EBU

OPERATING EUROVISION AND EURORADIO

LEGAL & POLICY FOCUS

BROADCASTERS' RIGHTS: TOWARDS A NEW WIPO TREATY

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FOREWORD

The aim of this Legal & Policy Focus is to further the understanding, in particular among legal practitioners of broadcasting organisations and other lawyers dealing with copyright issues, of the "neighbouring" (or "related") right that broadcasting organisations enjoy under copyright laws in Europe. Simply defined, broadcasters' neighbouring rights protect the signals transmitted by broadcasters that carry programme content for reception by the public. A main impetus for providing this overview is the current debate at the World Intellectual Property Organisation (WIPO) in Geneva for a new international treaty granting modern, or at least updated, protection to the neighbouring rights of broadcasting organisations. This discussion has been going on for over 20 years, and now seems to be entering a decisive phase.

Ironically, and even more remarkably, the longer this topic is discussed, the more apparent it becomes that in the broader international context, the nature and underlying rationale of this specific right is often not sufficiently known or self-evident. A certain amount of confusion occurs quite frequently with respect to the distinction between the subject of the neighbouring right, namely the broadcast as such (i.e. the programme output), and the actual programme content, which may or may not be protected independently. Correctly distinguishing between the two is crucial to understanding not only the objective and scope of the legal protection but also its effect.

Whilst the subject of neighbouring rights is extremely complex and potentially lengthy, this document provides a short easy-to-read overview, focusing on why the proposed WIPO Treaty would provide a crucial protection for broadcasters in the digital media age[1].

10 REASONS FOR A WIPO BROADCASTERS' TREATY

1 **BROADCASTERS' INVESTMENT IN CONTENT PRODUCTION AND DISSEMINATION MUST BE PROTECTED.**

Creation of broadcast signals involves acquiring and producing programmes, editorially organizing, scheduling and promoting them, plus creating and maintaining the means of disseminating the programme-carrying signals. Broadcasters' investment in this process is immense and its protection must thus be adequate.

2 **THE CURRENT LEGAL PROTECTION OF BROADCASTERS' SIGNALS AT THE INTERNATIONAL LEVEL IS OBSOLETE AND INADEQUATE FOR BROADCASTERS WISHING TO MEET CONSUMER DEMANDS AND TO CURB GROWING BROADCAST PIRACY.**

The Rome Convention of 1961 offers inadequate protection of broadcasters' signals today. New transmission technologies come with new costs and new risks for broadcasters as they increase the scope for international signal theft, including new means to easily copy and redistribute digital broadcasts.

3 **SIGNAL PIRACY IS HARMFUL TO ALL BROADCASTERS IN ALL PARTS OF THE WORLD.**

WIPO studies confirm that massive misappropriation of broadcast signals is suffered on a daily basis by both private and public broadcasters in all parts of the world. Much piracy stems from foreign-based Internet sites which see a business model in stealing products from one part of the world and displaying it to markets in another. The ability of multinational pirates to copy broadcast streams from any region and to send them around globally with impunity also robs developing country broadcasters of actual and potential markets around the world.

4 **BENEFITS TO SOCIETY, MEDIA PLURALISM AND THE LOCAL CREATIVE SECTOR.**

Broadcasters provide the most benefits to society, more than any other entity in the copyright sector. They play a critical role in developing and sustaining an informed society, ensuring the public's right to receive diversified and independent information; they safeguard cultural diversity and media pluralism, enhance social cohesion and media literacy; and adapt society to the dynamic process of modernization. The protection of their signals further strengthens global cultural exchanges and improves exports of cultural goods from developing nations.

5 **PROTECTION OF THE INTEGRITY AND VALUE OF BROADCAST SIGNALS SUPPORTS ACCESS TO CULTURE, INFORMATION, EDUCATION AND ENTERTAINMENT.**

Broadcasters' programmes enrich and stimulate artistic expression and creativity by displaying local talent. Broadcasters' services, and in particular those from public service broadcasters, serve the information and educational needs of minorities and other groups, including those with low levels of literacy or who live in remote locations. A treaty would safeguard all these benefits.

6 **A TREATY PROVIDES A MINIMUM, HARMONIZED LEVEL OF PROTECTION.**
A treaty is the most suitable instrument to address signal piracy, in a harmonized manner and on a multilateral basis. Effective rights would provide broadcasters the incentive to invest in cross-border and post-fixation offerings of their signals, as consumer demand for access to broadcasts "anywhere, at any time, on any device" is increasing everywhere. Limiting protection to a few platforms would create loopholes, inviting pirates to circumvent the treaty.

7 **SIGNAL PIRACY IS DETRIMENTAL TO THE ENTIRE COPYRIGHT SOCIETY.**
Broadcast piracy causes serious harm to broadcasters and the public they serve: loss of compensation from retransmitting entities; loss of advertising revenue; loss of programme quality that results from migration of quality programmes to pay services with technological protection measures; loss to broadcasters competing in markets where pirated signals are being transmitted. Also programme producers and contributors lose out on potential income, and government tax receipts suffer, as pirates are usually based outside the tax net.

8 **THE TREATY WOULD UPDATE EXISTING RIGHTS AND NOT ADD A "NEW LAYER".**
Broadcasters have been granted neighbouring rights protection in respect of their programme-carrying signals since 1961, independent of the protection of the signal's content. Any country should remain free to provide for the same kinds of limitations or exceptions to such protection in its national legislation, in accordance with the internationally recognized "three-step test".

9 **THE TREATY WOULD NOT CREATE NEW RIGHTS FOR MERE "WEBCASTERS" OPERATING SOLELY ONLINE.**
Protection should include broadcasters' programme transmissions delivered online or via other new platforms simultaneously, and to a certain extent, non-simultaneously. All these signals require the broadcaster's investment, editorial input and responsibility, and its technical expertise. Countries should remain free to extend such minimum scope of protection, so as to prevent gaps due to technological developments and the 5G environment.

10 **ALL ADHERING COUNTRIES WOULD OBTAIN IMPLEMENTATION SUPPORT AND LEGISLATIVE TRAINING.**
The effects of the treaty would be a higher level of protection of broadcasters' signals not only at the international, but also at the national level. Through the active support of the WIPO administration of the treaty, there would be an increase in the education and training of officials and legal practitioners in copyright law with respect to broadcasting.

INTRODUCTION

BACKGROUND

Today more than ever, broadcasters are urged to provide convenient, portable and cross-border access to their signals, notably through online services, IP-TV and OTT ("over-the-top") platforms. Obviously, broadcasters wish to offer their audiences more and easier access to their programmes by any means. However, they cannot be expected to invest in such access if sufficient protection of their signals is not guaranteed. At the international level, the legal protection under the 1961 Rome Convention is clearly outdated. With the increasing on-demand consumption of broadcasters' programming, the current gaps are growing rapidly.

By representing the most robust safeguard for cultural diversity and media pluralism, broadcasters provide more benefits to society than anyone else in the copyright sector. They are key in ensuring fundamental democratic values, such as freedom of expression, but are also vitally important in introducing local creative talent to the general public. Moreover, everyone loses out from broadcast piracy: creators, performers, sports right-holders – and citizens too.

In light of the above, it is a blatant omission that none of the international rules on the protection of broadcasters take due account of the new platforms for signal distribution which include not only cable and satellite services, but also digital and online services, broadband networks, connected-TVs, USB sticks, smart phones and tablets. Pirated programmes are also used to drive equipment sales such as set-up boxes with in-built players and add-ons providing deep links to pirates' websites. These forms of signal piracy should be properly addressed; the WIPO debate for the update of broadcasters' neighbouring right must now move to its decisive stage.

The need for an update was recognised by broadcasters at an early stage and supported by an overwhelming majority of delegations at the first meeting of the Standing Committee for Copyright and Related Rights of WIPO in 1998; since then, its necessity has never been in serious doubt. However, the drafting work at WIPO has been subject to unprecedented delays in the norm-setting process, while technical developments of the past decade have brought upon more changes to broadcast media and their consumption than in the 50 years following the 1961 Rome Convention. In 2020, with

standardized 5G networks, many parts of the world will enter into another new technological era, with a potentially huge impact on the broadcast sector. Recently, both the United States and the European Union started their own work on modernising the copyright frameworks to be fit for the digital era. It is therefore crucial that also the update of the broadcasters' neighbouring right is included in the multilateral framework.

CURRENT CONTEXT

Broadcasting organisations exist to meet the cultural and informational demands of the citizens of the countries in which they operate. For that purpose, they assemble, schedule and transmit programmes to the general public. Traditionally, these programmes were distributed over a terrestrial network only. Technological developments over the past several decades have allowed for many additional methods of programme delivery, apart from the traditional "over-the-air" distribution. These new methods include satellite, cable and broadband networks, online streaming, Internet-connected TVs, tablets, smart phones and even videogame consoles. Broadcasters also play a key role in the political development and social integration of society. This multi-facetted importance of broadcasting organisations calls for a regulatory framework that should not only set appropriate rules within which these organisations can legitimately operate, but also provide them with adequate protection against the unauthorized use of their signals.

Unfortunately, as foreseen by broadcasters long ago[2], there is ample empirical evidence of the piracy of broadcasters' signals. In addition to the examples reported at the WIPO Worldwide Symposium in Manilla in 1997 (and 1998 in Cancun), at the six regional consultancy meetings thereafter and the various presentations by broadcasters from all over the world at WIPO meetings, two studies commissioned by WIPO from an independent consultancy firm (Screen Digest) demonstrated that in 2010, online TV piracy had become "a mass market phenomenon" on a worldwide scale[3].

