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**THE PROPOSED TREATY FOR
THE PROTECTION OF BROADCASTING
ORGANIZATIONS: OLD WINE IN A NEW BOTTLE?**

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ABSTRACT

This article analyses the proposed WIPO Treaty for Protection of Broadcasting Organizations (“Broadcast Treaty”) and argues that (a) The need for the Broadcast Treaty has not been fully established and b) even if there were such a need for the Broadcast Treaty (purportedly to help counter signal piracy), the proposed draft of the treaty deviates from this approach towards a ‘rights-based’ approach, creating a ‘para-copyright’ regime, potentially creating chilling effects on legitimate end uses of copyrightable material.

PRELIMINARY: NEED FOR THE BROADCAST TREATY

The basis of international law on the protection of intellectual property rights can be traced back to the Berne Convention for the Protection of Literary and Artistic Works, 1886 (“**Berne Convention**”)¹ that grants substantive rights to authors. The Berne Convention particularly vests with authors the rights of reproduction,² translation,³ adaptation,⁴ and communication to the public,⁵

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1 The Berne Convention for the Protection of Literary and Artistic Works, 1886.

2 Article 9, The Berne Convention for the Protection of Literary and Artistic Works, 1886.

3 Article 8, The Berne Convention for the Protection of Literary and Artistic Works, 1886.

4 Article 12, The Berne Convention for the Protection of Literary and Artistic Works, 1886.

5 Article 11, The Berne Convention for the Protection of Literary and Artistic Works, 1886.

broadcasting and cable transmission⁶ and the right of resale⁷ of their works. Further, in case of dramatic or musical works, authors also have the right to authorize public performances or any other communications of their work.⁸

However 'broadcast right' as a specific neighbouring right to copyright was first recognized and protected in international intellectual property law in the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, 1961 ("**Rome Convention**")⁹. While the Rome Convention came into place primarily to protect the rights of performers and producers of phonograms, it also protected the rights of broadcasting organisation with regard to the right to authorize rebroadcasting, fixation, reproduction and communication of their broadcasts, but not cable distribution of broadcasts.¹⁰ Further it protected the right of performers to prevent public broadcasting or communication of their performances, right to fixation of their unfixed performances and right to reproduction of a fixed performance in certain cases.¹¹

This was done because broadcasters' rights were seen as being derived from literary and artistic rights that were already protected by the Berne Convention, so while broadcasting organisations are rarely involved in the creation of content themselves, they do invest in the broadcasting and distribution of content and it became important to incentivize broadcasting and to protect their economic interests in light of signal theft.¹²

6 Article 11, The Berne Convention for the Protection of Literary and Artistic Works, 1886.

7 Article 14, The Berne Convention for the Protection of Literary and Artistic Works, 1886.

8 Article 11(1), The Berne Convention for the Protection of Literary and Artistic Works, 1886.

9 Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, 1961.

10 Article 13, the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, 1961.

11 Article 7, the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, 1961.

12 Shyamkrishna Balganes, *The Social Costs of Property Rights in Broadcast (And Cable Signals)*, *Berkeley Technology Law Journal*, Vol. 22, 2007, p. 1309-1312; Patricia Akester, *The Draft WIPO Broadcasting Treaty and its Impact on Freedom of Expression*, *Copyright Bulletin*, April-June 2006, p. 5-6, available at: <http://unesdoc.unesco.org/images/0014/001464/146498E.pdf> (Last visited February 1, 2015); Protection of Broadcasting Organizations: Terms and Concepts, WIPO, SCCR/8/INF/1, August 16, 2002, p.12.

The Brussels Convention Relating to the Distribution of Programme - Carrying Signals Transmitted by Satellite, 1974 (“**Brussels Convention**”) later filled in gaps left by the Rome Convention with regards to satellite signals and protected broadcasting organisations from signal theft and piracy.¹³

The WIPO Copyright Treaty, 1996 (“**WCT**”) provided authors with the right to authorize the distribution and copies of their works including the right to rental, the WCT also vested with authors of literary and artistic works the right to communication even over the internet.¹⁴ The WCT also protected the authors’ rights with regards to circumvention of technological measures and alteration of electronic rights management information.¹⁵

The WIPO Performances and Phonograms Treaty, 1996 (“**WPPT**”) provided performers with the rights of reproduction, distribution, and distribution of their performances fixed in phonograms¹⁶; provided producers of phonograms with the rights of reproduction, distribution and rental of their phonograms¹⁷; and most importantly provided both performers and producers with the right of remuneration for public broadcast or communication of their performances/phonograms.¹⁸

The Beijing Treaty on Audio Visual Performances, 2012 (“**Beijing Treaty**”) provides performers with rights to authorize broadcasting and communication, right to fixation and the right to communication to the public.¹⁹ The Beijing Treaty also vests within performers the right to direct and indirect reproduction of performances in audio visual fixations²⁰ and the right to authorize the distribution of copies of their performances.²¹

13 Brussels Convention Relating to the Distribution of Programme - Carrying Signals Transmitted by Satellite, 1974, available at: http://www.wipo.int/treaties/en/text.jsp?file_id=283796 (Last visited November 20, 2014) (Hereinafter, **The Brussels Convention**).

