced the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled.

D. 2014 to present

The first decade of WIPO negotiations saw an increasing and impactful engagement by civil society groups and technology companies, and a strong coalition among the creative communities in opposing broadcaster demands for making available and post-fixation rights in works they did not create, license, own or remunerate. From 2014 on there were important changes.

Several of the civil society groups that attended WIPO from 2003 to 2008 stopped attending during the period when the focus was increasingly on the important but narrow topic of exceptions for persons who were blind. Technology companies no longer monitored the SCCR meetings, partly due to negotiations dragging on for decades, and also thinking there was a small probability the broadcast treaty negotiations would get to a diplomatic conference.

Broadcasters were able to make significant changes in the positions of countries that had been critical of a durable broadcasters' right, narrowing the opposition to holding a diplomatic conference. Groups representing authors, performers and producers offered less resistance, often attributed to the impact of vertical integration in global media firms. Internet streaming services experienced explosive growth in many countries. Internet streaming of sporting events, major and minor, became more commonplace. Broadcasters increasingly insisted on rights associated with on-demand internet streaming.

III. THE EXPLOSIVE RISE OF INTERNET STREAMING

A number of factors have contributed to the dramatic growth in Internet streaming services, but the most important have been the enhancements in access to affordable high-speed Internet connections. The growth of social media services combined with the widespread use of smartphones with high-quality video cameras has also played an important role in the increasing role of user-generated content.

A. Music

Spotify, a music streaming service, was launched in 2006. In the first quarter of 2022, Spotify reported 422 million monthly active users, including 182 million paying subscribers. Spotify continues to grow, but so do several competitors. Apple Music, Amazon Music, and YouTube music are among the leading U.S.-based competitors owned by technology companies that have a

market valuation of more than one trillion U.S. dollars. Other major competitors include the Tencent Music Entertainment Group, which claims more than 800 million active users and 120 million paying subscribers, and a multitude of other services including several with global reach such as Tidal, and the French services Qobuz and Deezer and Internet radio platforms like Tunein or Radio Garden. The services compete on the appeal of the user interface, the catalog of available music, price, user engagement and sometimes the methods of remunerating artists or labels. Soundcloud, a service with more than 175 million global users, is known for its interactions between artists and listeners. Tidal, initially launched and owned by famous artists, claimed higher audio quality and a more favorable remuneration system for artists. There are countless other services, some local such as Pandora in the United States, Portaldisc in Chile, LINE Music, AWA or RecoChoku in Japan or Melon in Korea, and others with global ambitions.

According to the IFPI annual report on the market for record music, in 2021, 65 percent of all revenues from recorded music came from either subscription- or ad-supported streaming services, reflecting an increase in streaming revenue of 24.3 percent over 2020.¹³

B. Streaming movies and television programs

Netflix began as a service that lent DVD versions of movies to subscribers through the mail. In 2007 Netflix introduced Internet streaming and increased its number of subscribers by 80 percent. Netflix expanded to Europe in 2012, and in 2013, began developing original programming to supplement the licensed content. By 2021, Netflix reported 222 million subscribers globally, including 147 million outside of North America. Today there are a large number of streaming services, including a handful of giant companies, some owned by or sharing ownership with the best-known media conglomerates such as Disney or Paramount, or technology companies like Apple, Amazon, or Alphabet, as well as a plethora of competitors or partners. In China, the leading streaming services are Tencent Video, with 115 million subscribers, iQiyi with 105 million subscribers, and Youku, with 85 million subscribers. BBC, Britbox and ITV are the leading UK-based streaming services. As is the case for other streaming services, mergers and acquisitions have been important, including cases where smaller firms with a national or regional focus are acquired by larger multinational firms. For example, Hotstar, a leading streaming service in India, was acquired by Disney in 2020. In evaluating the future of streaming for movies and television programs, Paramount has expressed the opinion that economies of scale, including in terms of licensed content, will determine the success of competing services.

¹³ IFPI Global Music Report: State Of The Industry 2022.

https://www.ifpi.org/wp-content/uploads/2022/04/IFPI_Global_Music_Report_2022-State_of_the_Industry.pdf

The video-on-demand model is now so dominant a model that scheduled programming is widely seen as largely obsolete, and “straight to video” is no longer a description of low-budget or low-quality feature films. In addition to the subscription services, there are hybrid offerings like Hulu that offer tiers with or without advertisements, and a growing set of free advertising-supported streaming services.

C. Streaming news and sporting events

If there has been a compelling reason to watch over-the-air and subscriber cable broadcasting it has been the access to reporting on news and live sporting events. Today many people follow news through links to a video shared on social networks, some but not all originating from traditional broadcasting and news services, as well as from broadcasters’ own web pages and a new generation of Internet-only streamed news services. Reporting and commentary increasingly involve a large number of individuals or small groups not affiliated with traditional news outlets that create their own videos or audio-only shows (including but not limited to those described as podcasts), and many involve high production values and sophisticated reporting, with both niche and vast audiences.

Sporting events are also undergoing a profound transition, as even the best-known and most profitable events are available through Internet streaming. Large technology companies like Amazon, Yahoo, or the leagues themselves have become significant actors. Nearly all if not all major sports leagues offer some streaming options, making it possible to follow events from smart television sets or devices, computers, mobile phones or tablets. Not only can one find legitimate services for major sports leagues or events like the Olympics (where streaming provided access to far more events than the ones available from traditional broadcast channels), but also to a much greater diversity. One can find minor local events, such as a high school match, and a much broader array of events being streamed than one would ever find on traditional broadcast stations.

D. Adult Content

Among the most widely used streaming services are those featuring adult content, such as Pornhub, the 10th most popular website in the world in 2021 with 2.3 billion visits per month,¹⁴ XVideos (the 13th most popular site) and countless competitors. Adult content sites may offer live broadcasts and various types of audience interactions. They are noted here because these sites are likely beneficiaries of any new WIPO broadcaster rights.

E. Podcasts

Many of the music and video streaming services now feature podcasts, a category growing in popularity. The top podcast in the world is the Daily,

¹⁴ <https://www.statista.com/statistics/1201880/most-visited-websites-worldwide/>

which is produced five days a week by the New York Times, and is available through multiple music streaming platforms. Countless other news outlets feature their own podcasts, such as *Estadão Notícias*, by the Grupo Estado in Brazil, *SPIEGEL Daily* in Germany or *Today in Focus* by the Guardian in the U.K. But podcasts have such a low barrier to entry that almost anyone can create one and millions do. The topics are as varied as our imagination and interests, from religion to science, culture to business, current events to ancient history, cooking to car repairs, and everything else. Initially, podcasts were primarily audio only, but today many are video podcasts, sometimes referred to as vodcasts. Examples of video podcasts on YouTube include Marques Brownlee (16.7M subscribers), Professor Dave Explains (2.39M subscribers), Engineering World (554K subscribers), the Honest Carpenter (717K subscribers), and Just Have a Think (482K subscribers), to mention a few of the countless well produced offerings.

F. Social media platforms and user-generated content

When the WIPO SCCR was created in 1998, the term user-generated content was barely used. Today the world is awash with user-generated content uploaded and shared on social networks both large and small. Everyone with a smartphone is potentially a video producer. The scale of user-generated content is enormous. While a cable channel is limited to 24 hours of programming per day, YouTube receives more than 500 hours of new videos uploaded every minute and claims more than 1 billion hours of videos watched every day. Meta claims 2 billion persons use Facebook every day for a variety of purposes including to view many of the videos uploaded by its users. Instagram (also owned by Meta) reports 1.4 billion daily users, and TikTok has joined the billion users club. Snapchat, Pinterest and Twitter, and among a handful of the countless platforms, large and small, that share audiovisual content, including through live, scheduled and on-demand access. Twitter claimed 229 million in “monetizable daily active usage” in the first quarter of 2022, including, for example, these¹⁵ recent ones from WIPO, or these¹⁶ on the COVID-19 pandemic.