IN 2020, WITH STANDARDIZED 5G NETWORKS, MANY PARTS OF THE WORLD WILL ENTER INTO ANOTHER NEW TECHNOLOGICAL ERA, WITH A POTENTIALLY HUGE IMPACT ON THE BROADCAST SECTOR.

THE ECONOMIC LOSSES DUE TO TV PIRACY ARE IMPRESSIVE

On **4 August 2012**, a New York Times article entitled "Internet Pirates Will Always Win,"[4] included the quote "According to Torrent Freak, the top pirated TV shows are downloaded several million times a week".

A **2012** report found that live television was the fastest-growing segment of copyright infringement (DETICA research, jointly commissioned by Google/PRS).[5]

In **2016**, an IRDETO study revealed that pirate IP-TV supplier websites have become "a full-fledged business and a formidable competitor to established pay TV operators"[6].

The EU Intellectual Property Office reported in **2017** that the number of operators of illegal IP-TV services, providing access to potentially thousands of television channels and often also to 'video on demand' (VOD) catalogues, is "on the rise and expected to continue at an accelerated rate"[8].

In **February 2017**, the Philippines-based media company ABS-CBN was awarded damages of nearly 11 million US dollars against various online streaming websites that regularly displayed pirated versions of its programming[7].

In **June 2018**, a Stockholm court ordered the Sweden-based Advanced TV Network, distributing Arabic-language programming over the internet without authorization from BeIN Sports and the TV group DigitAlb, to pay over 20 million euros in damages[9].

All involved in developing radio and television programmes suffer from broadcast piracy, and in particular creators, performers, producers and organizers of sports and other cultural events. One would therefore assume that such figures are sufficient to underpin both the importance and the necessity of multi-territorial legislative action[10]; no other right-holders' Treaty of WIPO was justified by such overwhelming evidence.

BROADCASTERS' NEIGHBOURING RIGHT

WHY DO BROADCASTERS HAVE A NEIGHBOURING RIGHT[11]?

Broadcasters plan, produce and/or acquire, schedule and transmit their daily programme output to the benefit of the public. It requires major financial, technical and organisational investment in infrastructure and logistics to enable the general public to receive programmes, by means of a "signal" or a "transmission". Benefits from this investment trickle down to society as a whole: in a 2014 WIPO study analysing the contribution made by creative industries to economic performance, broadcasting is the third largest of the core copyright sectors (after press/literature and software). Its contribution is more than twice that of the music sector and more than three times as much as the film industry[12]. In order to protect and build on this investment, broadcasters need to have proper means to authorize or prohibit use of their programme-carrying signals in upstream and downstream markets. The neighbouring right for broadcasters thus mainly exists to protect the broadcasting organisations' entrepreneurial effort and investment which materialize in the form of their broadcasts (or related online signals) as an end-product.

KEY ELEMENTS UNDER THE 1961 ROME CONVENTION

Under the 1961 Rome Convention, various key elements of the neighbouring right were already duly acknowledged.

KEY ELEMENTS OF THE NEIGHBOURING RIGHT

- **Responsibility**, which means that the programme itself could also be transmitted by another entity, as long as it is done on behalf of the broadcasting organisation;
- **Independence of audience**, which means that neither the type of broadcasting, public or commercial, nor the intended audience size are relevant;
- **Independence of content**, which means that whether or not the programme content is protected is entirely irrelevant;

- **Independence of fixation**, which means that programme-carrying signals can be exploited in both unfixed form (e.g. via live events) or through fixed forms (e.g. via a "catch-up" or "replay" service); for example, already the 1961 Rome Convention protects fixed signals against their reproduction;

- **Independence of right-holders** (of the content), which means that the protection of the broadcast does not interfere with the protection or exercise of the rights in the programmes themselves; and,

- **Independence of transmission and technology**, which means that each broadcast is protected, whether it is live, deferred (pre-recorded), a repeat broadcast or just a relay from another source (for example, the satellite relay of a football match played abroad), and regardless of the platform or technology via which the transmission occurs.

These elements indicate that the neighbouring right as a *separate, exclusive right* is essential to broadcasters and provides them with an independent remedy against the unauthorized use of their programme signals, irrespective of the signal's content. In this context it is important to note that not all broadcast content is protected. Some material may not qualify for copyright protection in the first place due to lack of originality or creativity. Although somewhat surprising, this is often the case for news and sports programmes as well as public street events or even a royal wedding. In such cases, the neighbouring right would provide the only basis for a broadcaster to claim infringement in the case of unauthorized use of its signal.

The aforementioned elements demonstrate also that the entity harmed most directly in cases of signal piracy is the broadcaster which produced (or at least prepared by editing) the signal that was pirated, and not the owner of the signal's content. Pirated signals made available unauthorized from other sources heavily undermine a broadcaster's entrepreneurial effort and can be detrimental not only to its advertising income, but also to its public image. As a beneficiary of protection, a broadcaster should therefore be able to act quickly and obtain effective legal relief against the pirate. The neighbouring right is the best legal instrument to tackle unauthorized use and redistribution of broadcast signals, as it entitles broadcasters to act and seize a court on their own behalf, *in their own right*, independently from the right-holders of the broadcast content and without affecting their rights.

OBJECT AND SCOPE OF PROTECTION

Traditionally, the object of protection of the neighbouring right is the broadcasting signal. Broadcasts are electronic signals that carry radio or television programmes, transmitted by or on behalf of broadcasters for reception by the public. While programme content is what ultimately benefits the public, the neighbouring right deals with the activity which makes this enjoyment possible and which culminates in the transmission of the programme to the individual radio and television sets. Hence, the neighbouring right protects only the signals and not the programme content which the signals carry. Thus, the notion of the so-called "signal-based approach" is used for nothing else than to clarify that the separate protection of the programme signal's content is irrelevant.

On the previous aspect there is sometimes confusion, especially due to different terminology being used in different instruments. The 1961 Rome Convention, for example, refers to the protection of "broadcasts" (though without specifically defining this notion), which could convey the impression that it encompasses only the "live" signals themselves. However, this would ignore what a broadcast actually stands for, notably *the entire programme output*, as assembled, scheduled and transmitted by the broadcasting organisation. As explained above, a broadcast is simply the result of the entire entrepreneurial activity (i.e. the combined technical, organisational and financial undertaking) of the broadcasting organisation, which enables the transmission - by or on behalf of that organisation - of programme-carrying signals to the public. This includes activities such as rights acquisition which of course is also done by other right-holders, like film or phonogram producers. However, as is the case for phonogram producers, the necessary rights clearance activity by broadcasters would in itself not yet be decisive as rationale, but for both phonogram producers and broadcasters this activity is an important part of their IP lifecycle. The real object of protection of the broadcasters' neighbouring rights is the entire programme output carried by the signals as transmitted by or, in the case of involvement of a separate transmission entity, on behalf of, the broadcasting organisation. As such, the term "signal" is, just like the word "phonogram", only a

metaphor for the object of protection, a symbolic drafting tool which mainly clarifies that the focus of the protection is not on the signal's content.

The scope of protection (i.e. the "rights") under the broadcasters' neighbouring right is always defined by the relevant legal instrument, at the national or international level. A broadcaster's *exclusive* right over its own signals means that it is entitled to authorize or prohibit certain uses, e.g. rebroadcasting or retransmission, fixation, reproduction or "making available" to the public, to all or part of its signal. Technological developments continue to allow for new forms of use that may fall outside the scope of any existing legislation[13]. Hence, the neighbouring right must include safeguards against *any unauthorized* use of broadcasters' signals, subject to the usual exceptions and limitations. The fact that some countries refer to such protection as "copyright" under their national laws is irrelevant to the international neighbouring rights categorization and to countries' obligations under international treaties.

Unfortunately, the 1961 Rome Convention has no Preamble in which these foregoing considerations could have been clarified so as to provide an explanation of the main "rationale" for the broadcasters' neighbouring right. For example, the rationale behind the independence of the broadcaster neighbouring right is very similar to that of the neighbouring right of producers of phonograms. The 1961 Rome Convention grants protection to the neighbouring rights of both phonogram producers and broadcasters.

THE NEIGHBOURING RIGHT MUST INCLUDE SAFEGUARDS AGAINST ANY UNAUTHORIZED USE OF BROADCASTERS' SIGNALS, SUBJECT TO THE USUAL EXCEPTIONS AND LIMITATIONS

Phonogram producers are granted neighbouring rights protection in respect of the entrepreneurial activity of producing a phonogram, an independent protection that is separate from the copyright protection for the author/composer(s) of the musical work embodied in the recording[14]. In a similar way, broadcasters are granted neighbouring right protection in respect of their activity of delivering programmes, a protection that is separate from any protection of the programme content of their broadcasts or signals.

Both phonogram producers and broadcasters need robust and effective protection of their investment in creating a product, whether sound-carrying recordings or programmes carried by signals; and the protection is granted irrespective of, and independent from, the protection of the content of the recording or the signal. There is nothing out of the ordinary about this independency: any compilation of works or any adaption of a work (e.g. a translation) obtains its own protection, separate from the underlying works or contributions. This is also why the producer of a phonogram does not need to provide evidence that it has permission to record the work(s) on its phonogram/CD, or why the owner of a compilation does not need to prove that all contributors have duly signed up to the inclusion of their parts. The broadcaster will be protected irrespective of whether it can provide evidence of all the necessary permissions. This system ensures that entities are prepared to invest in productions with a large number of contributors.