14 WIPO Copyright Treaty, 1996, Articles 4-8.

15 WIPO Copyright Treaty, 1996, Article 11-12.

16 WIPO Performances and Phonograms Treaty, 1996, Articles 6-10.

17 WIPO Performances and Phonograms Treaty, 1996, Articles 11-14.

18 WIPO Performances and Phonograms Treaty, 1996, Article 15.

19 Beijing Treaty on Audio Visual Performances, 2012 (Hereinafter, **Beijing Treaty**), Article 6, Article 11.

20 Beijing Treaty, Article 7.

21 Beijing Treaty, Article 8(1).

The concept of broadcasting rights as neighboring rights has therefore become increasingly important over the years. In 1998, the WIPO Standing Committee on Copyright and Related Rights (SCCR) decided to include in its agenda deliberation on treaty proposals for the protection of broadcasting organisations.²² Negotiations regarding the same have been taking place for the past 17 years. The proposed Broadcast Treaty is stated to be necessary to combat signal piracy.²³

The draft non paper for this treaty circulated by the WIPO²⁴ states that the need for this treaty stems from the need to update international rules keeping in mind technological developments²⁵. A study sanctioned by the WIPO enumerates the different ways in which signal piracy can take place and the harmful effect it has on revenues of the broadcasting organisations.²⁶ This, the study says may result in dis-incentivizing broadcasting organisations from continuing their work which would in turn affect public interest adversely as important programmes would no longer be broadcast.²⁷ The study also analyses how the Broadcast Treaty will positively affect different stakeholders like copyright holders and broadcasting organisations due to an additional layer of protection²⁸

However, no justification has been put forth as to why this additional layer of protection is *necessary*. Indeed no reasoning has been provided as to why the protections provided to copyright holders and to broadcasting organisations and authors and performers under international instruments so far are *inadequate*

22 Standing Committee on Copyright and Related Rights, First Session, Geneva , November 2-10,1998, SCCR/1/9, p. 35, available at: http://www.wipo.int/edocs/mdocs/copyright/en/sccr_1/sccr_1_9.pdf

23 Protecting of Broadcast Organisations- Background Brief available at: <http://www.wipo.int/pressroom/en/briefs/broadcasting.html>

24 Draft Non-Paper on the WIPO Treaty on the Protection of Broadcasting Organisations, March 8, 2007.

25 See also WIPO Background Brief, Available at: <http://www.wipo.int/pressroom/en/briefs/broadcasting.html> (Last visited November 19, 2014).

26 WIPO in the report of the secretariat entitled “*Study on Socioeconomic Dimension of the Unauthorized Use of Signals-Part II: Unauthorized Access to Broadcast Content- Cause and Effects: A Global Overview*”, SCCR 20th Session, Geneva June 21-24, 2010, SCCR/20/2Rev.

27 WIPO in the report of the secretariat entitled “*Study on Socioeconomic Dimension of the Unauthorized Use of Signals-Part III: Study on the Social and Economic Effects of the Proposed Treaty on the Protection of Broadcasting Organisations*”, SCCR, 21st Session, Geneva November 8-12, 2010, SCCR/21/2.

28 *Id.*

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when it comes to comparing curbing unauthorized use of broadcast signals if they are implemented properly.

It has not been proved that the Broadcast Treaty fills any gaps left behind by the existing international law on the issue.

Therefore the reasons provided so far for the need -for the Broadcast Treaty do not justify the *necessity for the additional protections* provided in the treaty in the strict sense.

The conceptual problem here is that the Broadcasting Treaty is designed in essence, to combat problems with implementation that arose from the earlier treaties,²⁹ but insofar as those problems are not caused due to a lacuna in the law but due to poor implementation of those laws, the fact of rampant signal theft is not so much an argument for a new treaty as it is for better implementation of the international conventions that already exist.

SHIFT TO A RIGHTS-BASED APPROACH

Even if a new Broadcast Treaty were necessary to combat signal theft, it would seem that the protections granted by the Broadcast Treaty are excessive and indicate a shift to a rights based approach, thereby creating a para-copyright regime.

The non-paper put out by the WIPO in 2007 avows to adopt a “signals-based” approach, in fulfilling the same following the WIPO General Assembly decision in 2007.³⁰

However, this article argues that it can be observed that there is a subtle shift in the language of the Broadcast Treaty³¹ which tends towards a “rights-based”

29 *Supra* note 27, the study posits the idea that it would be easier for broadcasters to enforce their rights and catch instances of unauthorized use than it would be for individual copyright holders as a justification.

30 Non Paper on the WIPO Treaty on the Protection of Broadcasting Organization, April 20, 2007, available at: http://www.wipo.int/edocs/mdocs/copyright/en/sccr_s2/sccr_s2_paper1.pdf.