The January 6th, 2021 insurrection in the United States, Ukrainian war events, car accidents, graduation ceremonies, press conferences, panel discussions, WIPO SCCR meetings, city council meetings, court proceedings and countless other subjects are captured on video and uploaded to be streamed on social network sites all around the world. The pandemic created the motivation for much of the world to learn to use video streaming services such as Zoom, Google Meet, Microsoft Teams or Facebook Live. Education that was interrupted by the pandemic continued online, using a variety of streaming platforms.

G. Computer gaming

Among the largest streaming services in the world is Twitch, an online

¹⁵ https://twitter.com/search?q=wipo&src=typed_query&f=video

¹⁶ https://twitter.com/search?q=covid&src=typed_query&f=video

platform for streaming, with an emphasis on social interaction among video gamers. Twitch has claimed to have 2.5 million viewers “at any given moment,” including 31 million daily visitors, and to have streamed 1.3+ trillion minutes of gaming in 2021. The platform also has other uses, including these major categories: *gaming, music, eSports, Creative and IRL (chatting and beyond!)*.¹⁷

Twitch is owned by Amazon, a company with a market cap of nearly one trillion U.S. dollars. Other platforms for streaming gaming include Beam, Azubu, Bigo Live, YouTube Gaming, Facebook Gaming, Afreeca, Disco Melee and Gosu Gamers. As WIPO stated recently, the video gaming industry is larger than the movie or music industries. Some games include original music scores, actors, and interactive content that is creative, innovative, and often expensive to produce. The more elaborate games involve characters that claim various types of intellectual property protection, actors, original scores, and large teams of programmers, as well as substantial marketing investments. Some individuals who stream their own game playing on Twitch earn millions of U.S. dollars per year, through a combination of advertising income, subscriptions, and donations from fans.

H. Creative Commons and other free/open licensing models

The Internet relies extensively on software that is either in the public domain or available under a variety of free or open-source licenses. Beginning in the 1990s and accelerated with the publication beginning in 2002 of several Creative Commons copyright licenses, there has been a dramatic increase in the number of works that are voluntarily made available without remuneration. The various Creative Commons licenses are used for text, photographs, music and video, typically using a “some rights reserved” approach, where the work is partly free and partly subject to private rights.

Creative Commons publishes several licenses that require attribution. Some of the licenses are limited to non-commercial uses, while others permit commercial use. Some of the licenses require a “sharealike” obligation so that works that are based upon the Creative Commons “sharealike” license will carry the same license. The NoDerivs licenses prohibit the redistribution of works that remix, transform, or build upon the licensed content.

Significant for the WIPO debate on a broadcasting treaty, the Creative Commons attribution licenses also include restrictions on the use of other legal terms or technological measures that legally restrict others from doing anything the Creative Commons license permits. The obligation is described as follows:

Application of effective technological measures by users of CC-licensed works prohibited

All CC license versions prohibit licensees (as opposed to licensors) from using effective technological measures such as

¹⁷ Respectively, <https://www.twitch.tv/directory/gaming>, <https://www.twitch.tv/directory/music>, <https://www.twitch.tv/directory/esports>, <https://www.twitch.tv/directory/creative> and <https://www.twitch.tv/directory/irl>.

“digital rights management” software to restrict the ability of those who receive a CC-licensed work to exercise rights granted under the license. To be clear, encryption or an access limitation is not necessarily a technical protection measure prohibited by the licenses. For example, content sent via email and encrypted with the recipient's public key does not restrict use of the work by the recipient. Likewise, limiting recipients to a set of users (e.g., with a username and password) does not restrict use of the work by the recipients. In the cases above, encryption or an access limitation does not violate the prohibition on technological measures because the recipient is not prevented from exercising all rights granted by the license (including rights of further redistribution) (...)

Note that in 4.0, CC introduced a definition of Effective Technological Measures. This definition is not intended to change the scope of what is and is not allowed, but instead, provide long-needed clarification over the scope of the prohibition.¹⁸

There is also CC0 license option, described as a Universal Public Domain Dedication, or a deed, to dedicate the work to the public domain by waiving all rights to the work worldwide, including related rights, to the extent allowed by law. Some funding agencies attach open licensing conditions to works. Works created by employees of the United States are in the public domain, and not protected by copyright.

1. Differences between traditional broadcasting and Internet streaming

There is an impressive diversity of services delivered over the Internet, and for some services, considerable innovation. There are differences in user interfaces, business models, available content and the interaction between creative communities and audiences.

Traditional radio and television broadcasting, as it existed in 1961 when the Rome Convention was adopted, was primarily available from broadcasters with residency in the same country, and available to anyone without a subscription. In many countries, the broadcasters were also required to provide some public services, such as programming of news and public affairs. It was a free one-way communication.

Cable and later Direct Broadcast Satellite (DBS) services introduced the possibility of paywalls and subscriber payments, eliminating the most important rationale for the broadcaster rights in the Rome Convention, and leading to an exemption from the Brussels Convention on the distribution of program-carrying signals transmitted by Satellite (Article 3).

Internet streaming services today are quite different from anything available from traditional broadcasters or even the cable industry. The scale and variety

¹⁸

Creative

Commons

https://wiki.creativecommons.org/wiki/License_Versions#Application_of_effective_technological_measures_by_users_of_CC-licensed_works_prohibited

of available content is vastly greater. Internet services can be delivered to discrete audiences, by geographic region or interest, or unlike traditional wireless or cable broadcasters, made available globally. For the majority of users globally, the platform streaming the content is based in a foreign country.

Internet streaming services have used artificial intelligence to create specialized offerings for individuals, targeted advertising, and new and sometimes extensive opportunities to interact and engage audiences. Traditional broadcast television was generally received on traditional television sets, and traditional radio was generally received through traditional radio receivers. Traditional cable services often required special set-top devices to decrypt signals for use on traditional television sets. The new Internet streaming services, in contrast, can be used on television sets equipped with appropriate and widely available software, or through streaming devices such as Apple TV, Roku, Amazon Fire, Chromecast or Google TV, and also on mobile phones, tablets, Apple or Android software, personal computers and other devices.

Traditional broadcasting services have seen declining market share in many markets, while Internet streaming services are experiencing dramatic growth. Traditional broadcasting organizations and even some cable companies often benefit from the broadcaster neighboring rights, in some national markets, including the 96 countries that have joined the Rome Convention. The new Internet streaming platforms have attracted investors and enjoyed spectacular growth without such related rights.

In their 2004 open letter opposing extending the broadcasting right to webcasting, Mark Cuban and other technology companies described the Internet sector as “famously, legendarily well-capitalized from angels, venture capitalists, public markets, private investors, governments and every other source of capital imaginable.” The fact that these new streaming services have grown so fast, without any special neighboring rights for streaming, speaks volumes.

IV. RISKS PRESENTED BY A NEW WIPO TREATY ON BROADCASTING

The evaluation of the benefits and risks presented by a new WIPO broadcasting treaty is complicated by the constantly evolving nature of the proposals, as illustrated by the attached ANNEX: WIPO Documents on Broadcasting from 1997 to 2022.

Among the most important issues to be resolved in the negotiation are the beneficiaries, the object of protection, the nature of the protection (including any new rights created by the treaty), the term, if any, of the protection, and the exceptions to those rights.

