



The Proposed WIPO Treaty on the Protection of Broadcasting and Cablecasting Organizations

I. Introduction

By the end of the year, Member States of the World Intellectual Property Organization (WIPO) may conclude a treaty on the protection of broadcasting and cablecasting organizations when its business and social repercussions are inadequately understood.

The purpose of the proposed treaty is to give new international protection to traditional broadcasting organizations against the theft of their signals transmitted across national borders. Though protection is currently granted under several international treaties, broadcasters deem it insufficient in light of technological advancements and the new digital environment.¹

Discussions have progressed slowly over the past 8 years.

Partly, because of their highly technical nature coupled with great divergences in the treatment of broadcasting organizations among national legal systems. It is also due to growing awareness of the treaty's potential unintended consequences. Consumer groups and other stakeholders have brought to the discussions concerns on the impact on access to information, freedom of expression and cultural diversity, and the stifling of innovation in the rapidly changing technological and commercial media environment.

WIPO Members have the critical challenge of balancing the legitimate interests of the broadcasting industry with public interest and other stakeholder concerns in the new media environment. Members are yet to reach consensus on even the basic elements of the treaty. At its past September 2006 meeting, the

Executive Summary

Discussions for a new treaty to protect broadcasting and cablecasting organizations against signal theft at the WIPO are closely linked to the information revolution. Member States must carefully balance between granting increased protection to certain segments of broadcasting media to protect their commercial interests with safeguarding the public interest in access and use of the content that is broadcast. Accordingly, the proposed treaty should narrowly focus on signal theft, excluding any intellectual-property type rights and technical mandates. If rights are included, these must be balanced by a robust regime for limitations and exceptions.

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General Assembly, the main decision-making body of WIPO, instructed members to aim to “agree and finalize, on a signal-based approach, the objectives, specific scope and object of protection” of the proposed treaty.² Accordingly, the proposed treaty must be framed narrowly to address signal-theft. To this aim, two special meetings of the Standing Committee on Copyrights and Related Rights (SCCR) were scheduled in 2007, one in January, the other in June. If agreement is reached, a Diplomatic Conference, the final stage in the treaty-making process at the WIPO, will be convened at the end of the year.

The basis for the discussions on the proposed treaty is a consolidated draft document in treaty language that compiles all proposals by member states.³ Nonetheless, the Chairman of the SCCR prepared an informal draft ‘non-paper’ as an attempt to bring together the greatly divergent positions of members within a narrow signal-based framework. Members submitted comments on the draft dated 26 March 2007, which was subsequently reviewed by the Chairman.⁴

Though the non-paper will be discussed at the June meeting, it has no formal standing.

Members are free to discuss on the basis of the more extensive consolidated draft text, or to make new proposals. This is important in that the Chairman’s draft non-paper goes far beyond signal protection. It provides for exclusive rights to broadcasters that would extend to the Internet and obligations on technical protection mandates and enforcement measures, while maintaining a restrictive provision on limitations and exceptions. The potential for harmful consequences from the proposed treaty are further amplified by the removal of articles on access to knowledge and information, competition, and cultural diversity.

This policy brief provides a broad overview and analysis of the proposed treaty to assist developing countries in the discussions and related decision-making. It is based on a compre-

hensive in-house research study that found that the proposed treaty may create more costs than benefits in the short and long-term for developing countries.⁵

II. The New Broadcasting Landscape

Broadcasting is a medium of mass communication important for the transmission of information and access to knowledge. However, the traditional ‘public good’ conception of and values of broadcasting, -that it be provided at zero or low cost to the general public and promote freedom of expression, access to information, pluralism and cultural diversity-, no longer define broadcasting media. Broadcasting has emerged as an industry and profit-maximizing activity, characterised by private and public monopolies and deregulation.

The development of digital technology is further revolutionizing the broadcasting landscape. On the one hand, it creates enormous opportuni-

ties for increased flow of information and access to knowledge and dissemination, social interaction and entertainment. With Internet, for example, individuals are no longer passive consumers of broadcasts but may be in-

teractive participants, even in creating content and broadcasting. On the other hand, a fierce battle to control access to content is taking place among traditional media corporations seeking to capitalize on the new developments, maintain local market dominance and expand to foreign markets. Where boundaries between audiences and creators are blurring, traditional broadcasters around the globe are finding it difficult to adjust -faced with increased competition and outmoded business models.

‘Traditional’ broadcasting media is generally understood as referring to that which delivers transmissions via wireless (i.e. over-the-air and satellite) means that required high financial and infrastructure investments. It is likewise associated to the traditional concept of public broadcasting to a wide audience and whose business model

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is largely based on public funding and advertisement. However, in the WIPO discussions cablecasting organisations that deliver transmissions via wire (i.e. cable television and excluding transmissions over computer networks) are being considered in the same form. As opposed to ‘new media’, that allows for interactive two-way communication with audiences by way of the Internet, traditional broadcasting is limited to one-way communication. However, the distinction will increasingly be blurred as ‘traditional’ broadcasters and cablecasters move into new media (i.e. simultaneous and/or deferred streaming of their broadcasts/cablecasts through the Internet.