31 For the purposes of this discussion, we will be using the latest draft of the Broadcast Treaty: Working Document for a Treaty on the Protection of Broadcasting Organisations Prepared by the Secretariat, Standing Committee on Copyright and Related Rights, 27th Session, Geneva, April 28- May 2, 2014, SCCR/27/2/REV.

approach as opposed to an approach focused on the narrow problem of signal theft. Therefore, the protections and rights granted by the draft Broadcast Treaty are in excess of what would be mere signals protection and in cases extends to covering the content underlying the signal as well. It is further argued that this is particularly problematic as it can be observed that the need for signal protection above and beyond what is already granted by international conventions has not been justified.

To prove this we will undertake a clause by clause comparison of the Broadcast Treaty with other international treaties mentioned above in order to prove the shift to a more “rights based approach” and the higher level of protections offered to broadcasters.

The shift in the language of the draft Broadcast Treaty to a rights based approach can basically be observed in two important places- the first being the broadening of definitions in the Broadcast Treaty as compared to international instruments on the subject so far, and the second being the rights and protections granted to broadcasters that are analogous to rights already granted to authors and performers in international instruments so far, therefore adding an additional layer of protection over the same content.

BROADENING OF DEFINITIONS IN THE BROADCAST TREATY³²

Inter alia, there are seven main areas where we can observe a broadening of definitions in the Broadcast Treaty as compared to other international treaties and relevant documents the Broadcast Treaty. These include the definitions of a signal, broadcast, broadcasting organization(s), retransmission, communication to the public and rights management information. In each of these instances, it is observed that the definitions in the Broadcast Treaty are wider than those in existing international instruments.

32 Nehaa Chaudhari & Amulya Purushothama, *CIS Submission to the Expert Committee: Comment on the Broadening of Definitions in the Proposed Broadcast Treaty Compared to other International Conventions*, available at: <http://cis-india.org/a2k/blogs/the-broadening-of-definitions-in-the-proposed-broadcast-treaty-compared-to-other-international-conventions>.

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In the case of a “signal”, the Broadcast Treaty speaks of an “electronically generated carrier consisting of sounds or images or sounds and images or representations thereof whether encrypted or not”³³, which could potentially include content that the signal carries as well.

A “broadcast” under the Broadcast treaty is “transmission of a signal by a broadcasting organization for reception by the public”³⁴; an alternative to this excludes signals sent over computer networks from the definition of a broadcast,³⁵ another alternative defines broadcasting as “the transmission by wireless means for the reception by the public of sounds or of images or of images and sounds or of the representations thereof” .This definition includes satellite transmissions, wireless transmissions of encrypted signals where the means for decrypting are provided to the public by the broadcasting organization or with its consent. Transmission over computer networks is excluded from this definition as well.³⁶ This mirrors definitions of broadcasting set out in the WPPT³⁷, the Rome Convention³⁸ and the Beijing Treaty

Under the proposed Broadcast Treaty, a broadcasting organization is “the legal entity that takes the initiative for packaging assembling and scheduling program content for which it has, where necessary, been authorized by rights holders and takes the legal and editorial responsibility for the communication to the public of everything which is included in its broadcast signal.” Or alternatively³⁹, it considers broadcasting organisations and cablecasting organisations as one and the same and defines them as “the legal entity that takes the initiative and has the responsibility

33 Article 5, Alternative A, 5(a), the Broadcast Treaty.

34 Article 5, Alternative A, Article 5 (b), The Broadcast Treaty.

35 Article 5, Alternative A, Alternative to (b), The Broadcast Treaty.

36 Alternative B for Article 5, Article 5 (a) The Broadcast Treaty.

37 See Article 2(f) of the WIPO Performances and Phonograms Treaty, 1996.(Hereinafter, **WPPT**) that reads as: “broadcasting” means the transmission by wireless means for public reception of sounds or of images and sounds or of the representations thereof; such transmission by satellite is also “broadcasting”; transmission of encrypted signals is “broadcasting” where the means for decrypting are provided to the public by the broadcasting organization or with its consent”.

38 See Article 3 (f) of the Rome Convention, 1961 (Hereinafter, **The Rome Convention**), that reads as: ““broadcasting” means the transmission by wireless means for public reception of sounds or of images and sounds.’

39 Alternative B for Article 5, Article 5 (c) The Broadcast Treaty.

for the transmission to the public of sounds or of images or of images and sounds or of the representation thereof and the assembly and scheduling of the content of the transmission.” This definition is also by far the most technologically neutral and ensures adequate protection for broadcasting organisations on all broadcasting platforms which is potentially problematic and overreaching.

The proposed Broadcast Treaty defines “retransmission” as “the transmission by any means by any person other than the original broadcasting organization for reception by the public whether simultaneous or delayed”;⁴⁰ or alternatively defines rebroadcast as “the simultaneous transmission for the reception by the public of a broadcast or a cablecast by any other person than the original broadcasting organization”; even simultaneous transmission of a rebroadcast is understood to be a rebroadcast under this definition.⁴¹

Under a further alternative⁴² retransmission is defined as “the simultaneous transmission for the reception by the public by any means of a transmission ... by any other person than the original broadcasting or cablecasting organization” this definition of retransmission also includes simultaneous transmission of a retransmission.