A. The text is not focused on tools to address piracy

To the extent that the treaty provides a thin temporary protection against the piracy of a scheduled broadcast of content, there is little opposition and possibly some new benefits in fighting piracy of broadcasts that are not already in place through existing copyright and related rights treaties. That said, the actual gaps in protection have not been explained. Most of the broadcast piracy

concerns relate to subject matter that is already protected by copyright or related rights.

Anything that is protected by existing copyright and related rights already benefits from a host of intellectual property rights in existing treaties including the Berne Convention, the Rome Convention, and the WTO TRIPS Agreement, as well as three “WIPO Internet treaties,” including the WIPO Copyright Treaty (WCT), the WIPO Performances and Phonograms Treaty (WPPT) and the WIPO Beijing Treaty on Audiovisual Performances (WBTA). Each of the WIPO Internet treaties have protections for technical protection measures and Digital Rights Management (DRM) Information.

It is sometimes asserted that live programming for news and public affairs, music and theatrical performances or sporting events are not protected by copyright in some jurisdictions. If so, that is normally by design or where contracts or some existing related rights protect rights. When challenged on this issue, the treaty proponents were unable to identify a single country where it was legal to pirate broadcasts of live sporting events.

No one argues that piracy of broadcasting is not a legitimate concern, but it has been frustrating to see little effort to connect those concerns to the treaty text, or more important, to focus on measures that deal with piracy only.

B. Economic rights, if any, come at the expense of the rights of holders of copyright or performer rights

During the first decade of the debate on the broadcast treaty, every association representing authors, performers or producers of phonograms aggressively opposed the inclusion of any economic rights that would come at their expense, either by dividing collection society revenues or by eliminating their bargaining power in contract negotiations.

These groups were as concerned about piracy as the broadcasters, but argued that economic rights were not necessary to address piracy concerns. Below is an excerpt from a 2004 letter signed by 13 rights holder organizations:

The Consolidated text for the Protection of Broadcasting Organisations drafted by the Chairman of the SCCR, Joint Reaction of Rights Holders, June 2004:

- (i) Some of the rights proposed are not required for the fight against piracy at all, in particular when they extend to fixations of the signal that have been authorised by the broadcaster itself; and
- (ii) The catalogue of rights in the consolidated text draws, on the one hand, from the structure and "content related rights" provided in the WCT and WPPT and, on the other hand, from more specific "signal related rights". This "double approach" results in partly overlapping rights (e.g., the making available right and the transmission from a fixation right).

All in all, the rights are drafted in a manner that is unnecessarily

broad and that leads to the unprecedented situation where the rights of broadcasting organisations are set at a higher level than those granted to authors (both in the Berne Convention and the WCT) and to performers and producers (in the Rome Convention and the WPPT). In practice, this risks leading to situations where the exercise of rights in the underlying content (in particular when such rights are not exclusive) will be prejudiced by broadcasters' use of their new exclusive rights for commercial purposes (e.g. in the case of a sweeping retransmission right).¹⁹

The traditional broadcasting organizations have frequently rejected efforts to narrow the treaty to only address streaming piracy concerns, insisting on a new layer of rights that compete with and in some cases exceed the economic rights enjoyed by authors and performers, and making it more costly, complex and time consuming for users to obtain permissions to use streamed content.

Every draft of the treaty has proposed a new layer of rights that is based upon the absolute elimination of an obligation by streamers to create, license, compensate or own any of the streamed content. This is not an oversight. During the negotiations, there have been frequent proposals to include provisions that limit the broadcaster rights to content which the broadcaster created, owned, or licensed, and none of these have been acceptable to broadcasters, even though such a condition is in the interests of the authors and performers.

Also, while some drafts of the treaty provide considerable national flexibility in implementation, Article 5 on national treatment creates an upward ratchet to harmonize on the implementation most favorable to the broadcasters and least favorable to authors and performers.

C. The duration of protection may exceed the terms for author or performer rights

The duration of post-fixation rights has changed over time. In some drafts, the term was a minimum of at least 20 or 50 years, from the date of each broadcast. In that formulation, a user would have to wait 20 or 50 years from each recording to use the work without permission from the broadcaster, effectively extending the protection beyond that available to authors or performers and providing the broadcasters with what in practice were perpetual rights, given the challenges of recording and storing content for 20 to 50 years for future uses. In a 2023 draft text, there is no specified term, but a right of fixation, making it appear as though the broadcaster right is permanent, and not limited in time.

As noted in the Report of the General Rapporteur for the 1974 Brussels Convention quoted above²⁰, this is not a new area of confusion. The Rapporteur

¹⁹<https://web.archive.org/web/20061102033752/http://www.cptech.org/ip/wipo/bt/rightsholders062004.pdf>

²⁰ Records of the International Conference of States on the Distribution of Programme-carrying Signals Transmitted by Satellite, Brussels, UNESCO/WIPO, 6-21 May

referred to duration of protection as “a very tough nut to crack,” noting that “the treaty was no longer based on private rights.”²¹

The Rapporteur noted that some states “might regard their obligation to take “adequate measures” as fulfilled shortly after the satellite emission,” but others might interpret the text “as imposing a permanent obligation with respect to signals that have been recorded.”²² It was noted that “Several delegations urged complete deletion of the article on the ground that a provision creating a minimum term would be inconsistent with a treaty carrying no obligation to protect private property rights,” and further that “Some delegates were also troubled by a legal situation in which new terms would start for particular signals upon each new emission, even though the programme contained in the signal might be old or even in the public domain.”²³ The concerns expressed in the 1974 Brussels Convention regarding over protection are not resolved in any of the treaty drafts.

D. New layers of rights that run parallel to rights of authors and performers will prejudice interests of users and create more orphaned works

The proposed new layer of rights to broadcasters for content they do not create, own or license, makes it more difficult for users to clear rights, and also creates new risks that a user can be sued for infringement, even when the holder of a copyright or performer right does not object to the use. It is already challenging to clear rights for use in films, documentaries, public affairs programming and in social media, when dealing with holders of copyright and performer rights. By adding a new corporate entity into the mix, the rights thicket becomes more complicated, and more time consuming and expensive to clear. The risk of creating more orphaned works also becomes greater.

When broadcaster rights were limited to analogue television and radio broadcasts and recording technologies, and the challenges of producing audiovisual works were significant, these problems existed, but were not a significant concern for most people. Now, things are very different for several obvious reasons discussed below.

E. The definitions of broadcasting and broadcast organizations cover a much larger set of entities and activities

Traditional radio and television broadcasting was typically a regulated activity, requiring some non-trivial capital investment and operating costs. Today, anyone with a mobile phone is in possession of a device that can record high-definition audiovisual content and publish that content on countless platforms. The expansion of broadcasting from radio and television to Internet streaming is like the difference between sending a handwritten letter through the post office and sending an email, only even more dramatic. The massive,

1974.

²¹ *Id.* Paragraph 85.

²² *Id.* Paragraph 86.

²³ *Id.* Paragraph 87.

almost unimaginable explosion of Internet streaming goes far beyond services like Paramount+ or HBO Max, when one looks at the astounding growth of the platforms where streamed media is published, and the types of content streamed.

In its misguided effort to make the rights “technology neutral,” the negotiators are proposing to create a new layer of rights in billions and billions of streamers of content, on radically different platforms. What may have been of limited interest to the audiences of over the air free television and radio in 1961 is now a threat to a much wider and more important flow of information, with the potential for vast unintended consequences.