In the field of broadcasting, rapidly obtaining *injunctive relief* against unauthorized use of the signal is often more important than obtaining compensation for damages later. For sports or news programming, the real value lies in the exclusive first transmission and in such cases the only effective defence is a preliminary court order preventing unauthorized use of the signal as soon as possible. After the fact, finding proof of misuse or calculating damages can be extremely difficult, if possible at all. A broadcaster having merely standing to sue third parties, for example via its licence agreement with a film producer, is not sufficient as that would only entitle the broadcaster to engage a court but it does not confer an exclusive right which the broadcaster may invoke for obtaining swiftly a remedy in its own name and putting the burden of proof on the infringer to show that its act was legitimate. Obtaining immediate injunctive relief would almost certainly be impossible if a broadcaster had to rely on rights derived from third parties to provide the necessary evidence in time[15]. This element is another fundamental reason for the neighbouring right's independence.

BENEFITS DERIVED FROM THE PROTECTION

BENEFITSFORBROADCASTERS

It is beyond dispute that broadcasting activities provide public benefits for society. At the same time, broadcasters' investments in quality programming, be it sports, informational, educational or cultural content, is dependent on their ability to fully exploit and protect their signals. Signal piracy affects not only "premium" broadcasters that recoup their programming investment by charging subscription fees, but it also damages free-to-air commercial broadcasters and public TV stations, especially if their advertising revenue is siphoned off by pirates. This stems from the fact that quality programme-making is a technically complex and expensive undertaking. This does not change in the digital age: even where certain forms of distribution may become cheaper, the upfront activities for preparing programme signals, including the staff and skills required for producing, editing and scheduling, etc, continue to require substantial funding upfront. Signal piracy undermines their investment in programming, threatens the value of their rights, and reduces their advertising revenue and sublicensing income. Without protection against unauthorized use of their programme signals, broadcasters would thus incur significant losses In the case of public broadcasters. Piracy may also lead to questioning the value of the broadcaster's offer and can even challenge its funding sources. The impact may be more severe on premium Pay TV services, whose value would be seriously questioned if their content was made available for free through the unlawful use of their signals.

Moreover, there is an increasing consumer demand for time and place convenient access to broadcasters' signals. Such access is usually made possible via an online platform and with the help of mobile devices such as tablets and smartphones. However, access to programming via such new types of platforms or receiving devices is at risk if broadcasters' signals delivered through such platforms are not sufficiently protected. Therefore, broadcasters need control also over their online signals in order to meet this increasing consumer demand.

BENEFITS FOR OTHER RIGHT-HOLDERS

It is further worth stressing that the broadcasters' neighbouring right exists in parallel to the rights of copyright holders and the neighbouring rights of performers and producers of phonograms; it does not interfere with these rights in any way, but only supplements them. This has been the case since the Rome Convention in 1961 introduced the notion of the neighbouring right and it has never caused any significant difficulty in any adhering country. The broadcasters' right is limited to authorizing or prohibiting the use of their own signals: it does not extend to the protected works or other subject matter which are part of the programme's content. Therefore, broadcasting organisations simply cannot prevent or hinder the use of this content outside of their own broadcasts. At the same time, this means that even if a broadcaster has authorized the use of its signal, the user of the signal's content must also obtain authorization from all who hold rights over that content.

Owing to the independently existing rights in the programme content, other right-owners in the broadcast content will naturally continue to be able to exercise their own respective rights against pirates or any other infringing parties. After all, in cases where a broadcaster wishes to grant a licence to a third party, it can only grant rights which it holds itself. When a broadcaster obtains an injunction against unauthorized use of the broadcast signal, the order to cease the use stops equally the unauthorized use of the programme content; when the right-holders in the signal's content have authorized the use of that content, the broadcaster will not be entitled to prevent such use. In the reverse situation, use of the programme-carrying signal will not be possible if the right-holders in that programme's content do not wish to license their rights.

The foregoing means that a loss of income for broadcasters represents also a loss of income for the entire creative industries sector. The negative impact of signal piracy can ultimately lead to less investment in broadcast content and may discourage investment in ambitious projects. This applies equally to all regions[16] and in some extreme cases, as occurred in Africa, it has driven broadcasting organisations to completely cease their activity.

THE NEIGHBOURING RIGHT DOES NOT INTERFERE WITH THE RIGHTS OF COPYRIGHT HOLDERS AND THE NEIGHBOURING RIGHTS OF PERFORMERS AND PRODUCERS OF PHONOGRAMS, BUT ONLY SUPPLEMENTS THEM

BENEFITS FOR SOCIETY AND THE GENERAL PUBLIC

More importantly, it would be erroneous to consider broadcast piracy in isolation. The harm of broadcast piracy trickles much further down, well beyond content and signal right-holders' interests only, leading to a loss of substantial public interest benefits. As broadcasters must meet their obligations under media regulations, such as the protection of minors, respect for advertising or sponsorship limits, support for local audiovisual production companies, etc., all these public interest safeguards can be wholly circumvented by illegal online streaming and download services. Therefore, in both developed and developing countries, only a healthy and vibrant broadcasting system will continue to serve the interests of the viewing and listening public and provide societal benefits, such as those stemming from free and independent journalism, but also social and economic development and employment opportunities. Finally, one should not overlook the vital role played by broadcasters in providing reliable information to the public in times of emergencies[17].

Sports events offer a good illustration of how piracy impacts revenue[18]. Acquisition of exclusive rights to sports events can easily amount to hundreds of millions of euros. If such broadcasts are then taken without authorization and shown on unauthorized streaming websites or other channels, this unfairly reduces the value of the broadcaster's rights and the revenue netted from advertising and sponsorship. In such cases, the broadcaster must abandon the prospect of income from sublicensing and its reputation will likely suffer as well. Furthermore, the general public interest could be harmed as this loss for the broadcaster would likely call into question the funding of popular sports events, including major events such as the Olympic Games.

It is sometimes put forward that protecting broadcasters' signals could deprive society from using works in the public domain, or that it could even affect the freedom of expression. This is a clear misunderstanding, as it confuses broadcast signals with their content. A WIPO broadcasters' treaty would remove material from the public domain no more than any compilation copyright or the use of a public domain work in a sound recording. Sound recordings, compilations and broadcasts, which include public domain material all require skill, capital and often involve a certain level of creative effort. A third party should not be allowed to freely exploit the effort and expense undertaken by a broadcaster in creating, publicizing and disseminating a public domain work. In fact, not protecting such broadcasts would discourage making the works available to the public via broadcasting, resulting in less public access to public domain works.

Finally, the interest in updated protection for broadcasters at the international level concerns all countries in the world; signal piracy is recognised as a global phenomenon, it is not an isolated matter that affects only a few regions[19]. And it concerns each country directly. When a domestic broadcaster finds its signals being misappropriated abroad, and it is unable to take the necessary action, this impacts not only the financial health and reputation of the broadcaster involved but necessarily also the payment balance of the broadcaster's country.

SHORTCOMINGS OF EXISTING INTERNATIONAL INSTRUMENTS[20]

THE MAIN ADVANTAGES OF A NEW TREATY

A new treaty would provide broadcasters with a modern - or at least updated - neighbouring right that could be invoked independently and separately from any rights to programming content, thus filling the gaps of the 1961 Rome Convention. This is important not only for situations where protection of the programme content may be non-existent or uncertain (e.g. sports events, news or public domain material), but also as concerns broadcast content that is separately protected. In all such cases, the main entity in need of a swift legal remedy is the broadcaster (by directly exercising the exclusive rights itself), whereas the content right holder may not have such an urgent interest, either because it has already received payment or it is simply too difficult to engage local court proceedings (e.g. for obtaining injunctive relief). This becomes all the more relevant where the content right-holder is established in another region or time zone.

The main legal purpose of such an international instrument is to establish so-called "*national treatment*" in the treaty-adhering countries. This would ensure that the programme-carrying signals of foreign broadcasters would be protected as if they were the signals of national broadcasters instead of the foreign broadcasters having to rely on the - possibly discriminatory - international private law provisions of the local copyright law.

Moreover, in all adhering countries, domestic copyright law would have to ensure the minimum level of protection as granted under the treaty. Therefore, an indirect effect of the treaty would be to generally raise the level of protection under national laws as well.

Likewise, there are not only practical reasons, but also political aims: a modern treaty would place broadcasters on the same level as other right holders (authors, musical performers and actors) who already benefit from updated international protection under the WCT, WPPT and WAVPT. It would clearly be an incongruity if only the contributors to broadcast programming, but not the actual broadcasters, were to be protected against online piracy.

Finally, the treaty would send a clear message to the outside world that broadcast piracy cannot be condoned and that broadcasters' rights must be globally duly respected. This message is of critical importance given the ever-growing ease of copying and redistributing programme-carrying signals via the Internet for illicit profit.

1961 ROME CONVENTION

At the international level, the broadcasters' neighbouring right has been recognized for more than half a century as one of the categories of right holders protected under the 1961 Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (1961 Rome Convention).

RIGHTS UNDER THE 1961 ROME CONVENTION

According to Article 13 of the 1961 Rome Convention, broadcasting organisations have the right to authorize or prohibit:

- the rebroadcasting of their broadcasts;
- the fixation of their broadcasts;
- the reproduction of certain fixations of their broadcasts;
- 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.

The importance of the 1961 Rome Convention for broadcasters lies in their international recognition as a *separate category* of right holders, together with performers and producers of phonograms. Also worth noting is that this neighbouring right over their broadcasts has co-existed for close to 60 years with the rights over the programming content.