To contrast with this, the Rome convention defines rebroadcasting simply as the simultaneous broadcasting by one broadcasting organization of the broadcast of another broadcasting organization.⁴³ Clearly, a higher level of protection is granted to broadcasting organisations under the proposed Broadcast Treaty; one that was so far not guaranteed to them by international conventions, and clearly this is because of a shift towards a rights based approach.

The proposed Broadcast Treaty defines communication to the public as “any transmission or retransmission to the public of a broadcast signal or a fixation thereof by any medium or platform”.⁴⁴ Or alternatively as “making the transmissions ... audible or visible or audible and visible in places accessible to the

40 Article 5, Alternative A to Article 5(d) The Broadcast Treaty.

41 Alternative to Article 5(d), The Broadcast Treaty.

42 Alternative B for Article 5, Article 5 (d), The Broadcast Treaty.

43 Article 3(g), The Rome Convention, 1961.

44 Article 5, Alternative A to Article 5 (f), The Broadcast Treaty.

public.⁴⁵ Whereas the WPPT defined communication to the public as “the transmission to the public by any medium, otherwise than by broadcasting, of sounds of a performance or the sounds or the representations of sounds fixed in a phonogram... including making the sounds or representations of sounds fixed in a phonogram audible to the public.”⁴⁶ The Beijing Treaty defined communication to the public as “the transmission to the public by any medium otherwise than by broadcasting, of an unfixed performance or of a performance fixed in an audio visual fixation... Communication to the public” includes making a performance fixed in an audiovisual fixation audible or visible or audible and visible to the public.”⁴⁷ Clearly the definition has been broadened under the proposed treaty, which makes it plausible for the protection granted to broadcasters to cover the content underlying the signal as well.

The proposed Broadcast Treaty defines rights management information as “information that identifies the broadcasting organization, the broadcast, the owner of any right in the broadcast, or information about the terms and conditions of use of the broadcast and any numbers or codes that represent such information when any of these items of information is attached to or associated with the broadcast or the pre broadcast signal or its use in accordance with Article 6.”⁴⁸ Clearly the current treaty extends the protection offered to rights management information to pre-broadcasting signals in addition to broadcast signals, this represents a higher level of protection granted to broadcasters under the proposed Broadcast Treaty as compared to any other international treaty including the WIPO Copyright Treaty, 1996,⁴⁹ the WPPT⁵⁰ and the Beijing Treaty.⁵¹

RIGHTS GRANTED IN THE BROADCAST TREATY⁵²

The nine areas with regards to rights and protections where there is an observable shift in the language of the Broadcast Treaty toward a more rights based approach

45 Alternative B for Article 5, Article 5 (e), The Broadcast Treaty.

46 Article 2(g), WPPT.

47 Article 2(d), The Beijing Treaty.

48 Article 5 (h), The Broadcast Treaty.

49 Article 12(2), WIPO Copyright Treaty, 1996.

50 Article 19(2), WPPT.

51 Article 16(2), Beijing Treaty.

52 Nehaa Chaudhari & Amulya Purushothama, *supra* note 32.

granted in the treaty are: the right of performance, the right of fixation, the right of communication to the public, the right of retransmission, reproduction, distribution, the protection of rights management information, the term of protection, and limitations and exceptions to protections.

In this part we will compare the rights granted to broadcasting organisations in the Broadcast Treaty, to the Berne Convention, the Rome Convention, the Brussels Convention, the WCT, the WPPT and the Beijing Treaty.

Performance

Under the proposed Broadcast Treaty, broadcasting organisations have an exclusive right to authorize performances of their signals for commercial purposes in places available to the public.⁵³ This right of public performance and of communication to the public of a performance with respect to dramatic or musical works rests with the copyright holder under the Berne Convention.⁵⁴ The Rome Convention protects performers' rights to prevent public broadcast and communication of their performances "except where the performance used in the broadcast is already a broadcast performance or is made from a fixation".⁵⁵ Under the WPPT, a similar right is granted to performers.⁵⁶ And finally performers have a similar right under the Beijing Treaty.⁵⁷

Clearly the right of performance has been adequately granted to authors/performers/ copyright holders under the earlier international conventions and the provision of this right to broadcasters in the proposed treaty unnecessarily adds an extra layer of protection for the same content which is problematic as it betrays a shift to a rights based approach and goes above and beyond mere protections against signal theft.