In developing countries, traditional free-to-air television and radio broadcasting remains a central mechanism for public access to information, knowledge and culture, particularly in remote geographical areas and for the poor who cannot afford to pay for access.

The new possibilities for delivery of content across multiple new platforms for broadcasting, including via computer networks and mobile devices, holds great promise for the developing world in bridging the digital and knowledge divide. Therefore, for developing countries important considerations are protecting the legitimate interests of their national broadcasters, while promoting the development of an open new media environment that facilitates access both to national and foreign content.

III. A Development Analysis of the Proposed Treaty

WIPO members have made some headway in implementing the decision of the General Assembly of aiming to “agree and finalize, on a signal-based

approach, the objectives, specific scope and object of protection” of the proposed treaty. There is broad agreement that the objective of the treaty should be to tackle signal theft, and that the object of the protection should be limited to the signal. As such, the scope of protection would not extend to the content transmitted through the signal, which may be subject of

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copyright or related rights protection. However, some members, particularly the European Community, continue to push for the inclusion of intellectual property-type rights that would extend to the Internet. Coupled with legally enforceable technological protection measures, the new rights

would likely restrict access to knowledge, information, freedom of expression and culture, particularly in developing countries.

The treaty beneficiaries

Member States of WIPO have agreed that the beneficiaries of the proposed treaty will be traditional broadcasting organisations in the “traditional” sense. This is in tune with the initial purpose of the treaty which was, arguably, to protect free-to-air public service broadcasters.⁶ However, the proposed treaty currently covers both ‘traditional’ broadcasting organisations and cablecasting organisations.⁷

While Members vowed to exclude webcasting and simulcasting from the scope of the proposed treaty, the Chairman’s non-paper includes exclusive rights protection for traditional broadcasting organizations and cablecasting organizations for their transmissions and re-transmissions over the Internet.

In determining the treaty beneficiaries, the only difference being recognised among broadcasting, cablecasting, and to some extent, webcasting and simulcasting is the technology employed and platform for delivery of transmis-

sions.⁸ Public service television and radio broadcasters would be covered in the same form as pay television and channel owners. The differences between non-commercial, public service, community and commercial broadcasting or broadcasting business models (i.e. whether funded by public moneys, advertisement or subscription-fees) have important developmental implications, and yet they are not part of the proposed treaty discussions. Public service and community broadcasting, as distinct from commercial broadcasting, play a fundamental role in ensuring access to knowledge in developing countries. These differences among broadcasting media should be critical elements in defining the beneficiaries, rationale and extent of protection of the proposed treaty.

Implementing a signal-based approach to protection

The first demandeurs of the proposed WIPO treaty are traditional broadcasting organisations, which perceive deficiencies in the current international legal framework for the protection of broadcasting organisations. Now joined by cablecasting organizations, they want an extension of the set of exclusive rights they are currently granted under the framework of the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations to traditional broadcasting organisations.

In the view of traditional broadcasters, the Rome Convention should be updated because at the time of its conclusion in 1961, it did not account for the technological advancements that now allow for different modes of delivery beyond terrestrial and over-the-air (i.e. cable, satellite, computer networks) and reception by the public beyond television and radio (i.e. recorders, computers, mobile telephones and other devices). Accordingly, they want a new treaty that accords them multiple exclusive rights (i.e. reproduction, fixation, post-fixation

rights including simultaneous transmission and deferred retransmission) allowing them to control access and use of their content-carrying signals over any means of delivery, including computer networks. They further seek that the rights be legally enforced through technological means that would prevent anyone from decrypting and/or circumventing the protection unless authorised by the broadcaster. The TRIPS Agreement also provides rights-based protection for traditional broadcasting organisations, though less extensive than that found in the Rome Convention.

Rights-based protection has been awarded to broadcasting organisations in international treaties as beneficiaries of copyright related-rights or neighbouring rights. Copyright is a form of intellectual property protection designed to reward and promote the production of intellectual literary and artistic works. The fundamental role of copyright law is to protect authors and other copyright owners in respect to their works (such as unauthorised copying of their works), as an incentive for intellectual creation, in balance with society's interest in the dissemination of works and access to knowledge.

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The granting of copyright-type rights to broadcasters cannot be justified on the same rationale, as they are

merely intermediaries in making works available to the public. In this regard, broadcasting organisations were granted related rights protection under the Rome Convention as a reward for their investments in assembling and scheduling the content transmitted through their signals and on the same basis, are now demanding and updated and extension of such rights. However, Members must carefully consider the merits and potential problems derived from this approach.