WIPO itself has streamed content on a variety of platforms, including on YouTube, where WIPO has its own “channel,” and on Facebook, Twitter and Instagram. To use video from those sites, a user would have to clear rights from WIPO or its contractors, but also from companies like Meta or Twitter, which had nothing to do with the creation of the content. KEI has uploaded hundreds of videos to YouTube, some involving considerable effort in creation and editing, and for many of these videos the only available copy is on YouTube. KEI itself would have to clear rights to repurpose our own productions. This is a problem that performers are concerned about, if broadcasters have an exclusive right to fixations, but it’s also a much broader problem for a public that depends upon these platforms to host and stream information.

In the United States, it is very common for local, state or federal government agencies to have channels or accounts on social media sites, often to stream government meetings or public service information. Why should Google, a company with a market cap of over one trillion dollars, need to be given an exclusive right of fixation of a video of the Arlington County Annual Tribute to Rev. Dr. Martin Luther King, or the Boston City Council video of the November 7th, 2022, City Services & Innovation Technology Hearing? Who owns the viral cell phone videos of the January 6th, 2021, storming of the U.S. Capitol? CNN, NBC, YouTube, Facebook, or Instagram, or all for the same video if the fixation moved from one to the other, as they often do? How will anyone know 30 years from now if a copy of a video was fixed from which platform or series of platforms?

Whether a video stream is from a well-established broadcasting organization, a government agency, a Facebook-streamed family event or someone's personal Instagram account, the platform can qualify as a broadcasting organization, so long as transmitters are not “distributors that merely retransmit for the reception by the public.” The bar to qualify as a broadcasting organization does exist, but it is extremely low, and progressively lower in recent drafts than in earlier versions.

The content is considered a “programme” if it is “live or recorded material consisting of images, sounds or both, or representations thereof,” which covers pretty much anything, including videos of dripping water or songs generated by some machine. It certainly includes public affairs and material in the public

domain.²⁴

“Broadcasting” is defined as “by any means,” including over the Internet, and when content is encrypted, and “the means for decrypting are provided to the public by the broadcasting organization or with its consent,” two conditions that suggest subscription services supported by advertising or payment by end users.

The protection extends to transmissions “in such a way that members of the public may access them from a place and at a time individually chosen by them,” so broadcasting is not just one to many, it is also one to one.

F. Some broadcasters incorrectly think they will be net beneficiaries of new rights

In the 1996 WIPO negotiations on a sui generis database treaty, some database companies initially supported an instrument that would grant them new rights. The database treaty proposal was very similar to the broadcast treaty proposal in that the database companies were distributing information that they typically did not own, including information that was in the public domain or otherwise not subject to intellectual property rights. The WIPO proposal, similar to the much criticized²⁵ EU directive on the legal protection of databases,²⁶ creates a right in the copy of a database element retired from the database vendor, even when the element itself is not created, owned or licensed by the vendor. In theory, the public can obtain the data from the original source, although often this is either impossible or impractical.

What changed in the 1996 negotiations was the analysis by large U.S. database companies on how the treaty would change the terms under which they acquired the database elements. A complex, costly new thicket of rights would be created for data, which would make it more difficult, time-consuming, and costly, and in some cases impossible, to acquire many database elements. As a consequence of this evaluation, Dun & Bradstreet and Bloomberg both joined the opposition to the treaty, which died at the 1996 diplomatic conference.

The primary lobby for the WIPO broadcasting treaty are owners of

²⁴ There is also some question of to what degree, if any, does the definition of a programming signal even limit the new right to audiovisual content, since images alone are protected, and while perhaps unlikely, this could be interpreted to include text or photo albums, particularly since the draft text has eliminated the requirement that the beneficiaries of the protection hold regulated broadcast licenses.

²⁵ Beunen, A. C. (2007, June 7). Protection for databases : the European Database Directive and its effects in the Netherlands, France and the United Kingdom. Wolf Legal Publishers, Nijmegen. Retrieved from <https://hdl.handle.net/1887/12038>; Abuse of Database Right: Sole-source information banks under the EU Database Directive. <https://www.ivir.nl/publicaties/download/abuseofdatabaseright.pdf>;

²⁶ Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A31996L0009>

traditional television and radio stations. These groups have apparently viewed the proposals as in their interests, and perhaps on balance they are. However, it is not uncommon for broadcasters to use audiovisual content, without permission or compensation, from a variety of Internet platforms, as well as content from other broadcasters. In some jurisdictions, such as the United States, some but not all those activities can benefit from the fair use exception in U.S. law for copyright. Outside the United States, and to the extent that the markets for streaming are becoming more international and less national in audiences, this may not be the case.

For platforms that depend upon user-generated content, the ramifications of the treaty need analysis, particularly when users share information across platforms, and from one user to another. Not only will platforms be liable for infringement by holders of the copyright, if any, on the shared content, but they can be liable to clearing the fixation right from any and all other streaming sites the content may have been copied from. This liability will also extend to content clearly in the public domain as far as copyright or performer rights are concerned, or where the creator of the content wants the information shared.

KEI is one of countless groups that create audiovisual content, and hope and pray the content will go viral. This is true regardless of the political or policy views of the group, and extends to companies seeking to use social media to promote products or brands. All these cases present new risks to the platforms where user-generated audiovisual content is now shared.

G. The draft treaty conflicts with the notion of a public domain, or the right of authors or performers to enable the public to use and reuse or share works

The proponents of the treaty have a narrative that the protection only extends to a “signal” and not the underlying information itself. But by claiming that “during the moment of fixation, the programme-carrying signal is still a live signal,” and that the broadcaster has an exclusive right for that fixation, the notion of and the benefits from the public domain are changed. A work is then only in the public domain if the public has access to the work from someone other than a broadcasting organization, something that can be time consuming, costly or impossible.

At present, authors and performers can provide the public with access to works through a variety of licensing options, including the various Creative Commons licenses, which are widely used. The broadcaster right conflicts with such licenses.

Negotiators have been made aware of the conflicts between the public domain and the public’s rights under access promoting licenses and have been asked to provide assurances that such works would not be subject to exclusive rights of any kind by the broadcasters. This has not happened.

H. By extending the definition of broadcasting organizations, the draft will create global concentration of rights

The definition of a broadcasting organization has evolved over the course

of treaty drafts, to eliminate any reference to the status of traditional broadcasting organizations. The only requirements are that the organization is a legal entity that takes the initiative and responsibility for the assembly and scheduling and transmission of programmes. In the SCCR/43/3 explanatory notes, “the definition of a broadcasting organization is completely technologically neutral.” (Note 2.09).

The practical impact of a low standard that is technologically neutral is to turn the instrument into a new Internet treaty. On the one hand, the Internet includes the most diverse and numerous numbers of publishers the world has ever seen, by a huge margin. On the other hand, it has also given rise to a handful of giant companies that host the streaming of audio-visual content. Before Internet streaming became popular, the public received broadcasts from traditional television and radio stations, and later from cable television and direct broadcast satellites. In many countries, radio and television stations were owned by companies that were considered domestic in ownership, management, and location of headquarters. The new Internet streaming services and platforms, on the other hand, are often foreign companies, and are increasingly dominated by a handful of very large firms.

Ironically, the largest beneficiaries of the new broadcaster right, companies like Alphabet, Amazon, Meta, Spotify,²⁷ Tik Tok, and a host of others, are not actively lobbying for the agreement. Some have indicated that they see the proliferation of new rights and liabilities for infringements as a net negative. These companies use encryption, passwords, and existing copyright laws to address concerns over unauthorized uses.