The 1961 Rome Convention provides the *minimum* level of protection that each Contracting State must grant to broadcasters. It also adopts the principle of national treatment: every State must provide equal treatment to its national broadcasters and those from other Contracting States. The minimum protection offered by the 1961 Rome Convention, however, is clearly not sufficient in light of the changing media landscape of the 21st century. The object of protection of the 1961 Rome Convention is broadcasting, which is understood as transmission over the air of signals intended for reception by the general public. It thereby excludes transmissions by cable, via the Internet or over mobile networks and connected TV platforms, which now constitute a significant and growing part of broadcasting activities.

Technological developments have also made broadcasters' signals increasingly vulnerable to misappropriation, both within and across borders. Consequently, whereas the 1961 Rome Convention only covers simultaneous retransmission over the air, unauthorized use today may include, *inter alia*, deferred retransmission over the air, by cable or over the Internet, on-demand delivery of fixed broadcasts, or displaying the signal in public places for profit-making purposes.

While the 1961 Rome Convention is one of the most important and widely adopted international instruments for the protection of broadcasters' neighbouring right, as the instrument applies to close to 100 countries, there are a number of countries which have not yet adhered to it, most notably the United States and China. In an increasingly globalized media market, a legal instrument offering protection to broadcasters in the world's most significant markets of media services is fundamental.

1974 BRUSSELS CONVENTION

Not long after the adoption of the 1961 Rome Convention, a further step in protecting broadcasters' signals was made with the Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite of 1974 (1974 Brussels Convention). It recognized the interests of the broadcasting organisations but perhaps most importantly, that technological development had rendered the protection offered by the 1961 Rome Convention insufficient. Nevertheless, the Brussels Convention stops short of offering an independent protection to broadcasters and applies only to signals transmitted by satellite. It provides no substantive rights in a signal, it does not apply where signals are intended for direct reception by the public, and it does not provide enforcement mechanisms for broadcasters[21]. Moreover, Contracting States are free to implement measures under either public or private law, and it is rather illusory to expect a telecoms authority to plead on behalf

of a broadcaster when pre-broadcast signals have been taken from a telecoms satellite without authorization. All these features make the 1974 Brussels Convention totally inadequate, both structurally and substantively, because it simply does not provide the protection which broadcasters need.

AGREEMENT ON TRADE-RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS (TRIPS)

The initial focus of the WTO TRIPS Agreement was IP enforcement and it was realized that for such purposes the treaty should at least mention which rights are covered by it. However, Article 14, paragraph 3 simply repeated the 1961 Rome Convention rights, because going beyond the substance of the 1961 Rome Convention would have required multilateral agreement, which was clearly not on the GATT-TRIPS negotiation table. Moreover, Article 14, paragraph 3 of the TRIPS Agreement provides even lesser protection to broadcasting organisations than to performers and phonogram producers, by allowing TRIPS Members to opt out of granting rights to broadcasters as long as the copyright holders of the subject matter of broadcasts are protected in accordance with the Berne Convention. This approach in Article 14, paragraph 3 TRIPS would thus not bring any new solution, as all right-holders of broadcast content have already a right of communication to the public and/or making available under the WIPO Copyright Treaty (WCT), the WIPO Treaty for the Protection of Phonogram Producers and Performers (WPPT) and the WIPO Beijing Treaty for the Protection of Audio-Visual Performers (WAVPT). Also, most problematic is that this outdated clause fully ignores the generally acknowledged need for a content-independent and otherwise separate protection of broadcasters' signals.

In any case, the TRIPS Agreement was superseded by the 1996 and 2012 WIPO Treaties and is thus no longer of any relevance for the debate on a WIPO broadcasters' treaty.

COUNCIL OF EUROPE

The Council of Europe provided an early instrument for the protection of broadcasting organisations' neighbouring right in the 1960 European Agreement on the Protection of Television Broadcasts (EAT)[22]. It gives broadcasters the rights to authorize or prohibit the rebroadcasting, fixation and communication to the public of their television broadcasts. In many respects it goes further than the 1961 Rome Convention. For example, it covers the communication of broadcasts to the public by means of any instrument for the transmission of signs, sounds or images. Therefore, this right is not limited to places with an entrance fee (although Contracting Parties are allowed to impose such a condition). Broadcasting organisations are also entitled to authorize or prohibit "wire diffusion of broadcasts", whether simultaneous or based on fixations; this would also cover deferred retransmissions by wire.

Initially, the EAT was ratified by 11 Council of Europe countries. Later adherence, however, was made practically obsolete by the Protocols to the Agreement because these stated that only countries adhering to the 1961 Rome Convention could become parties to the EAT. Furthermore, some countries' ratifications have been accompanied by important reservations, mainly in reference to those provisions going beyond the 1961 Rome Convention.

In 2000, the Council of Europe's Steering Committee on the Mass Media and its Group of Specialists on the Protection of Rights Holders in the Media Sector embarked on a standard-setting activity aimed at improving the protection of the neighbouring rights of broadcasting organisations. Since at that time WIPO was making steady progress in the initial phase of norm-setting proceedings, a possible broadcasters' treaty, rather than a convention, was held more suitable; a Recommendation by the Council of Europe was thus considered sufficient. It reiterated the importance of the Declaration on Neighbouring Rights adopted by the Committee of Ministers of the Council of Europe on 17 February 1994, which recognized the need for a general improvement in the protection of neighbouring rights.

The final "*Recommendation Rec(2002)7 of the Committee of Ministers to member states on measures to enhance the protection of the neighbouring rights of broadcasting organisations*" states that despite the changes in the media ecosystem, the role of broadcasting in democratic societies has not changed. The Recommendation aims to address this new reality and to provide an appropriate level of protection to those who operate within it. Therefore, in addition to the rights granted under the 1961 Rome Convention, the Recommendation extends the protection of broadcasting organisations to a number of new rights.

NEW RIGHTS UNDER THE 2002 RECOMMENDATION

- The right of retransmission of a broadcast by wire or wireless means, whether simultaneous or based on fixations;
- The right of direct or indirect reproduction of the fixations of broadcasts in any manner or form;
- The right of making fixations of broadcasts available to the public by wire or wireless means in such a way that members of the public may access them from a place and at a time individually chosen by them;
- The right of distribution of the fixations and copies of fixations of broadcasts; and,
- Adequate protection against any of the acts referred to above in relation to pre-broadcast programme-carrying signals.

The Recommendation also invites Member States to implement effective legal instruments for the protection of technological measures that are used by broadcasting organisations in connection with the exercise of their neighbouring rights. Likewise, it extends the term of protection to 50 years from the end of the year in which the broadcast took place (as compared to the 20 years granted by the 1961 Rome Convention).

The 2002 Recommendation represents the consistent effort by European countries to update the protection of broadcasting organisations. However, it is not binding and it is uncertain as to what extent it will influence any new legislation of Council of Europe Member States. WIPO's lack of progress in subsequent years prompted new discussions at the Council of Europe in 2008. However, these came to a standstill over a formal dispute on the issue of competence between the EU Commission and some of the Member States involved.

The matter was referred to the European Court, which decided in 2014 in favour of exclusive competence for the EU Commission albeit under the assumption that a Council of Europe Convention on this matter would largely replicate the existing EU framework (*the acquis communautaire*)[23].

EU LAW

Compared to the protection afforded at the international level, the protection of broadcasting organisations under EU law is one step ahead. It is a result of the European Commission's efforts during the 1990s and later to bring protection of neighbouring rights up to par with that of copyright. Today, the EU *acquis communautaire* provides broadcasters with protection exceeding that of the 1961 Rome Convention and which is almost in line with the 2002 Council of Europe Recommendation.

The protection of the broadcasting organisations' neighbouring right in the EU results from a piecemeal approach within a number of EU Directives aiming to harmonize European legislation in the field of copyright and neighbouring rights.

RELEVANT EU DIRECTIVES

- Directive 92/100/EEC of 19 November 1992 (Rental and Lending Rights Directive, updated in 2006) gives broadcasting organisations the exclusive right to authorize and prohibit the fixation of their broadcasts as well as the reproduction of such fixations. Moreover, the Directive requires Member States to grant broadcasters the exclusive right to distribute fixations of their broadcasts, including copies thereof.
- Article 7 of the said Directive, dealing with the fixation right, also describes the scope of protection by indirectly broadening the term "broadcasting organisation" (although "broadcasting" is not separately defined). This implies that Member States must give the aforementioned protection to broadcasts transmitted by wire or over the air, including by cable or satellite.
- Cable operators that merely retransmit broadcasts, however, are not given such rights. This reflects the opinion that distributors merely retransmitting received broadcasts simultaneously do not warrant the same type of protection. This corroborates the reasoning that the neighbouring right exists mainly to protect broadcasters' investments in assembling, scheduling and creating programmes, while taking full editorial responsibility for them.

- Directive 2001/29/EC of 22 May 2001 (also known as the "InfoSoc" Directive), aimed at adapting the protection granted to authors and neighbouring rights holders to the digital environment. Broadcasting organisations were granted the exclusive right to authorize or prohibit direct or indirect, temporary or permanent reproductions by any means and in any form, in whole or in part, of fixations of their broadcasts. Most importantly, under this Directive broadcasting organisations enjoy the exclusive right to authorize or prohibit the "making available" to the public of fixations of their broadcasts, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them. These provisions clearly seek to cover on-demand services for broadcast programmes, over the Internet or any other platform.

This short overview does not suggest that an update of the broadcasters' neighbouring right would not be necessary at the EU level. On the contrary, loopholes in the current protection of broadcasters' signals under EU law still exist and need to be covered.