53 Article 9 (1) (ii) (Alternative A), the Broadcast Treaty.

54 Article 11, the Berne Convention.

55 Article 7(1)(a), the Rome Convention.

56 Article 6(i), WPPT.

57 Article 6 (i) and Article 11, the Beijing Treaty.

Fixation

The proposed Broadcast Treaty grants broadcasting organisations the exclusive right to authorize fixations of their broadcasts.⁵⁸ As fixation is defined as an “embodiment of sounds or images or representations thereof from which they can be perceived reproduced or communicated through a device”,⁵⁹ this would realistically cover content underlying the signal as well. The Rome Convention states that the protection provided for performers by this convention possibly includes the preventing of fixation without their consent of their unfixed performances”.⁶⁰ Further, broadcasting organisations already enjoy the right to authorize or prohibit the fixation of their broadcasts under the Rome Convention.⁶¹ The Brussels Convention limits this obligation to prevent distribution of signals in case of derived signals that are taken from signals which have already been distributed by a distributor for whom the emitted signals were intended. Derived signals are signals whose technical characteristics are modified whether or not there have been one or more intervening fixations. This allows for some limitation on the right of fixation granted by the Rome Convention.⁶² The WPPT provides performers with the right of authorizing the fixation of their unfixed performances.⁶³ This is mirrored in the Beijing Treaty.⁶⁴

Clearly, the right of fixation has already been adequately covered by international conventions. The provisions of the proposed Broadcast Treaty simply extend this right to possibly cover the content underlying the signal. This would add an extra layer of protection as performers and authors already are vested with a right to fixation under earlier international conventions and treaties. Further, the granting of this right to broadcasters could potentially grant them control of content underlying their signals as well. Therefore, the provision under the Broadcast Treaty betrays a shift towards a rights based approach and not mere protection against signal piracy.

58 Article 9 (1) (i) (Alternative B), the Broadcast Treaty.

59 Article 5(e) (Alternative A) and 5(f) (Alternative B),

60 Article 7(1) (b), the Rome Convention.

61 Article 13(b), the Rome Convention.

62 Article 2(3) read with Article 1(v), the Brussels Convention.

63 Article 6(ii), WPPT.

64 Article 6(ii), the Beijing Treaty.

Communication to the Public

The proposed Broadcast Treaty defines “communication to the public” as “making the transmissions... audible or visible.”⁶⁵ Further, it guarantees the exclusive right to authorize the communication to the public of their broadcasts to broadcasting organisations.⁶⁶ The right of communication to the public has also been guaranteed to authors of literary and artistic workers who can authorize the broadcasting of their works and communication of their work to the public by any means including rebroadcasting under the Berne Convention.⁶⁷ The Rome Convention grants a similar right to broadcasting organisations when the broadcast is made in places accessible to the public for a fee.⁶⁸ However, the Brussels Convention limits this right and excludes situations where the signals emitted by or on behalf of the originating organization are intended for direct reception from the satellite by the general public.⁶⁹ Further, under the WCT, the right to authorize communication to the public is vested with authors of literary and artistic works⁷⁰ and under the WPPT, performers enjoy a similar right to authorize broadcasting and communication to the public of their unfixed performances except where the performance is already a broadcast performance.⁷¹ In the Beijing Treaty, performers enjoy the exclusive rights of authorizing the broadcasting and communication to the public of both their unfixed performances except where the performance is already a broadcast performance.⁷² Here, their performances are fixed in audiovisual fixations.⁷³

As is obvious, the right to communicate to the public and even the right to broadcast are adequately guaranteed by the existing international conventions already - the proposed Broadcast Treaty, by vesting a similar right in broadcasting organisations, merely adds an extra layer of protection for the same and doesn't

65 Article 5 (e) (Alternative B), the Broadcast Treaty.

66 Article 9(1) (iv) (Alternative B), the Broadcast Treaty.

67 Article 11 bis, the Berne Convention.

68 Article 13(d), the Rome Convention.

69 Article 3, the Brussels Convention.

70 Article 8, WIPO Copyright Treaty, 1996 (hereinafter, WCT).

71 Article 6 (i), WPPT.

72 Article 6 (i), the Beijing Treaty.

73 Article 11, the Beijing Treaty.

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actually fill any existing gaps in the current international intellectual property regime.

Retransmission

Under the proposed Broadcast Treaty, broadcasting organisations enjoy the exclusive right of retransmission of their broadcast by any means including rebroadcasting, by wire or over computer networks, includes simultaneous retransmission or otherwise⁷⁴; the right to authorize broadcasting of their works to the public including any communication to the public by wire or by rebroadcasting the broadcast of the work is vested with the authors of literary and artistic works in the Berne Convention,⁷⁵ The Rome Convention already guarantees that broadcasting organisations have the right to authorize and prohibit the rebroadcasting of their broadcasts⁷⁶ and the Brussels Convention⁷⁷ enjoins contracting states to “take adequate measures to prevent the distribution of any Programme-carrying signal by any distributor for whom the signal emitted to or passing through the satellite is not intended on or from its territory”.

Therefore, the right of retransmission was well vested with broadcasting organisations and authors. However, the proposed Broadcast Treaty has expanded the said right to include simultaneous retransmission, transmission over computer networks, cablecasting etc., providing a higher level of protection to broadcasters.