I. The cross-border nature of Internet services undermines the case for radically different broadcasting rights

The most recent draft text provides, in Article 10, considerable flexibility in providing “Other Adequate and Effective Protection” for broadcasts.

“Any Contracting Party may apply the provisions of Articles 6, 7, 8 or 9, or all of them, only to certain retransmissions or transmissions, or limit their application in some other way, provided that the Contracting Party affords other adequate and effective protection to broadcasting organizations, through a combination of the rights provided for in Articles 6 to 9 and copyright or other rights or other legal means.”

While this is better than no flexibility, given the problems with the broadcaster right, it does suggest one outcome is a fairly diverse range of implementations. When publishing on the Internet, audiences are increasingly international. The fact that something may be not subject to a broadcaster right

²⁷ Tim Ingham, Who Really Owns Spotify? According to a flurry of new SEC filings, financial giants now claim big chunks of the streaming service, Rolling Stone, February 23, 2020, <https://www.rollingstone.com/pro/news/who-really-owns-spotify-955388/>

in the United States provides no assurance that the right won't be recognized in another country, where a stream is transmitted. Large companies like Alphabet, Amazon, Meta or Spotify will find it easier to comply with a hodgepodge of national laws than will a smaller company.

J. The limitations and exceptions proposed are too narrow

The limitations and exceptions provisions in Article 11 of the SCCR/43/3 are narrower than exist for copyright. The specific exceptions in paragraph 1 are welcome, but permissive and not mandatory. Paragraph 2, regarding "the same kinds of limitations or exceptions" that are in the national law for copyright and performer rights is permissive, and not mandatory, leaving the possibility that the broadcaster right can have worse exceptions than exist for copyright or performers rights. This makes no sense, given the weak claim the broadcasters have to any rights in content they don't create, own or license.

1. The restrictive three-step test

Making everything worse is paragraph 3, which includes a restrictive version of the three-step test, which will be applied to all exceptions, including the exceptions now found in the Rome Convention, which has no three-step test, or the exception in the Berne Convention, which has no three-step test, such as the mandatory exception for quotations and news of the day in the Berne Convention, and the teach and research exception in the Berne, which is also not subject to a three-step test.

There is no reason for a three-step test in this treaty. There was no three-step test in the 1961 Rome Convention or the 1974 Brussels Convention. There is also no clarity over what the three-step test even means, or what are the "legitimate interests of the broadcast organization".

The broadcast treaty is to protect investment, not creativity. Broadcasters do not deserve to be treated the same way that authors and performers are. In the WTO TRIPS agreement, when a three-step test was introduced, it was not as restrictive for patented inventions as it was for copyright and related rights. For example, for patented inventions, the TRIPS Agreement provides for reasonable conflicts with normal exploitation, and for "taking account of the legitimate interests of third parties." And more significantly, the three-step test in the TRIPS is for exceptions not found in the Berne Convention, so it does not apply to the quotation, news of the day, public affairs or education exceptions in the Berne Convention.

Even more significant for the TRIPS, unlike in the case for copyright or performer rights, there is no three-step test for the broadcaster right. The WTO agreement sees the broadcasters as having fewer rights than copyright holders.

There is no justification for a three-step test for the broadcasting right, and if one is included, it will lead to confusion, and attacks on the ability of treaty members to respond to changes in technology, business models and social norms. This is particularly important for such a radical expansion of rights to Internet transmissions. Finally, there clearly needs to be space in the limitations and exceptions to deal with material in the public domain or licensed for public

access.

K. Formalities

Regarding formalities, governments should have considerable flexibility in using formalities, particularly given the challenges of clearing rights from parties that don't even create, own or license the content, and when it can be a mystery which broadcasting organizations may claim a right in a fixation.

L. Technical Protection Measures

Considering the matter of technical protection measures, creative works already benefit from the provisions on technical protection measures from the WIPO Copyright Treaty (WCT), the WIPO Performances and Phonograms Treaty (WPPT), and the WIPO Beijing Treaty on Audiovisual Performances. There has been no evidence at the SCCR that broadcasters lack the ability to encrypt program context and restrict access through passwords.

There is no lead for Articles 12 and 13 in the SCCR/43/3 draft. Moreover, as noted by Professor Bernt Hugenholtz in his thoughtful and concise analysis, the text on protecting the public domain has been removed.

“Article 12 provides for anti-circumvention protection in line with Article 18 WPPT. The present draft unfortunately omits a provision (former Paragraph 3) in the 2022 text that would have obliged contracting states to take measures to ensure that anti-circumvention protection not prevent users from enjoying public domain content or benefiting from limitations and exceptions.”²⁸

CONCLUDING THOUGHTS ON POSSIBLE EXIT STRATEGIES

The primary reason that this treaty is before the SCCR is the political influence of the owners of radio and television stations. The treaty proposal is seen as a time consuming and agenda blocking project that solves no problems and creates new ones. The current push for a diplomatic conference is in part an effort to put this frustrating negotiation in the past and move on to more interesting challenges for the standing committee on copyright and related rights, and to provide a text that is less harmful, without alienating politically influential owners of television and radio stations. These are some suggestions for exit strategies.

A. Eliminate the right of fixation

A new right of fixation is not necessary for traditional television and radio broadcasters, given the provisions of the Rome Convention and the TRIPS Agreement. It is a really bad idea to extend this right to Internet streaming, and if eliminated, several of the other issues in the treaty become more manageable.

²⁸ Prof. P. Bernt Hugenholtz, *The WIPO Broadcasting Treaty: Comments on the Second Revised Draft*, Institute for Information Law (IViR), University of Amsterdam, 2023

B. Narrow the focus to sports

Consider a much narrower treaty on sports broadcasting, an area where broadcasters have often claimed there is a lack of sufficient protection. If this is a real as opposed to an imagined problem, then fix it and end the talk about the broad broadcasting issues at the SCCR going forward.

C. Blame Game

Find some usual suspects to blame the lack of progress on a treaty “good enough” for those politically influential television and radio station owners, and take it off the agenda.

D. If it's not broken, don't fix it

Point out that since the technology, business models and uses of information are evolving very fast, and innovation is happening under existing legal regimes, this is not the time to create a treaty, which can have unintended and harmful impacts on both innovation and access.

E. Model Law

As noted above, the adoption of the Rome Convention was slow until parties negotiated a model law. The model law, which was negotiated under the auspices of the Intergovernmental Committee established by Article 32 of the Rome Convention, was designed to soften opposition to the Rome Convention from broadcasters.

Given the confusion over some features of the draft text, and risks of creating a new global norm that does more harm than good, there are advantages to changing the nature and form of the instrument, from a binding treaty to a model law. A model law to address piracy concerns would have less downside and could solve any actual unfair competition and piracy concerns faster than a treaty, while giving the international community freedom to consider more formal norm setting in the future, after observing the model law's impact in practice.