UNAUTHORIZED USES BY THIRD PARTIES NOT COVERED BY EU LAW

- simultaneous or deferred retransmission of wireless or wired signals, by any means;
- use of broadcasters' online (simulcast and related on-demand) signals;
- use of broadcasters' pre-broadcast signals; and,
- advertising overlays or similar commercial exploitation of the screen display in violation of signal integrity24.

Although the European Commission acknowledges the necessity for modernizing the broadcasters' neighbouring right at the global level and is proactively engaged in the WIPO process, its Communication of 9 December 2015 entitled "*Towards a modern, more European copyright framework*" did not include any reference to this pressing need of the broadcast industry. Such omission is incoherent and must be rectified. Without up-to-date effective rights, there is no incentive for EU broadcasters to invest in cross-border and time-convenient offerings of their signals at a time where consumer demand for such access is increasing and when providing such access is becoming partially compulsory (in particular, via the new EU Regulation on cross-border portability of online content services[25] which entered into force in April 2018).

CORE PRINCIPLES OF A NEW TREATY

A FUNDAMENTALLY CHANGED TECHNOLOGICAL ENVIRONMENT

The landscape of the 21st century is very different from that of the 1960s: at the time of the 1961 Rome Convention, broadcasting over the air was the prevailing method used to transmit programmes to the public. Today, even though this method remains widespread, it is but one of many technological possibilities for a programme to reach its audience. Programmes which are originally broadcast over the air often reach their audience by cable through the services of cable TV operators. Broadcasting via satellite provides an alternative way to reach audiences in remote places and across borders. The Internet provides new forms of broadcast-related offerings such as catch-up and on-demand services. And, with the exponential growth in the use of smart mobile devices, there is yet another new technological platform for the distribution of a broadcasting programmes.

New technologies have also enabled the existence of different types of content providers, meaning that broadcasters today operate in a highly competitive environment where the audience has the choice between numerous audio-visual services, delivered via different technological platforms. In this new environment, quality and exclusivity gain in importance.

These developments are accompanied by continuous growth of signal piracy, as explained in the introduction. Technological development has not only granted access to individuals or small entities to engage in broadcast-like activities, such as producing high quality video footage, but also uncovered many ways for misappropriation of signals. Such unauthorized use often occurs in countries where the national legislation does not offer effective protection to broadcasters, and with the Internet, pirated signals could target audiences all over the world.

Aging national or international instruments no longer provide broadcasters with the necessary legal tools to protect them against the new forms of illegal use of their signals. Of course, countries can always take action at the national level, however, this will solely protect national broadcasters' signals within national borders. Such territorially fragmented protection is certainly not sufficient at a time when transmissions over satellite and the Internet

cross national boundaries and even continents very easily. It is therefore indisputable that, with the radically changed media landscape, the protection of broadcasting organisations is in urgent need of an update. Existing instruments are limited either by their territorial scope or by the restrictive definitions they contain. A new WIPO treaty would provide the best format for harmonizing the protection of broadcasting organisations all over the world, ensuring that new standards for protection are implemented among the treaty's Contracting Parties.

MANDATE FOR THE STANDING COMMITTEE ON COPYRIGHT AND RELATED RIGHTS

The WIPO 2006 General Assembly mandated the Standing Committee on Copyright and Related Rights (SCCR) to agree on a signal-based approach and to clarify the "*objectives, specific scope and object of protection*" with the aim of submitting a treaty-language proposal to a Diplomatic Conference. However, the special sessions of that Committee in January and July 2007 failed to find a common ground on certain key issues and the issue was therefore retained on the SCCR agenda for its regular sessions, with no limit in time.

The objectives and beneficiaries of the anticipated treaty are relatively straightforward and the decisive criteria for protecting broadcasters' activities in the 21st century remain similar to those of the Rome Convention of 1961; however, the approach has meanwhile changed. Whereas the initial debate focussed on encompassing the relevant provisions of the 1961 Rome Convention into a new treaty, a new proposal from Mexico and South Africa in 2011 narrowed down the approach so that the new treaty would basically only "fill in the gaps" of the 1961 Rome Convention, taking account the new technologies and multiple platforms for broadcasters' activities (and for signal pirates). With the new currently tabled draft text of the SCCR Chairman, which clarifies objectives, scope and object, fulfilling the SCCR mandate is now within reach.

EXCLUSION OF WEBCASTING ORGANISATIONS

The specific reference in the WIPO General Assembly's mandate to the protection of broadcasting and cablecasting organisations "*in the traditional sense*" is not intended to limit the scope of the instrument, but only to narrow the scope of beneficiaries. Long debates took place in the special sessions of 2007 on whether the treaty should also include protection for webcasting organisations. That question arose as a result of broadcasters extending their programme delivery over the Internet. In that respect, it was held important to make a distinction between those broadcasting organisations that simultaneously stream their programmes over the Internet (*simulcasting*) and other organisations which **exclusively** operate their services via computer network transmissions (*webcasting*).

There are strong arguments in favour of a differentiated approach towards simulcasting and webcasting, because simulcasting is now a well-established activity of the broadcasting organisations. A programme that is simulcast over the Internet is the same as the one being broadcast to the public by other platforms like satellite or over the air. Since broadcasters have exclusive rights over their programme-carrying broadcast signal, it only makes sense to extend those rights to the Internet in line with a technologically neutral approach towards the broadcasters' neighbouring right. The reasoning behind the existence of the neighbouring right fully applies to the simulcast signal since it mirrors the broadcast programme, which is subject to the broadcaster's legal and editorial responsibility.
The nature of webcasters, on the other hand, is quite unclear. While it is generally accepted that this encompasses organisations that make content available only via the Internet, there is no legal definition of the term "*webcaster*".

Any operator who makes a piece of audio or video content available on a publicly accessible website (even simply via sitting in front of its own webcam) could fall under this category. Further, in principle webcasters' activities are not, or hardly, regulated by legislative instruments.Although these operators distribute audio or audiovisual material to the public similar to broadcasters, they do not need to comply with heavy and detailed media regulations concerning *inter alia*, establishment criteria, editorial responsibility, advertising and sponsorship, contribution to local productions, and the protection of minors. There are also no specific requirements with regards to the content of the webcasters' programmes.

All of this means that, whereas protecting simulcasts would be the natural extension of an existing exclusive right, the case for protecting webcasters is much more difficult to make. The mere fact that entities use the same distribution technology for their content services does not automatically make them eligible for the same protection, because this would completely ignore the fundamental role that broadcasters hold in society. This explains the rationale for the wording of the 2007 General Assembly's mandate, which refers to broadcasters "*in the traditional sense*".

The treaty should thus clarify that its protection extends only to signals used for transmissions by a broadcasting organisation. Broadcasting organisations "*in a traditional sense*" are those which accept full editorial and legal responsibility for assembling and scheduling the content of their signals and communicating them to the public. Internet-only operators, such as webcasters or similar intermediaries, do not meet these criteria. Their exclusion from the treaty is fair because to date only broadcasters have demonstrated the need for updated protection. Hence, pure webcasting organisations should preferably be excluded from the treaty's beneficiaries through a suitable definition of a "*broadcasting organisation*".

INDEPENDENCE OF TRANSMITTED CONTENT

As noted above, a broadcasters' neighbouring right is independent from the content. Exactly the same rationale applies for the producer of a phonogram – such producer will be protected whether the recorded material itself is protected or not. Another typical example is a film in the public domain because its term has expired: the broadcast thereof will be protected for a certain time, but the film itself can be used freely by everyone.

There is a certain misapprehension among some civil society groups that broadcasters' protection would block access to public domain material. This objection is a red herring, as all parties to the 1961 Rome Convention have had extensive signal protection for decades without encountering any such problems. Nothing in a treaty on broadcasters' rights may affect or curtail exceptions and limitations which are applicable to all copyright-protected material. In addition, in academic literature it is broadly explained that the treaty will actually further freedom of expression rather than impede it[26]. Moreover, the treaty would and should provide countries the same flexibility for limitations and exceptions as under national law (see below).

The idea that separate protection for broadcasters would block public access to public

> THE TREATY NEEDS TO BE FULLY ALIGNED WITH OTHER INTERNATIONAL COPYRIGHT INSTRUMENTS TO AVOID DISCREPANCIES IN INTERPRETATION AND IMPLEMENTATION AT THE INTERNATIONAL OR NATIONAL LEVELS

domain material confuses the question of signal use with content use. Anybody is free to take and use public domain material from the same source as that of the broadcaster. Further, private reception and private recording of broadcasts will not be affected by extending the neighbouring right. This was already the case since the 1961 Rome Convention introduced the right and will not change as a result of its extension.

A FORWARD-LOOKING INSTRUMENT AS A STARTING POINT

Broadcasting organisations need protection that is platform-neutral so that all forms of programme distribution are covered, and broadcasters are allowed to defend themselves against all possible forms of unauthorized use of any of their signals. The focus should not be on the past or present, but on the future: on the development of broadcasting organisations and their offerings to the public. This has significant consequences both for the treaty's scope of application (i.e. the signals to be protected) and the extent of its rights (in terms of which uses are considered infringing, see in detail below chapter 6). A platform-agnostic approach is the only way to ensure that the new treaty will not need a revision or serious amendments shortly after it is adopted.