Reproduction

The proposed Broadcast Treaty vests the right to authorize direct and indirect reproduction in any manner or form of fixations of their broadcasts with the broadcasting organization.⁷⁸ The right to authorize reproduction of copyrighted work⁷⁹ and the right to adaptation and alteration⁸⁰ is granted to authors of literary

74 Article 5 (d) (Alternative A) read with Article 9(1) (i) (Alternative A) and 9(1) (iii) (Alternative B), the Broadcast Treaty.

75 Article 11 bis, the Berne Convention.

76 Article 13(a), the Rome Convention.

77 Article 2(1), the Brussels Convention

78 Article 9(1) (ii) (Alternative B), the Broadcast Treaty.

79 Article 9, the Berne Convention.

80 Article 12, the Berne Convention.

and artistic works under the Berne Convention; the Rome Convention allows for the protections provided for performers to include the preventing of reproduction of a fixation of their performance if the original fixation is made without the consent or if the reproduction is made for purposes different from those for which consent was begot, the reproduction is made for purposes that aren't in accordance with Article 15, of a fixation of their performance.⁸¹ It further provides for broadcasting organisations to enjoy the exclusive right to authorize or prohibit the reproduction of fixations made without their consent of their broadcasts⁸² and for producers of phonograms to enjoy the right to authorize or prohibit the direct or indirect reproduction of their phonograms.⁸³ Performers enjoy the exclusive right of authorizing direct or indirect reproduction of their performances fixed in phonograms in any manner or form under the WPPT,⁸⁴ and producers of phonograms have the exclusive right of authorizing the direct or indirect reproduction of their phonograms in any manner or form under the WPPT.⁸⁵ Lastly under the Beijing Treaty, performers enjoy the exclusive right authorizing the direct or indirect reproduction of their performances fixed in audiovisual fixations in any manner or form.⁸⁶

As is evident, the right of reproduction has vested with authors and performers and producers of phonograms under several international treaties, the extension of this right to broadcasting organisations adds another layer of protection thereof, but fulfills no lacuna in the existing international intellectual property framework. Further, the granting of this right to broadcasters could potentially grant them control over content underlying their signals as well.

Distribution

Under the proposed Broadcast Treaty, broadcasting organisations enjoy the exclusive right to make available to the public, the originals and copies of the fixations in such a way that they can access them from a time and place chosen by

81 Article 7 (1) (c), the Rome Convention.

82 Article 13(c), the Rome Convention.

83 Article 10, the Rome Convention.

84 Article 7, WPPT.

85 Article 11, WPPT.

86 Article 11, the Beijing Treaty.

them individually,⁸⁷ in addition to making such a fixation available through sale or any other means of transfer of ownership.⁸⁸

The WCT vests the right of distribution of artistic or literary works with their authors;⁸⁹ performers enjoy an equivalent right under the WPPT,⁹⁰ as do producers of phonograms,⁹¹ and further, performers enjoy the exclusive right of distribution of their performances in audiovisual fixations under the Beijing Treaty.⁹²

Therefore, the right of distribution has been adequately protected by earlier conventions, the Broadcast Treaty, by extending this right to broadcasting organisations adds another layer of protection for the same right and doesn't necessarily fill any gaps in the international intellectual property framework.

Protection of Rights Management Information (“RMI”)

Under the proposed Broadcast Treaty, RMI could be attached to 1) the broadcast or the signal prior to broadcast, 2) the retransmission, 3) transmission following fixation of the broadcast, 4) making available of a fixed broadcast or 5) a copy of a fixed broadcast.⁹³ One alternative provides for an obligation on contracting parties to provide for “adequate and effective legal protection against unauthorized(a) decryption of an encrypted broadcast or circumvention of any technological protection measure (“TPM”) having the same effect as encryption, (b) manufacture, importation, sale or any other act that makes available a device or system capable of decrypting an encrypted broadcast and (c) removal or alteration of any electronic RMI used for the application of the protection of broadcasting organization.”⁹⁴ Another alternative provides for the same protection only against “(a) unauthorized decryption of an encrypted broadcast, (b) removal or alternation of any electronic RMI for the application of the protection of the broadcasting organisations.”⁹⁵ Further, one alternative also provides that states

87 Article 9 (1) (v) (Alternative B), the Broadcast Treaty.

88 Article 9 (1) (vii) (Alternative B), the Broadcast Treaty.

89 Article 6, WCT.

90 Article 8, WPPT.

91 Article 12, Article 14, WPPT.

92 Article 8, the Beijing Treaty.

93 Article 13(2), the Broadcast Treaty.

94 Article 12, Alternative A1, the Broadcast Treaty.

95 Article 12, Alternative A2, the Broadcast Treaty.

must ensure “adequate legal protection and effective legal remedies against the circumvention of effective technological measures used by broadcasting organisations in connection with the exercise of their rights under this treaty that restrict unauthorized acts in respect of their broadcasts”,⁹⁶ while another provides for this in addition to a provision that states “without limiting the foregoing, contracting parties shall provide legal protection against (i) unauthorized decryption of an encrypted broadcast signal and (ii) removal or alternation of any electronic RMI relevant for the application of the protection of the broadcasting organisations.”⁹⁷