Copyright law is not meant to reward investments. Moreover, there is lack of evidence suggesting that broadcasting organizations have an economic need for exclusive rights. To date, only 86 countries have ratified the Rome Convention. Among countries that are not part of the convention, including the United States, China and India, the national broadcasting industry has flourished.

The General Assembly at its past September 2006 meeting instructed Members to frame a potential new treaty on a signal-based approach in recognition of the concerns of other stakeholders with respect to a rights-based approach. Moreover, Members have agreed that the objective of the potential new treaty is to address signal theft. In this respect, there is also no evidence suggesting that exclusive rights are necessary or desirable for protection against signal theft. The Brussels Satellite Convention that was concluded in 1974 to address signal-theft concerns in respect to satellite transmissions not covered in the Rome Convention, does not contain any type of intellectual property-type or any other exclusive rights to broadcasting organizations.

In terms of the impact of a potential new treaty providing exclusive rights to broadcasters, the main concern for the public and other stakeholders is

that such rights may allow broadcasters to control access and use of not only of their signals, but also the content transmitted through the signal, even when they have no copyright in the content.

Control over content, irrespective of whether it is covered or not by copyright, is one of the objectives that traditional broadcasters seek through the proposed treaty. Copyright owners have the exclusive right to license their works to be broadcast (transmitted) to the public. If the content carried in a broadcast signal is covered by copyright, unless the broadcaster acquires the rights, it cannot be broadcast. Once the broadcaster has acquired the rights in the broadcast, these can form the basis of protection for the content-carrying signal itself. However, where broadcasts do not carry a literary or artistic work or that carry a work partially or not protected by copyright (i.e. works that have fallen in the public domain, Creative Commons licensed works), the broadcaster cannot rely on the licences of copyright owners as a way to protect the content-carrying signal itself. For example, in broadcasting political speeches or live sports events considered to be in the public domain in some national jurisdictions.

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Traditional broadcasters want Rome related rights-type protection to be extended to cover all platforms for delivery not previously covered (satellite, cable, computer networks), in addition to new rights (i.e. deferred transmission over the Internet) that would allow them to control access and use of their content-carrying signals, even when the content may not be subject to copyright protection. The extension of copyright-type protection to broadcasters to cover content, even where they are not copyright owners, can seriously restrict access to knowledge by the public.

Traditional broadcasters argue that although such restriction would be automatic when the

broadcaster prohibits the use of the signal, for example for re-transmission of a live sporting event via cable, access to such content could still be achieved by going directly to the source. However, there is no basis for imposing new restrictions for access to content in the public domain based on the need to protect broadcasters from signal theft. If the proposed treaty were to extend such rights to cover broadcasters' transmissions via computer networks, any individual could be blocked from viewing content transmitted via the Internet even when it is not covered by copyright and would not be able to freely store and redistribute the content.

Technological Protection Measures and Enforcement

An additional concern on the impact of the proposed treaty on access to knowledge and other stakeholders is that it may also give broadcasters further protection by providing legal enforceable measures to use technology to control access and use of the content embodied in the signals. Broadcasters already utilize several technical mechanisms to control access by consumers in the receiving devices (i.e. television, radio, and possibly computers and mobile devices), including electronic access controls, set-top boxes and encryption software.

It is possible that the proposed treaty could include obligations for members to provide technological protection measures (TPM) as technical mandates against decryption and other measures, including banning devices that may help circumvent technical mandates. If TPMs were extended to broadcasting organisations and cablecasting organisations as proposed in the two alternatives in the Basic Draft Proposal, it would mean new obligations for WIPO Members, since neither the Rome Convention nor the TRIPS Agreement contains such provisions. In addition, technological protection measures are not relevant or necessary to protect signals, the objective of the proposed treaty, and would dangerously extend protection to content.

Broadcasting organisations want obligations with respect to the protection of TPM and digital rights management (DRM) similar to those that were introduced in the WIPO Copyright Treaty and the WIPO Performers and Phonograms Treaty. The United States Digital Millennium Copyright Act (DMCA) of 1998, as a model for implementing the respective obligations in the two treaties, is highly controversial and deemed as producing negative effects on scientific research, competition and technological innovation, as well as restricting private, non-commercial use of non-copyrighted works.

Many developing countries are still struggling to implement such obligations in their national laws, and the impact of the provisions is still being evaluated. It seems that at the very least, the imposition of a technology mandate regime for broadcasting and cablecasting is premature.

A broadcasting TPM regime could act as an even greater restriction on access to knowledge and stifle technological innovation and constrain competition. No impact assessment has been made of how TPMs would in practice be used by broadcasters or how it may impact other stakeholders and the public interest. At the same time, the Chairman's draft non-paper includes obligations for the enforcement, when there is no clarity as to what framework is required to support and enforce such obligations.