From this perspective, it becomes clear that the treaty must be similar to, though in certain ways also different from, the 1961 Rome Convention. The South-African/Mexican draft proposal of 2011 paved the way for such an approach by introducing a technologically neutral conception of the broadcasters' neighbouring right as one of its core elements. This is a fundamental point of distinction between the new text and the 1961 Rome Convention, but is indispensable to the aim of keeping media business models robust and relevant, not only today but also in tomorrow's digital landscape. Modern protection for broadcasters means taking account of the wide diversity of media platforms and the unique role that broadcasters continue to play in that environment. If the new treaty fails to face up to contemporary realities, the issues at stake would almost inevitably need to be re-examined in the near future – a most inefficient use of the international community's resources.

This explains why the intention is not to replace or amend the 1961 Rome Convention, but rather to adopt a separate legal instrument that takes account of technological developments since 1961. This approach makes the most sense, because the relevant provisions of the 1961 Rome Convention (and other treaties) will remain in force in those countries which have adhered to either or both instruments. At the same time, the new instrument must be compatible with its predecessors and fit harmoniously into the existing framework. The treaty needs to be fully aligned with other international copyright instruments to avoid discrepancies in interpretation and implementation at the international or national levels. This calls for terminology which is consistent with existing rules (e.g. preferable is the notion of "*related rights*" instead of "*other subject matter*").

KEY UNDERLYING CONCEPTS

EXCLUSIVE RIGHTS VERSUS THE "RIGHT TO PROHIBIT"

Adequate protection implies effective judicial remedies. Especially in sports and news programming, where the real value lies in the exclusive first transmission, it is vital for a broadcaster to be able to obtain an injunction immediately. For legal procedures to apply, the asserted right must be exclusive. The mere "*right to prohibit*" is inadequate for such purposes, because it does not represent an absolute right of intellectual property. Its application is generally flexible at the national level and may not necessarily provide an independent right to take legal action to stop or prevent an impending piracy within the broadcaster's own territory. Effective remedies therefore can only be provided through a limited set of *exclusive* rights, focussing on the protection against the retransmission and on-demand use of broadcasters' signals and against such uses of pre-broadcast transmissions.

Because of the difficulty of producing contractual evidence in time, injunctions would be quasi impossible to obtain if broadcasters had to rely on rights derived from third parties - even more so when the underlying rights agreement with a film distributor or sports event organizer is in a foreign language and an authenticated translation needs to be submitted to the court. In one real-life (but not published) example, a court was still requesting a broadcaster to produce yet more evidence to prove its right to bring the action more than a year after the football championship in question had finished.

PROTECTION OF SIGNALS AND "LIVE" PROGRAMMES

Some countries require that a work to be "fixed" in tangible form to be eligible for protection, as allowed under Article 2(2) of the Berne Convention. The United States is one such country which has solved the dilemma for sports broadcasts by stipulating that a broadcast work is considered to be "fixed" if the live transmission is being recorded simultaneously. In countries without this requirement, any non-fixed work such as a work of choreography will be protected if it is sufficiently creative.

Here again, the broadcasters' neighbouring right is completely independent of this particular requirement. The 1961 Rome Convention does not provide for such a condition (which would have been particularly awkward as the 1961 Rome Convention protects wireless signals against fixation) and live broadcasts are protected in the same manner as any other broadcast. The question whether the "work" underlying the broadcast is fixed or not is without relevance for the broadcasters' neighbouring right.

PRE-BROADCAST SIGNALS

One important loophole to be addressed by a future treaty is extending protection to include pre-broadcast signals. Pre-broadcast signals are not intended for direct reception by the public and fall outside the scope of existing international instruments. Nevertheless, they are programme-carrying signals transported to one or more broadcasters from the site of a particular (sport, musical or open-air) event and serve as the basis for the broadcast of such event. If broadcasting were defined as intended for "*direct*" reception by the public, then this would exclude situations where the transmissions have to reach a broadcasting organisation or a cable operator first. This means that the pre-broadcast signal, which is not intended to be received by the public directly, would fall entirely outside the scope of protection. Such wording should thus be avoided.

The pre-broadcast signal may occur simultaneously with the actual broadcast, as is often the case with live coverage of sports events, or separately when subject to editing, for example, by the receiving broadcaster. In either case, the unauthorized use of the pre-broadcast signal harms the broadcasting organisation as much as pirating the broadcast itself. It could allow users to distribute parts of a programme even before it was broadcast. Leaving pre-broadcast signals unprotected seriously undermines the protection of the broadcasters' neighbouring right as it leaves the door wide open for unauthorized use of programme signals. Equal protection for broadcast and pre-broadcast signals would also relieve broadcasting organisations from the burden of proof as to which signal was used without authorization. Only having to provide proof that it was their programme being misused makes any legal action quicker and easier.

The neighbouring right of broadcasting organisations is generally implemented under national copyright law or a specific Act dealing with related rights[27]. Countries may wish to implement the protection of pre-broadcast signals through another type of law, however as a minimum it needs to provide adequate and effective remedies allowing a broadcaster to take swift and efficient legal action against the piracy of such pre-broadcast signals on its own territory, in particular in cases of an imminent threat of infringement.

POST-FIXATION RIGHTS

The legal protection of a programme-carrying signal also indirectly protects its content, whether live, fixed or deferred. However, it must be made clear that the rationale for the broadcasters' neighbouring right is not based on a possible "*gap*" in the copyright protection of the broadcast content, for example due to a lack of sufficient creativity. If a work does not have sufficient creativity to obtain protection on its own, it means that it is not original and that as a work it should be in the public domain.

This clarification is important for the notion of "*post-fixation*" rights which apply to broadcasts once they are "*fixed*". Since the 1961 Rome Convention, such rights are already part of many international instruments and national laws. The main purpose of the broadcasters' treaty is to modernize broadcasters' rights, meaning that "*post-fixation*" rights (i.e. deferred retransmission and making available) must be included in the treaty. Today, the ninety-plus WIPO Member States party to the 1961 Rome Convention are already obliged to provide post-fixation rights; the WCT, WPPT, and the Beijing Treaty also all provide for post-fixation rights[28]. In the EU, updated post-fixation rights for broadcasters, including the making available right as well as the distribution right, have been in effect for over 17 years now.

Digital broadcasting systems like IP-TV allow users to stop, pause and start-over programmes via a simple button-click; in those situations, the end-user is enjoying a fixed broadcast. Broadcasters' on-demand offerings, such as catch-up services, are also based on fixations of their broadcasts. Without post-fixation rights, broadcasters would lose the incentive to create new convenient ways for consumers to enjoy their programmes or foster new distribution streams, such as secondary digital services. Moreover, it would deprive them of the incentive to invest in cross-border offerings of their signals at a time where consumer demand of access to broadcasts regardless of time and place is rapidly increasing throughout the world.

A "*narrow*" retransmission right dependent on simultaneity would allow any third party to record and reproduce a signal to retransmit over the Internet minutes, or even seconds after the live transmission by a broadcaster. Not providing for protection in these types of situations would result in seriously harmful forms of unauthorized exploitation of broadcasts.

The notion of "*post-fixation*" is sometimes used in relation to the rights of others in the content of broadcasts. However, this is misplaced. Providing such protection to broadcasters will have no negative effects on any other category of rights holders, because the neighbouring right is independent from the programme's underlying rights. This independence is entirely normal in copyright/IP laws: any performer of a work can act in his own right, just as any producer of a phonogram, any translator of a work or any compilation rights-holder, in addition to the author(s) of the performed, recorded or original works; to use an example outside copyright, any technical device or process could be infringing two (or more) different patents at the same time. Thus, an updated and strengthened protection of broadcasters would not be to the detriment of other parties protected under the 1961 Rome Convention, or, indeed, to the detriment of authors. On the contrary, all those holding rights in the content of broadcasts and related signals would automatically benefit from a reinforcement of the position of broadcasting organisations vis-à-vis the pirates of their signals, because any action that broadcasters take against such piracy will automatically protect also the right holders of the programme content. If the right-holder would wish to keep the enforcement by the broadcaster under its own control, he can arrange such an arrangement via contractual means. EU law can serve as proof that an increased protection of broadcasting organisations for close to 20 years has posed no risks to other rights holders.
Similarly, affording post-fixation rights to broadcasters would not create any stifling effect on innovation, and here one could refer to the example of ISP liability: When an ISP is notified of an infringing work, the "take down" process and its conditions are the same regardless of the type of right that is invoked. ISPs are exempted from liability under "safe harbour" rules that apply horizontally. The broadcasters' treaty would not change this mechanism, and ISPs' responsibility would remain the same as for any other content or related rights[29].

THE "MAKING AVAILABLE" RIGHT

There are multiple reasons why a meaningful treaty for broadcasters must include the "*making available*" right, as do other copyright treaties. The most obvious reason is that the act of making available (fixed) broadcasts (e.g. via on-demand use) is by far the most common form of unauthorized use of broadcasts, making this right the core of any future treaty for broadcasters. Omitting this right would deprive the legal instrument of its main purpose. The Rome Convention recognized in 1961 that a related right, independent of content, is essential before broadcasters can even consider seeking remedies. And, in the light of new media and technologies, the ability to act independently and swiftly against broadcast piracy is even more crucial today so as to allow *prima facie* evidence for urgent injunctive remedies, which are provided via the making available right. Moreover, the making available right justifies investments in offering consumers access anywhere, any time, on any device.

For authors, the act of "*making available*" is a sub-category of "*communication to the public*" right, recognized in Articles 11, 11bis, 14 and 14bis of the Berne Convention 1967 as an exclusive right of authors. And even if in 1996 the act of making available was implicitly or, at least arguably covered already, the "Internet piracy threat" was nevertheless considered a strong enough argument to create an *explicit* new right for authors in the WCT and a separate right for music performers/producers in the WPPT and for actors in the Beijing Treaty, WAVPT. The piracy threat for broadcasters was duly recognized at the 1997 WIPO symposium of Manila, and has ever since increased, with the growing ease of copying and new redistribution technologies.