ADDITIONAL READINGS

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ANNEX 1 – DIFFERENCES BETWEEN THREE RELEVANT WIPO CONVENTIONS ON
EXCEPTIONS, FORMALITIES, TERM AND RIGHTS

Exceptions

Agreement	Limitations and Exceptions
<p>The International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations Done at Rome on October 26, 1961</p>	<ul style="list-style-type: none"> • No three-step test • Specific exceptions (Article 15.1) <ul style="list-style-type: none"> ○ Private use ○ Current events ○ Ephemeral fixations by broadcasting organizations ○ Teach or scientific research • Equivalents with copyright. (Article 15.2) <ul style="list-style-type: none"> ○ Any Contracting State may . . . provide for the same kinds of limitations with regard to the protection of performers, producers of phonograms and broadcasting organizations, as it provides for . . . copyright in literary and artistic works. . . .
<p>The 1971 Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms</p>	<ul style="list-style-type: none"> • No three-step test • Limits on protection (Article 6) <ul style="list-style-type: none"> ○ Same kinds of limitations as are permitted with respect to the protection of authors of literary and artistic works ○ Compulsory licenses are permitted only for teaching or scientific research
<p>The 1974 Brussels Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite</p>	<ul style="list-style-type: none"> • No three-step test • Specific exceptions permitted (Article 4) <ul style="list-style-type: none"> ○ Reports of current events ○ Quotations ○ Developing country uses, teaching in the context of adult education, scientific research • Prevent abuses of monopoly (Article 7)

Term

Agreement	Duration
The International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations Done at Rome on October 26, 1961	<p>Article 14, Minimum Duration of Protection</p> <ul style="list-style-type: none"> • The term of protection to be granted under this Convention shall last at least until the end of a period of twenty years computed from the end of the year in which: <ul style="list-style-type: none"> . . . (c) the broadcast took place—for broadcasts.
The 1971 Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms	<p>Article 4, Term of Protection.</p> <ul style="list-style-type: none"> • The duration of the protection given shall be a matter for the domestic law of each Contracting State. However, if the domestic law prescribes a specific duration for the protection, that duration shall not be less than twenty years from the end either of the year in which the sounds embodied in the phonogram were first fixed or of the year in which the phonogram was first published.
The 1974 Brussels Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite	No term

Formalities

Agreement	Formalities
The International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations Done at Rome on October 26, 1961	No restrictions on formalities
The 1971 Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms	<p style="text-align: center;">Article 11, Formalities for Phonograms.</p> <p style="text-align: center;">If . . . a Contracting State . . . requires compliance with formalities, these shall be considered as fulfilled if all the copies in commerce of the published phonogram or their containers bear a notice consisting of the symbol (P), accompanied by the year date of the first publication, placed in such a manner as to give reasonable notice of claim of protection; and if the copies or their containers do not identify the producer or the licensee of the producer (by carrying his name, trade mark or other appropriate designation), the notice shall also include the name of the owner of the rights of the producer; and, furthermore, if the copies or their containers do not identify the principal performers, the notice shall also include the name of the person who, in the country in which the fixation was effected, owns the rights of such performers.</p>
The 1974 Brussels Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite	No restrictions on formalities

Rights

Agreement	Rights
<p>The International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations Done at Rome on October 26, 1961</p>	<p>Article 13 - Minimum Rights for Broadcasting Organizations</p> <p>Broadcasting organisations shall enjoy the right to authorize or prohibit:</p> <p style="text-align: center;">(a) the rebroadcasting of their broadcasts;</p> <p style="text-align: center;">(b) the fixation of their broadcasts</p> <p style="text-align: center;">(c) the reproduction:</p> <p>(i) of fixations, made without their consent, of their broadcasts;</p> <p>(ii) of fixations, made in accordance with the provisions of Article 15, of their broadcasts, if the reproduction is made for purposes different from those referred to in those provisions;</p> <p>(d) the communication to the public of their television broadcasts if such communication is made in places accessible to the public against payment of an entrance fee; it shall be a matter for the domestic law of the State where protection of this right is claimed to determine the conditions under which it may be exercised.</p>
<p>The 1971 Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms</p>	<p>Article 2 - Obligations of Contracting States; Whom they must protect and against what</p> <p>Each Contracting State shall protect producers of phonograms who are nationals of other Contracting States against the making of duplicates without the consent of the producer and against the importation of such duplicates, provided that any such making or importation is for the purpose of distribution to the public, and against the distribution of such duplicates to the public.</p>
<p>The 1974 Brussels Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite</p>	<p style="text-align: center;">Article 2.1.</p> <p>... 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.</p>

THE TROUBLE WITH THE WIPO BROADCASTING TREATY

ANNEX 2 – EXCERPTS FROM THE JUNE 2004 JOINT LETTER FROM 13 RIGHTS
HOLDERS ORGANIZATIONS CRITICIZING THE BROADCASTING RIGHT

Excerpts from the June 2004 joint letter titled “The Consolidated Text for the Protection of Broadcasting Organizations drafted by the Chairman of the SCCR - Joint Reaction of Rights Holders - Discussions in the WIPO Standing Committee on Copyright and Related Rights (SCCR)” *(letter available here: <http://www.cptech.org/ip/wipo/bt/rightsholders062004.pdf>)*

As a result of the discussions in the SCCR, consensus has been built as regards to the objective

and therefore the cornerstones of the Treaty:

- (i) The rights to be granted should be those required to fight signal piracy, and on the same basis the object of protection of the possible new treaty should be the broadcast signal; and
- (ii) The treaty should be drafted to update the protection of broadcasting organisations in a manner that does not prejudice the exercise of rights of other rights holders.

The consolidated text as drafted is in conflict with these general lines in particular as regards to the proposed catalogue of rights. There are two reasons for this problem:

- (i) Some of *the rights proposed are **not required for the fight against piracy*** at all, in particular when they extend to fixations of the signal that have been authorised by the broadcaster itself; and
- (ii) The catalogue of rights in the consolidated text draws, on the one hand, from the structure and "content related rights"

provided in the WCT and WPPT and, on the other hand, from more specific "signal related rights". This "double approach" results in partly **overlapping rights** (e.g., the making available right and the transmission from a fixation right).

All in all, the rights are drafted in a manner that is unnecessarily broad and that leads to the unprecedented situation where the rights of broadcasting organisations are set at a higher level than those granted to authors (both in the Berne Convention and the WCT) and to performers and producers (in the Rome Convention and the WPPT). In practice, this **risks leading to situations where the exercise of rights in the underlying content** (in particular when such rights are not exclusive) **will be prejudiced by broadcasters' use of their new exclusive rights for commercial purposes** (e.g. in the case of a sweeping retransmission right).

ANNEX 3 – EXCERPTS OF SELECTED STAKEHOLDER STATEMENTS ON BROADCAST
TREATY FROM SCCR 11

1. Introduction

The World Intellectual Property Organization (WIPO) held the 11th meeting of the Standing Committee on Copyright and Related Rights (SCCR) from June 7 to 9, 2004. The report of that meeting (SCCR/11/4) includes the NGO statements from creative communities, broadcasters, webcasters, consumer and digital rights groups on the proposed WIPO broadcasting treaty. The following are excerpts from those interventions as summarized in the meeting report.

2. Creative Communities

Actors, Interpreting Artists Committee (CSAI)

The protection of broadcasters should not be modeled on the protection that creators enjoyed. It was necessary to define a restrictive scope of protection, justifying each of the rights accorded. Appropriate studies should be commissioned on the economic impact of that protection.

International Federation of Actors (FIA)

. . . it understood the needs of traditional broadcasters and cablecasters as far as cable originated programs were concerned, to fight against the illegal use of signals. It believed that the Consolidated Text had streamlined some of the most significant proposals put forward by the Member States. However the Consolidated Text did not make any attempt to define either broadcast or content-carrying signals. Such definitions were indispensable to clarify the scope of the new treaty. An important number of the economic rights claimed by broadcasters related to the commercial exploitation of content rather than protection of signals against piracy. The representative stressed the need to carefully separate the protection of signal and content and to grant only the rights that broadcasters needed to fight against signal piracy and to keep a strict balance between different rightholders. It was important to avoid a situation where broadcasters would collect and benefit from revenues generated from exploitation of the work of performers that

were key content contributors. It would compromise the already unfair balance between related right owners.