The definition of RMI has been adopted from earlier conventions such as WCT⁹⁸ and WPPT⁹⁹ except for the inclusion of RMI attached to pre-broadcast signal. Under the WCT¹⁰⁰ and the WPPT¹⁰¹, contracting parties have an obligation to provide for legal protection and effective legal remedies against circumvention of effective technological measures used by authors or performers or producers of phonograms in connection with exercise of their rights under these treaties to restrict the unauthorized and unlawful use of their work. Under the WCT,¹⁰² the Berne Convention and the WPPT,¹⁰³ contracting parties have an obligation to provide for “adequate and effective legal remedies against any person knowingly performing (i) removal or alteration of any electronic RMI without authority or (ii) distribution or import for distribution or broadcast or communication to the public without authority works or copies of works knowing that electronic RMI has been removed or altered without authority knowing or with respect to civil remedies having reasonable grounds to know that it will induce, enable, facilitate or conceal an infringement of any right”. Similar provisions are made for the protection of RMI attached to audiovisual fixations under the Beijing Treaty.¹⁰⁴

96 Article 12, Alternative B 1 and B2, the Broadcast Treaty.

97 Article 12, Alternative B2 (2), the Broadcast Treaty.

98 Article 12(2), WCT.

99 Article 19(2), WPPT.

100 Article 11, WCT.

101 Article 18, WPPT.

102 Article 12 (1), WCT.

103 Article 19, WPPT.

104 Article 15, Article 16, the Beijing Treaty.

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Article 16(2) on rights management information identifies the performer, the performance of the performer or the owner of any right in the performance or information about the terms and conditions of use of the performance, and any numbers or codes that represent such information, when any of these items of information is attached to a performance fixed in an audiovisual fixation.

Thus, the provisions proposed in the Broadcast Treaty provide for a protection of RMI that is significantly higher than protection of RMI in earlier convention. Not only does it now extend to pre broadcast signals, retransmission, transmissions following fixation of the broadcast making available of a fixed broadcasts or a copy of a fixed broadcasts, it also extends to decryption and encryption of these signals. Clearly, a higher level of protection is granted to broadcasters through this provision.

Term of Protection

The proposed Broadcast Treaty provides for a term of protection that lasts for a minimum of 20-50 years computed from the end of the year in which the broadcast signal was broadcast.¹⁰⁵ The Berne Convention provides for a term of protection “life of the author and fifty years after his death” in case of literary and artistic works and 50 years after the work has been made available to the public or in case it hasn’t been made available to public, fifty years after the making of the work in case of cinematographic works.¹⁰⁶ Under the Rome Convention the term of protection is calculated as a minimum of 20 years from when the broadcast first took place for broadcasts.¹⁰⁷ Under the WPPT, the term of protection granted to performers is at least 50 years from the end of the year in which the performance was fixed in a phonogram. The term of protection granted for producers is at least 50 years calculated from the end of the year in which the phonogram was published, if unpublished, 50 years from end of the year in which fixation of phonogram was made.¹⁰⁸ And under the Beijing Treaty, term of protection to be granted to performers is at least until the end of a period of 50 years from the end of the year in which the performance was fixed.¹⁰⁹

¹⁰⁵ Article 11 (Alternative A), the Broadcast Treaty.

¹⁰⁶ Article 7 (1), the Berne Convention.

¹⁰⁷ Article 14(c), the Rome Convention.

¹⁰⁸ Article 17, WPPT.

¹⁰⁹ Article 14, the Beijing Treaty.

As is evident, the term of protection envisioned under the Broadcast Treaty extends protection to copyrighted works, as it is not calculated from when the first broadcast of the signal took place but from when the last broadcast took place. This could potentially lead to ever-greening of copyright protections as broadcasting organisations could simply renew their rights by simply broadcasting their signals again and again. Clearly terms of protection already envisioned under other international conventions protected any content underlying the signal adequately; this provision simply provides an additional layer of protection and doesn't really fill any gaps in the current international intellectual property framework. Further this provision could potentially vest with broadcasters' rights over the content underlying the signal that goes above and beyond those guaranteed to authors and performers.

Limitations and Exceptions to Protections

The proposed Broadcast Treaty provided for exceptions and limitations for "(i) private use, (ii) use of short excerpts in connection with reporting of current events, (iii) use solely for purposes of education and scientific research and (iv) ephemeral fixation by a broadcasting organization by means of its own facilities and for its own broadcasts."¹¹⁰ And for the same or other limitations as are applied in connection with copyrighted works as long as they are confined to special cases that do not conflict with normal exploitation and do not unreasonably prejudice the legitimate interests of the broadcasting organization. Under an alternative, the limitations and exceptions for protection of broadcasting signals can be similar to those for protection of literary and artistic works, provided they are confined to certain special cases that do not conflict with normal exploitation of work that doesn't unreasonably prejudice the legitimate interests of the broadcasting organization.¹¹¹ Under a further alternative, limitations and exceptions may extend to all this but further, exceptions of (a) private use, (b) excerpts in connection with reporting of current events (c) ephemeral fixation by a broadcasting organization by means of its own facilities and for its own broadcasts, (d) solely for the purpose of teaching or scientific research, (e) use to promote access by persons with impaired sight or hearing, learning disabilities or other special needs, (f) use by libraries, archivists or educational institutions to make publicly available

¹¹⁰ Article 10, Alternative A, the Broadcast Treaty.