ADDITIONAL GROUNDS FOR INCLUDING THE "MAKING AVAILABLE" RIGHT

- Rights in terms of fixation or reproduction are not suitable to combat online piracy because they are preparatory acts which can be done by a party other than the actual "communicator"; the infringing act that must be prohibited or authorized is the act of providing access to an Internet "upload", where the party uploading is the one who is "making available".

- The situation is the same as that of phonogram producers; when their recordings are made available online by pirates, the producers need to react quickly, and as holders of a separate neighbouring right, they do not need to involve the actual copyright-holder of the music. The making available right for broadcasters is thus the equivalent of Article 14 WPPT with exactly the same purpose. And has any government made adhesion to the WPPT conditional on record producers providing ample evidence for demanding an effective remedy to online infringements? Of course not.

- Broadcast piracy, and also the threat of an infringement, require legal action much swifter than in other areas; in sports for example, most of the value has a very short life-span. It is the broadcaster whose signal is taken or will be taken that is the most directly affected and for whom relying on content protection is not suitable. Most often the content rights owners - who will already have been paid for the lawful broadcast - may be based in other time zones etc. or otherwise difficult to reach; relying on content protection alone is thus not suitable. Moreover, for sports and news events, where quick action is essential, there are no underlying IP rights at all.

- There are also practical reasons for not requiring individual content rights owners to take action against the piracy of individual programmes - multiple claimants would increase costs, slow down proceedings and, in practice, it is unrealistic to expect all affected right-holders to get involved and be coordinated during proceedings. In particular, not all right-holders would be able to afford this scale of litigation, and they would clearly expect the broadcaster to deal with signal infringements.

- With the treaty, broadcasters would be on a par with authors, musical performers and actors which have received updated international protection over the past two decades. It would be a clear anomaly if only the contributors to broadcast programming, but not the broadcasters themselves, were protected against online piracy.

- The 1961 Rome Convention provides an important post-fixation right, namely the right of reproduction. This means that in all 1961 Rome Convention countries, broadcasters should share – in their own right – the proceeds from making available the fixed broadcasts (e.g. private copy levies). This seems to work well in practice[30], hence there is no reason to expect any difficulties with the introduction of a "making available" right for broadcasters, as it does not create a higher financial claim.

Finally, the clear message condemning piracy that such a treaty would provide should not be underestimated. From that perspective, omitting the making available right in the treaty would not benefit anyone. On the contrary, in the absence of the making available right, the intrinsic value of the rights necessary for the production and dissemination of broadcasts would be reduced. First hit would be broadcasts of sports events, as these rights are the most affected by online piracy. In the longer term, the effect would trickle down to other broadcasts so that large parts of the general public would altogether lose respect for copyright protection of any broadcast production. This in turn could ultimately lead to, or, at the very least contribute to, the devaluation of copyright in general.

BROADCASTERS' ONLINE SIGNALS (LIVE OR DEFERRED

The object of protection remains the signals carrying the radio or television programming, regardless of the technical means used for transmission and reception of these signals. For a treaty to be, and remain, meaningful and relevant in the near future, it must reflect the rapid technological changes by which broadcast signals are delivered, lest it become obsolete in a few years' time. This makes it an absolute necessity to include, as matter of principle, all signals in the scope of protection under the treaty, most of which in a mandatory manner. The reasons justifying this broad scope of protection are manifold, and to a large extent self-evident.

REASONS FOR PROTECTING ONLINE SIGNALS

- In order to best serve their audience and fulfil their public interest obligations, broadcasters require protection of their online signals to which the public is rapidly migrating. On-demand ("non-linear") consumption of programming through online signals is increasing everywhere and will soon be a new standard alongside linear (offline) broadcasting. However, if broadcasters are expected to invest in such convenient access, their online signals must be duly protected.

- Inadequately protecting online signals will lead to loopholes with regard to offline signals. If both signals include the same content, it would not be possible to distinguish between a pirated online signal and a pirated offline signal. This would apply to online simulcast signals, to signals used for "catch-up" services, as well as to "highlights" and "previews". In all such cases, a pirate could easily claim to have used only the online signal, thereby circumventing the protection granted to the offline signals. Such a situation would be an open invitation for broadcast piracy and thus tantamount to making the treaty much less meaningful.

- Moreover, the current trend in broadcasting is to develop more online services and also more "online-only" programming, i.e. content that for scheduling or other reasons cannot be broadcast offline or for which online delivery is more suitable to reach the intended audience. These can be partly referred to as online signals "related" to offline broadcasts, the following examples of which can be found in a recent note submitted by Argentina, Colombia and Mexico to the WIPO debate (document SCCR/33/5):

  1. extra news footage which was too long to include in a short news item;
  2. additional material to complement an offline broadcast (such as an interview that enriches a recent documentary); or,
  3. sports events taking place in parallel and simultaneously to another event; this is typical for big championship tournaments, such as Wimbledon tennis, the FIFA World Cup football, and in particular the Olympic Games.

- The broadcaster, having paid for the rights to use its signals both offline and online, has a clear interest to make these additional signals available to the public, and the online platforms offer more opportunities for broadcasters to do so. All future television screens will be "hybrid", i.e. connected to the Internet and allowing for online and over-the-top (OTT) delivery of programming. Hybrid-TV sets are now widely available in the EU and younger generations consume radio and TV content mainly in an on-demand and device-agnostic manner, and preferably for free (not seldom even irrespective of the content's legitimacy). This behaviour fosters negative side-effects for broadcasters' income: a migration of audiences to online video platforms is a significant threat to advertising revenues. This raises the question of how the European Commission's Digital Single Market aim of more cross-border access to broadcasters' signals can be attained without updating the protection of these signals.

The above examples demonstrate that, in contrast to the definition of "broadcasting organisation", the definition of "broadcasting" must be technologically neutral; a categorical exclusion of programme-carrying signals transmitted over "computer networks" would be both unwise and unwarranted, let alone given the tricky question of how a "computer" or such networks could be defined.

LIMITATIONS AND EXCEPTIONS

The question of which limitations and exceptions would be the most suitable for the broadcasters' treaty is a relatively simple exercise, but which is sometimes confused with the general discussion of limitations and exceptions (L&Es) at the SCCR meetings. As a matter of fact, broadcasters are among the biggest beneficiaries of limitations and exceptions under copyright as they can use up to about ten different exceptions in their daily programming (e.g. quotations, news reporting, incidental inclusion etc).

First of all, L&Es are horizontal issues and involve all WIPO right-holders' treaties, and, consequently, this debate would require at least a treaty-consistent approach. Similarly, any wording on L&Es in the broadcasters' treaty different from other WIPO right-holders' treaties would not make much sense, as they would have no effect in practice. This is because L&Es for broadcasting organisations is entirely dependent upon the L&Es for the use of the broadcast content. By way of example, if the treaty would make an exception for certain uses of a broadcast by libraries but a member state's copyright legislation does not provide for such an exception regarding the author's rights, the library will not be able to use the broadcast because use of the content of that broadcast can still be prohibited by the relevant copyright owner, thereby rendering the said exception for the broadcast useless. In all situations where the content of the programme is protected but the national copyright law would not have an identical exception for authors' rights, the specific exception to the broadcast signal would remain without any effect.

Therefore, for the L&E to the broadcasters' treaty there is practically no other option possible than to have exactly the same wording as in the other rightsholders' WIPO Treaties (the WCT, the WPPT and the WAVPT). This means that any country should have the right to provide for the same kinds of L&Es with regard to the protection of broadcast signals as it provides for, in its national legislation, in connection with the protection of copyright in literary and artistic works, in accordance with the internationally recognized "three - step test". This approach would provide countries with the same flexibility in creating and implementing L&Es to the broadcasters' treaty as exists with respect to other protected works.

TECHNICAL PROTECTION MEASURES

Digital technologies offer a large potential for increasing consumer choice of media content and, by developing such a wide range of content services, also for contributing to cultural pluralism. The viability of those services will sometimes depend on the business model of "conditional access". In this model, signal encoding techniques such as encryption are used by the content service provider to ensure payment of a subscription fee in return for access to the content package. In the broadcast sector, particularly pay TV operators deploy such techniques for their subscriptions, and this often includes the distribution of "smart-cards" enabling the enjoyment of these services via set-top-boxes.

Also, sellers of "premium" content, such as major film producers or large sports federations, may require broadcasters to apply encryption of their services in order to limit access to a certain territory. Preserving the market exclusivity of broadcast services is an integral aspect of the sales practices of such content owners, allowing them to exploit their rights to obtain fair revenues while at the same time keeping rights for discrete territories to be affordable for broadcasters, particularly smaller ones. Encryption occurs in particular with satellite broadcast services receivable by audiences in multiple territories sharing the same language.

Therefore, appropriate legal protection of such broadcast services against the marketing of illicit access tools is vital and necessary in order to uphold the economic viability of these services. Protection of technical protection measures (TPMs) is thus necessary also for the protection of broadcasters' rights. The provisions on technical protection measures in the broadcasters' treaty are aimed at providing such protection, as they are directed against the placing on the market, for direct or indirect financial gain, of illicit devices which enable or facilitate, without authorization of the right-holder(s), the circumvention

of any technological measures designed to protect the remuneration of a legally provided service. Commercial activities accompanying such unlawful circumvention include forms of advertising, direct marketing, sponsorship, sales promotion and other publicity promoting such illicit products and services.