If rights are to be granted to traditional broadcasters and cablecasters in the proposed treaty, contrary to the signal-based approach instructed by the General Assembly, these should be in a manner that does not restrict access to works in the public domain and the copyright owner's ability to allow use in relation to the underlying content that forms part of a broadcast.

Limitations and Exceptions

Limitations and exceptions to the exclusive rights that may be provided to broadcasters and cablecasters are a critical element in balancing the protection that may be granted in the treaty for broadcasting organisations with the interests of other stakeholders and the broader public interest.

The establishment of limitations and exceptions may allow governments to ensure public use of information and access to knowledge, in particular, for those who do not have economic resources to pay for access. However, they are non-voluntary, any country may choose to implement or not implement them in their national jurisdictions.

It would be in the interest of developing countries that the proposed treaty incorporates a non-exhaustive list of specific limitations and exceptions that allow them flexibility to craft relevant national policies to protect the public interest and counter the potential harmful impacts of the proposed treaty.

IV. Conclusion

The demands of traditional broadcasters and cablecasters for increased international protection against signal theft are legitimate. However, there is no evidence to suggest that a treaty providing broad property-type rights and mandating technological protection measures may be an adequate and effective mechanism to tackle signal theft. The proposed treaty must be framed in

such a way as to properly balance the legitimate interest and need of broadcasting organisations and the public interest in broadcasting and other stakeholders' legitimate interests. Accordingly, the proposed treaty should exclude from its scope any

reference to the Internet and establish a robust system of limitations and exceptions that would safeguard access to knowledge for developing countries.

End Notes

1. Namely, the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (Rome Convention, 1961), the Convention Relating to the Distribution of Programme-carrying Signals Transmitted by Satellite (the Satellite Convention, Brussels, 1974), and the Agreement on Trade Related Aspects of Intellectual Property Rights (The TRIPS Agreement, 1994).
2. For the full text of the decision, see WIPO document WO/GA/33/10 Prov. Pg.38.
3. See WIPO document SCCR/15/2.
4. See "Non-paper on the WIPO Treaty on the Protection of Broadcasting Organizations", dated April 20, 2007. The document is available at http://www.wipo.int/meetings/en/details.jsp?meeting_id=12744 (last accessed May 16, 2007). Country comments to the first draft non-paper are available at http://www.wipo.int/copyright/en/sccr_s1.
5. See Viviana Munoz Tellez & Andrew Chege Waitara, "A Development Analysis of the Proposed WIPO Treaty on the Protection of Broadcasting and Cablecasting Organizations", Research Papers 9, South Centre, January 2007. Available at <http://www.southcentre.org>.
6. The initial demand for the proposed WIPO treaty came from European traditional broadcasting organizations. See WIPO document SCCR/2/6, "WIPO Treaty for the Protection of the Rights of Broadcasting Organizations".
7. Some countries however, are not yet convinced that cablecasting organizations to be included or be treated in the same form as traditional broadcasting organizations in the proposed treaty. See for example, comments submitted by Indonesia and Brazil on the Chairman's draft non-paper of 1 March 2007.
8. The specific elements that would define broadcasting and cablecasting organizations are still under debate. While the Chairman's non-paper defines that they be a 'legal entity' that 'takes the initiative' and 'makes arrangements' for the 'transmission' of a broadcast/cablecast for the reception of the public, the Revised Draft Basic Proposal (SCCR/15/2) further adds that these must also have responsibility for the assembly and scheduling of the content of the transmission.



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Recent Publications

- A Development Analysis of the Proposed WIPO Treaty on the Protection of Broadcasting and Cablecasting Organizations – *South Centre Research Papers 9* – January 2007.
- *Intellectual Property Quarterly Update, First Quarter 2007* – Access to Knowledge: Open Access Models for Increased Access to Educational Resources and Research.
- Development and Intellectual Property under the EPA Negotiations – *South Centre Policy Brief 6* – March 2007.
- Market Power, Price Formation and Primary Commodities – *South Centre Research Papers 10* – November 2006
- *Intellectual Property Quarterly Update, Fourth Quarter 2006* – Intellectual Property in European Partnership Agreements with the African, Caribbean and Pacific Group of Countries.
- IP Rights Under Investment Agreements: The TRIPS-plus Implications for Enforcement and Protection of Public Interest – *South Centre Research Papers 8* – August 2006
- The Use of Flexibilities in TRIPS by Developing Countries: Can They Promote Access to Medicines? - *South Centre South Perspectives Series* – April 2006
- State of Play in Agricultural Negotiations: Country Grouping' Positions (Market Access Pillar, Domestic Support Pillar, Export Competition Pillar and Cotton Initiative). *South Centre Analytical Note*. November 2006 update.