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copies of works that are protected by any rights of the broadcasting organization for preservation, education or research And (g) use of any kind in any manner or form of any part of a broadcast where the program or any part of it which is subject of the transmission is not protected by copyright or any related right, is presumed to constitute special cases that don't conflict with normal exploitation of the work and don't unreasonably prejudice the legitimate interests of the rights holder.¹¹²

The Berne Convention first laid down the “three step test” which stated that “countries of the Union can choose to permit the reproduction of such works in special cases, provided that such reproduction doesn't conflict with a normal exploitation of the work and doesn't unreasonably prejudice the legitimate interests of the author”¹¹³. Under the Rome Convention these exceptions could include (a) private use, (b) use of short excerpts in connection with reporting of current events, (c) ephemeral fixation by a broadcasting organization by means of its own facilities and for its own broadcasts and (d) use solely for the purposes of teaching or scientific research, limitations on protection of copyright in literary and artistic works or compulsory licenses to an extent that is compatible with this convention keeping in mind the three step test.¹¹⁴ Under the Brussels Convention limitations and exceptions to protection of signals include (i) short excerpts of the programme consists of reports of current events , but only to the extent justified by the informatory purpose of such excerpts, (ii) quotations, or short excerpts of the programme carried by the emitted signal, provided that such quotations are compatible with fair practice and are justified by the informatory purpose of such quotations or (iii) the distribution is solely for the purpose of teaching including teaching in the framework of adult education or scientific research in a developing country.¹¹⁵ Further, contracting states are not limited from applying domestic law to prevent abuses of monopoly in this regard.¹¹⁶ The WCT follows

111 Article 10, Alternative B, the Broadcast Treaty.

112 Article 10, Alternative C, the Broadcast Treaty.

113 Article 9, the Berne Convention.

114 Article 15, the Rome Convention.

115 Article 4, the Brussels Convention.

116 Article 7, the Brussels Convention.

the three step test formula for literary and artistic work¹¹⁷ and the WPPT allows for similar limitations for protection of performers and producers of phonograms keeping in mind the three step test.¹¹⁸ Similar provisions exist under the Beijing Treaty as well.¹¹⁹

Clearly, the limitations and exceptions to protections under the Broadcast Treaty could possibly be narrower than those in other international conventions.

Therefore, the protections offered under the Broadcast Treaty are either (a) unnecessary as the underlying right is already protected in earlier international conventions or are (b) excessive and offer a higher level of protection than previously offered by international conventions, betray a shift to a rights based approach and therefore must be justified.

Therefore, be it through the definitional provisions or through granting rights and protections that are excessive and unnecessary, the language of the broadcast treaty betrays a tendency toward a rights based approach as opposed to a pure signals based approach, these provisions go above and beyond simple protection from signal piracy and they arguably come at too great a social cost.

CONCLUSION

Therefore, it is clear that the Broadcast Treaty in its current form is excessive and not *necessary* to achieve the professed goal of preventing signal theft. No need for the Broadcast Treaty has yet been shown.

But even if a treaty regarding broadcasters rights were necessary to prevent signal theft, the current Broadcast Treaty by providing broadcasters with rights over content underlying the signal has in fact adopted a rights based approach and has gone above and beyond the General Assembly mandate. This is problematic simply because broadcasters aren't part of the creative process, they haven't contributed to creation of the content, and their rights must be limited to their contribution-distribution of content and manufacture of signal.

117 Article 10, WCT.

118 Article 16, WPPT.

119 Article 13, the Beijing Treaty.

To provide broadcasters with these rights may impinge on legitimate uses of copyrighted material as transaction costs to utilize the material would increase because more permissions and licenses would be required to use copyrighted material and this could possibly have a chilling effect on free speech.¹²⁰

Further the Broadcast Treaty leaves out spaces for abuse by broadcasters, particularly with regards to term of protection being calculated from the last broadcast- broadcasters could simply rebroadcast the program every 50 years and thereby keep renewing their rights over the signal and possibly the content leading to ever greening of copyright.¹²¹

It is also clear that no valid justifications have been provided for the need for a Broadcast Treaty let alone the heightened protections under the proposed draft, and no impact assessment studies have been conducted to test whether the Broadcast Treaty would even prevent signal piracy if implemented.

Therefore it is clear that at the very least further study must be done on what has led to increase in signal piracy and the Broadcast Treaty must be redrafted to directly answer the problem without making a shift to a rights based approach.

120 Shyamkrishna Balganes, *supra* note 12, at p. 1321.

121 Patricia Akester, *supra* note 12, at p. 35-36.