Protection of TPMs is also important since unauthorized TPM circumvention activities are detrimental to consumers who are misled about the origin of illicit devices. For example, the most recent forms of such devices are ISDs (illicit streaming devices), i.e. IPTV-like set-top-boxes with pre-modified plug-ins for unlawful streaming, which are reported to be causing confusion among consumers regarding their legitimacy. This explains why protection against this kind of fraud includes also consumer protection and is beneficial to the society at large.

It should be stressed that the treaty does not oblige broadcasters to prevent access to their signals with TPMs; the legal protection applies only if TPMs are actually used. Moreover, the rights granted to broadcasters would not allow the control of private home use as the latter is covered by limitations or exceptions. As explained above, any country should remain entitled to provide for the same kinds of limitations or exceptions with regard to the protection of programme-carrying signals as it provides for, in its national legislation, in connection with the protection of copyright in literary and artistic works. Therefore, drafting the treaty's provisions in line with the other WIPO right-holders' Treaties (WCT, WPPT and WAVPT), which all include protection of TPMs, would provide countries with the same flexibility as exists with respect to other protected works. This would ensure that the treaty will not harm, for example, the legitimate use of time-shifting devices such as digital video recorders (DVRs) or hinder the development of other new consumer products.

ENFORCEMENT

As explained above, one of the main reasons for the broadcasters' neighbouring right is the possibility for the broadcaster to invoke its right *erga omnes* in an effective manner as soon as an infringement is discovered or threatens to take place. For that purpose, exercising the right independently from the rights of others, notably those having rights with respect to parts of the programme content, is primordial. Such exercise does not interfere with or affect in any manner the exercise of rights by the other right-holders, as has been demonstrated by almost 60 years of experience with the 1961 Rome Convention in the countries concerned. The same applies to the "making-available" right existing in the EU since 2001. Therefore, the broadcasters' right does not limit or prejudice the protection otherwise secured to authors, performers or producers of phonograms under domestic law or international agreements. This independence is recognized also for the other holders of rights under WIPO treaties (such as authors of adaptations or "derivate works" and authors of compilations) as well as for the holders of neighbouring rights (phonogram producers, musical performers and actors). At the same time, all right-holders involved in similar multiple-contribution types of works remain entirely free to agree among themselves on the enforcement modalities, in particular where it concerns non-exclusive licenses to the broadcasting organisation.

It may be observed that court litigation relating solely to the broadcasters' neighbouring right (i.e. without programme content rights being infringed at the same time) is extremely scarce[31]. However, this lack of court decisions does not follow on from the type of right concerned, but rather because the broadcasting practice is intertwined with "transmissions" that have an inherently short life span. In the daily activity of broadcasting the focus is generally on what happens now and what comes next, and hardly on what has occurred in the past.

> EU LAW CAN SERVE AS PROOF THAT THE INCREASED PROTECTION OF BROADCASTING ORGANISATIONS FOR NEARLY 20 YEARS HAS POSED NO RISKS TO OTHER RIGHTS HOLDERS

This makes legal proceedings - which can take years - clearly not the most suitable as quick solutions to signal infringements. Moreover, broadcast litigation that becomes publicly known is often only the tip of the iceberg as frequently the piracy act remains undiscovered, the pirate's identity or address cannot be traced, or it is simply too late to take effective legal action. Nevertheless, the existence of the broadcasters' neighbouring right should clearly not be underestimated, for its nature as an exclusive IP right provides the broadcaster with a swift remedy to alert pirates of their infringing activity and the necessity to refrain from continuing the harm caused by it.

In the light of the above, as the other WIPO treaties for right-holders all include the same type of provisions for rights enforcement, there is no reason to formulate it otherwise for the treaty on the broadcasters' right.

TERM OF PROTECTION

Any IP protection needs to be limited by a reasonable term. To counter the fallacious belief that broadcasters' rights do not require a term of protection because "signals do not live forever", one could imagine another example: the interpretation of an audiovisual work by an actor. This performance is limited to the actual "live" performance, which is a new one each time the live performance takes place, and each performance has its own term of protection. However, this does not take away the need for protecting the performance as fixed on a recording from where it can be reproduced and distributed. This explains why the 1961 Rome Convention includes a right to prohibit or authorize the reproduction of a fixation of a broadcast for 20 years after that broadcast was transmitted, in other words, well beyond a "live" signal.

It is therefore worth noting that each broadcast or related signal has its own term of protection. Although the wording under some provisions[32] would seem to associate the calculation of the term to the "first" broadcast, it should be duly acknowledged that each repeat broadcast of the same content gives rise to a separate term of protection.

By way of example, Article 14(c) of the 1961 Rome Convention simply grants 20 years from the end of the year in which "the broadcast took place" – which is thus a better formulation. Notwithstanding, the rights to the first broadcast would expire after 20 years (or 50 years as the case may be) and could then be freely used by anyone, regardless of the protection granted to any repeat broadcast.

CONCLUSION

Today, broadcast signals are especially vulnerable to piracy due to rapid technological changes, which make it easy and inexpensive to copy and re-distribute broadcasters' programmes. This can be done, for example, by capturing a broadcaster's signal originally transmitted over the air or by wire and making it available over the Internet. Many studies and reports have confirmed this fact.

Therefore, any broadcasters' treaty must provide effective protection for broadcasters against any piracy of their signals, providing them with tools to address the core issues in today's technological and business environment. As technology progresses, the loopholes in the current protection are becoming increasingly problematic.

Broadcasters have both legal and editorial responsibility over the communication to the public of their programme output. This means, first of all, that the **core object** of the protection of the broadcasters' neighbouring right should be the transmissions carrying the programme output as initiated and assembled by, or on behalf of, the broadcasting organisation, including simultaneous and deferred transmissions of such output on whatever medium or platform.

Secondly, the effectiveness of the broadcasters' neighbouring right requires that it be fully independent and free standing: for this reason, the protection of the content of the programme-carrying signal is entirely irrelevant. The object of signal protection is wholly separate from the ownership of any underlying rights in the content being transmitted. It follows that the content of a broadcast cannot and should not fall within the scope of application of a broadcasters' treaty.

It must be clearly understood that the broadcasters' neighbouring right does not impinge on authors', performers' or producers' rights. On the contrary, any right-holders of content in the programming carried by the signals automatically benefit from a reinforced position against potential pirates. At the same time, producers of pre-existing content remain entirely free to license their own rights to third parties on the broadcasters' territory, as long as there is no conflict with the rights granted by them to the broadcaster(s) concerned. However, this is purely a contractual matter, and thus an issue entirely independent from the broadcasters' treaty.

Moreover, the treaty would not create any unprecedented rights "out of thin air" - the rights proposed so far go no further than what already exists in many international and regional instruments and in many countries' domestic legislation.

The adoption of a new international treaty would ensure a generally accepted and up-to-date standard throughout the world protecting against unauthorized use of broadcasters' signals in foreign countries. It would provide broadcasters with the necessary tools to effectively exercise their rights and defend their investments in programme creation. It would provide a strong incentive for broadcasters in their adoption of new technology, while maintaining the same standards for their programmes, to the ultimate benefit of the general public.

Swift adoption of a new treaty would provide a re-focused commitment to tackling online and other broadcast piracy. A co-ordinated industry and government approach to tackling such piracy is vital, not only for the long-term health of the world's most outstanding cultural sector, but in the best interests of everyone.

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12. WIPO Studies on the Economic Contribution of the Copyright Industries (2014), available at the WIPO website http://www.wipo.int/export/sites/www/copyright/en/performance/pdf/economic_contribution_analysis_2014.pdf, p. 14.
13. In a decision by the European Court of Justice involving the unauthorized communication of live Internet broadcasts of sports events, which is an activity that is not covered by the scope of the (wireless) rebroadcasting right or the "making available" right in EU law, the Court explicitly recalled that, in view of Recital 16 of the 1992 EU Rental and Lending Directive (updated in 2006), EU Member States are allowed to grant broader protection to broadcasters on the national level; see Case C-279/13, C-More Entertainment AB v Linus Sandberg (2015).
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20. The present article is certainly not the first one explaining the international framework of the broadcasters' neighbouring right. For an excellent description of the WIPO debate on a possible treaty until 2007 see RIVERS, A Broadcasters' Treaty?, in TORREMANS (Ed.), Copyright law. A Handbook of Contemporary Research (Research Handbooks in Intellectual Property Series), 2007, p. 483 et seq.

21. It is also worth noting that the Brussels Convention never intended to reduce or limit other legal protection for broadcast signals. Article 6 states that the Convention "shall in no way be interpreted to limit or prejudice the protection secured to... broadcast organizations under any domestic law or international agreement."

22. The EAT text is available at http://www.wipo.int/edocs/lexdocs/treaties/en/ce-34ptb/trt_ce_34ptb_001en.pdf. Not relevant is the European Convention relating to questions on Copyright Law and Neighbouring Rights in the framework of Transfrontier Broadcasting by Satellite of 1994. As this instrument aims to protect the rights and interests of authors and neighbouring rights holders with regard to their works or contributions broadcast by satellite, the Convention defines the notion and act of broadcasting, the applicable law and the field of its application, but does not provide any rights to broadcasting organisations.

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31. An important exception hereto is the decision of the UK High Court (Chancery Division) on 18 March 2016, holding the online use of short clips taken from broadcasts of cricket matches to be infringing the rights of the broadcaster concerned, see England and Wales Cricket Board Ltd and Sky UK Ltd v. Tixdaq Ltd and Fanatix Ltd, [2016] EWHC 575 (Ch).

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