International Federation of Film Producers (FIAPF)

The objective of an instrument to protect broadcasters' rights should have the sole objective of a fight against signal piracy, and the scope of the instrument and the process of preparation of the Text depended upon a clear focus on that objective. It should not be used as an opportunity to extend the scope of activities of broadcasters and permit them to develop new services to the detriment of other rightholders. Audiovisual producers recouped their investment by sales to

various economic partners including broadcasters, cable operators, satellite platforms, or through video on demand services. The scope and beneficiaries of the new treaty had to be clearly defined to avoid any destabilization of existing business models that enable film producers to market their works. Any protection for broadcasting organizations was based on investment in the production of an immaterial signal. It questioned the appropriateness of granting broadcasting organizations a right of distribution as provided in Article 10 of the Consolidated Text. Such right exceeded signal protection.

International Federation of Journalists (IFJ)

. . . any protection granted to broadcasting organizations should be balanced with and not negatively affect the position of copyright and related rights holders. Any protection should be granted only to public service broadcasters or full service broadcasters. Webcasting had to be excluded from the scope of the new instrument. Broadcasters should only be granted the rights necessary for the fight against piracy, and such rights should not hamper rights granted to authors or performers. It would be inappropriate to grant broadcasting organizations protection that was not provided to authors.

International Affiliation of Writers Guilds (IAWG)

The representative welcomed the intention to address piracy which threatened not only broadcasting organizations, but also writers who were entitled to royalties and residual payments, based on the use of their material in broadcast services. Broadcasting organizations required protection against piracy, not against authors or society at large. It was vital

not to create rights for broadcasters that would conflict or override the pre-existing rights of writers, authors and others. This had been recognized by the delegations of many countries. The broadcasting treaty had to be carefully drafted to specifically address the needs of broadcasting organizations. There was no need to grant rights for non-simultaneous retransmissions, nor making available since they referred to the commercial exploitation and did not prohibit piracy.

International Federation of Producers of Phonograms (IFPI)

Many ideas that had been expressed during the discussions had not found a proper place in the Consolidated Text. This was the case for the position expressed by many governments that the treaty should explore alternative ways to protect against signal piracy, rather than to provide an extended catalogue of exclusive rights. The catalogue of rights could not go beyond the rights enjoyed by holders of rights in the content. The Consolidated Text was not yet comprehensive in reflecting the state of debates. The rights of making available and the right of distribution were not required for the fight against signal piracy and would only be used by broadcasters to broaden their existing range of activities and to claim additional rights over the content contained in the broadcast. The consolidated text did not safeguard the interest of other rightsholders. It was also important to maintain the balance between broadcasting organizations and the owners of content, but this was not reflected in the proposed scope nor in the rights proposed for broadcasting organizations. It was in favor of limiting the rights accorded to

broadcasting organizations to cases where those same rights were also granted to content owners.

International Music Managers Forum (IMMF)

. . . a signal protection-based instrument was the right approach, and suggested that the best way to protect signals was via signal protection language such as that contained in the Satellites Convention, not by granting related rights to broadcasters since copyright and related rights were designed for the protection of creativity and originality, not signals. Ample reasons had been demonstrated in that direction. It would provide broader protection in a simpler way that would stand the test of time. Its organization, together with other organizations, had drafted an alternative proposal to the Consolidated Text on the basis of Article 2 of the Satellites Convention. Broad signal protection could amount to higher protection than what could be granted on the basis of the Rome Convention or any related

rights approach. The IMMF did not believe that a broadcast signal continued to exist upon fixation; a fixed broadcast was simply the program materials being broadcast. It expected delegations to look more closely at the Satellites Convention approach.

International Organization for Performing Artists (GIART)

. . . protection should be limited to fighting piracy. It would be necessary to exclude webcasting from the scope of protection. The rights granted should not go beyond the Rome Convention, but simply update it. Furthermore they should not be formulated as exclusive rights but as rights to prohibit. Special attention should be given to the avoidance of conflicting effects on the rights of other right owners. Conditions to being party to the new Instrument should include membership of the Rome Convention.

International Federation of Associations of Film Distributors (FIAD)

. . . endorsed the statement made by the coalition of rightsowner organizations, in particular in relation to Articles 6, 9, 10, 11, 12, and 24, and stated that the protection of signals should not disadvantage other protected rightsholders.

International Confederation of Societies of Authors and Composers (CISAC) speaking also on behalf of the International Bureau of Societies Administering the Rights of Mechanical Recording and Reproduction (BIEM),

. . . three issues of concern. First, what was at the stake was the appropriate means by which broadcasting organizations could protect their legitimate interests. Second, great care had to be taken when delineating the rights to be granted to broadcasting organizations. It would have an impact on those who are involved in the creative process. The lack of creativity with regard to broadcasts should have a restrictive effect on the extent of protection granted by this instrument to broadcasters. A high level of protection should not be granted to broadcasters. Third, with respect to the beneficiaries of protection of any new instrument, he noted widespread concern

among the creative community and delegations in regard to the position of the United States of America with respect to webcasting, and stated that the extension of protection to webcasters was premature and undesirable. Webcasters should be excluded from the discussions. In relation to the preamble, he noted that the reference to the benefits of the possible new

treaty for authors and the creative community should be deleted. Alternative A to Article 1 should not be limited to international conventions protecting performers and phonogram producers.

Further clarity was required. In relation to Article 1 (2), further clarification was required on how the new treaty would not affect underlying rights. One of the possible ways of doing this would be to provide that the need for authorization of the underlying rightholders would not cease to exist simply because the broadcaster had been required to give his authorization. Protection had to be limited to broadcast signals while respecting longstanding principles of intellectual property protection.

American Film Marketing Association (AFMA)

. . . the object of protection in these discussions should be the signal rather than the contents of broadcasters' transmissions. Rightsowners existed long before a broadcast was created, and contracted with an intended transmitter based on specific rights. It supported the statement submitted by the coalition of rightholders. The Consolidated Text demonstrated that wide misinterpretation existed as regards substantive issues including definitions. There was a lack of understanding of the operators' practices, whether on cable or satellite, in respect of simultaneous retransmissions which differed widely from one country to another. Most European and North American audiovisual producers had mandated collective management of their retransmission rights to AGICOA, representing content producers that negotiate with simultaneous retransmission organizations. There was a missing reference to primary broadcasters in the debate, the only organizations that contracted and applied specific rights, those that allowed or prohibited retransmission of their signals by others. When broadcasters were themselves producers they already enjoyed protection in the area of retransmission. They did not want to grant equal rights to retransmitters that did not originate scheduled transmissions but merely carried another broadcaster's signal. This category of operators should not be included in the category of broadcasters. Simultaneous retransmission needed to be properly defined.

Associação Paulista de Propriedade Intelectual (ASPI)

. . . recognized the need to enhance protection of broadcasting organizations to fight against piracy. However, the implementation of a broad definition of broadcasting and cablecasting was a matter of concern. Webcasters and cablecasting organizations could not be classified as broadcasters when they did not produce content nor have other social value

3. Consumer and Digital Rights Groups

Electronic Frontier Foundation (EFF)

Article 16 would harm the dissemination of information in the public domain, as broadcasters would be able to restrict the distribution of content that was not copyrightable, was not in the public domain or was made available for distribution by its creator.

IP Justice

. . . questioned Articles 8 to 12, which established rights for broadcasters that were based upon the fixation of a broadcast signal. However, a broadcast signal existed only in the air and disappeared upon reaching receiving devices, so it was impossible to “fix” a broadcast signal. Moreover by including Internet transmissions in its scope, the treaty went beyond its stated objective and proposed to regulate an enormous breadth of ordinary consumer activity, endangering freedom of expression on the Internet.

Civil Society Coalition (CSC)

The real objective of the treaty was to allow broadcasters to benefit economically from exploitation of the public domain and the rights of other right owners. The Text did not distinguish between copyright material and the public domain, risking harm to the free flow of information. If that were not the purpose, it would suffice to make clear that technological protection measures and the term of protection did not apply to broadcasts containing public domain material.

Union for Public Domain (UPD)

The treaty could be combined with the use of material that by nature should be accessible to the public, after the period of protection had expired. Broadcasting did not necessarily require creativity as criteria for protection and this entailed the risk that protection could be granted without limits. Article 18 relating to formalities was also of concern.

Public Knowledge

. . . supported the statement made by the IMMF. He referred to the statements of the Delegations of India and Chile, that highlighted that any rights granted to broadcasting organization should not diminish the rights of content owners and public access to information.

European Digital Rights (EDRI)

. . . treaty should be signal-centric and should not introduce a new layer of rights, as these would conflict with existing copyright protection. This would damage the interests of copyright holders and the public. Broadcast rights should not restrict the public domain. Transmitted works currently without copyright protection, due to expiry of the term of protection or lack of originality, would become subject to a new broadcast right. This could effectively remove them from the public domain and make them inaccessible to users, even if this was not the intention. If necessary, protection for webcasters should be provided in a separate instrument that could be tailored to the specific characteristics of this medium.

4. Broadcasters

Association of Commercial Television in Europe (ACT)

There was probably wide consensus that the signals transmitting that event should be protected against unauthorized retransmission. Those willing to limit the ongoing process to an anti-piracy agenda should explain why the skills and investment which a broadcaster had put into its transmitted schedule would be less worthy of protection than the similar skills and investment which a record company had put in the production of a successful session. Many arguments had been advanced. It had never been a requirement under the Rome Convention that protection would be granted to original broadcasts.

Asia-Pacific Broadcasting Union (ABU)

Protection under the proposed treaty should be granted only to traditional broadcasters who had adequately justified their need for protection and whose rights required immediate updating. The updating of broadcasters' rights was for the protection of the broadcast signal, to enable the broadcasters to continue their mandate of public service which included providing education and access to information. Unlike the new forms of broadcasting, traditional broadcasting continued to provide services to the public free of charge. Traditional broadcasters believed there was enough

consensus to schedule a diplomatic conference in 2005.

European Broadcasting Union (EBU)

The purpose of the proposed treaty was the updating of the existing signal protection under the Rome Convention. That protection would not have the effect of putting a limitation on public domain material. Such interpretation was based on confusion between signal and content. A right to prohibit, being less than an exclusive right to authorize, was also based on confusion between the use of the signal and the content.

International Association of Broadcasting (IAB)

It was necessary to take a decision on the exclusion of webcasters in order to promote a solution for the minor pending differences in other areas. It was not possible to establish a relationship between the protection of audiovisual performers and that of broadcasters. The first were expressly excluded from protection in the Rome Convention. Moreover they had enjoyed a lengthy process of discussion that failed to achieve an agreement in the 2000 Diplomatic Conference. The protection accorded by the Rome Convention, and that proposed in the Consolidated Text, did not give broadcasters rights over content belonging to other right owners, nor over public domain material. It was necessary to speedily proceed to exclusion of webcasting from the scope of protection, solve the minor pending differences and recommend that the General Assembly convene a diplomatic conference.

National Association of Broadcasters (NAB) so expressing the views of the North American Broadcasters Association (NABA)

If content owners did not want to be part of the broadcasting process, they could choose to distribute their works in other ways. If they chose to become part of the process and to use the signals to exploit their works, they should then be willing to be subject to protections for broadcasters against the exploitation of the signal. Anyone wanting to exploit content that was broadcast would still have to secure rights to do so under existing licensing schemes. On the issue as to whether the treaty should be based on an just antipiracy approach, he noted that the treaty should do more by affording broadcasters with exclusive rights in their signal. Most broadcasters operated on a single channel, had one revenue stream, and were available most of the time free over the air. They competed with multichannel delivery channels with multiple revenue streams. The broadcasting systems provided multiple benefits to society in terms of political dialogue and

cultural enrichment. If broadcasters were to continue delivering these services, they must have the flexibility for alternative business models that might increasingly include the reproduction, making available, and distribution of broadcasts.

5. Webcasters

Digital Media Association (DIMA)

. . . webcasting was important and had to be included in the scope of the new instrument. There was no basis to exclude large webcasters from the scope of the instrument while including small broadcasters. Exclusion of webcasting from the scope of the new treaty would amount to an outdated treaty. There was no technological basis for denying protection.

ANNEX 4 – INTEL'S 2006 STATEMENT ON THE WIPO BROADCAST TREATY

Source: <https://seclists.org/interesting-people/2006/Apr/177> DISCUSSION
DRAFT: APRIL 10, 2006

Statement of Intel Corporation Concerning The World Intellectual Property Organization's Proposed Treaty On The Protection Of Broadcasting Organizations

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BACKGROUND. The World Intellectual Property Organization is drafting a proposed "Treaty on the Protection of Broadcasting Organizations." For many countries (including the United States) the treaty, if adopted, will create an entirely new type of intellectual property right. Under the treaty, broadcasting organizations obtain new legal rights to control uses of content that they broadcast-rights that are separate from and in addition to any existing copyright rights in the content. Adopting countries can choose to extend these new rights to "webcast" content in addition to traditional broadcast content.

INTEL'S POSITION. Intel opposes the WIPO Broadcast Treaty. Proponents have not demonstrated that the benefits of creating new exclusive rights outweigh the burdens that these new rights impose. These burdens include:

- Control of mobile device and digital home innovation. The treaty could give broadcasting organizations the right to control uses of content within the home-uses that are legitimate and non-infringing under copyright law. For example, makers of digital video recorders could be required to obtain licenses and agree to limitations imposed by broadcasters in order to enable "time shifting" of broadcast content. Similarly, mobile device designers could be required to get permission from broadcasters (in addition to copyright owners) in order to enable innovative uses of broadcast

content. This regime will increase consumer costs and reduce technical innovation.

- Technical Protection Measure (TPM) provisions will become regulatory mandates that limit design freedom. The treaty requires that the new broadcaster rights be protected by TPMs. Because broadcasting signals are generally subject to government standards,

TPMs will need to be incorporated into these standards. Government-mandated TPMs will limit design freedom and distort markets.

- Liability risk for software developers, device makers, and ISPs. Under copyright law, in some circumstances one party can be liable for infringement committed by an unrelated party. The treaty raises similar questions of secondary liability for infringement of its new broadcaster rights, but provides no guidance or safe harbors that limit risks for those non-infringing parties that might inadvertently enable infringement. These unquantifiable risks will inhibit innovation and market development.
- Increased rights clearance complexity. Users of content already face a nearly impenetrable thicket when trying to clear traditional copyright rights. Adding more complexity to the clearance process will inhibit innovative uses of content.
- Harm to copyright owner interests. Content users will pay licensee fees to broadcasters in addition to copyright owners, likely resulting in reduced revenues for copyright owners. Reduced incentives for creators may result in less created content.
- Harm to public interests. The treaty could limit "fair uses" and other publicly beneficial uses of content and restrict content that is otherwise in the public domain.

Intel believes that efforts to enact the WIPO Broadcast Treaty should be abandoned. Alternatively, and less optimally, Intel believes that the scope of the treaty should be dramatically narrowed, to focus specifically on signal theft.