

The WIPO Broadcasting Treaty. A Conceptual Conundrum

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Broadcasters barely made it into Rome Convention, which was signed in 1961. In fact, in those early days many broadcasters vehemently opposed international recognition of neighbouring rights. Broadcasters were generally afraid of the extra costs that rights for performing artists and phonogram producers (record companies) would entail for broadcasting. In the end, they were lured into supporting the Rome Convention with the promise of a new right of their own – the broadcaster’s neighboring right.

In the early 1980’s, when I started my career in copyright as an advisor to the Dutch Ministry of Culture, many broadcasters were still highly suspicious of the benefits of the neighbouring rights regime. I remember (rather naively) writing a memo to our Director General, suggesting that the Netherlands – twenty years after the adoption of the Rome Convention – initiate ratification of the Rome Convention – and almost being fired on the spot.

Did I not realize the disastrous consequences of ratifying Rome for the Dutch public broadcasters?

In the end, the Dutch resistance to Rome caved in only after the 1992 EC Rental and Lending Right Directive prescribed neighbouring rights for all of the Community’s Member States.

The Rome Convention’s norms have spread to many countries outside Europe as well, although they are still far from universal. Today, just 93 states have ratified Rome, fewer than 50% of total WIPO membership (193).

More than half a century after the adoption of Rome, most broadcasters have fully embraced the neighbouring rights regime, and now pin their hopes on a “digital update” of the broadcasters’ rights enshrined in the Rome Convention.

The broadcasters’ arguments for extending the RC minimum rights are deceptively simple: The Rome Convention dates from 1961, so the treaty’s protection does not cover digital piracy of broadcast signals (which is omnipresent on the Internet), nor any other digital reutilization of

broadcasts (e.g. catch-up services). The Convention, so the argument goes, is hopelessly outdated.

[The broadcasters do have a point here. The Rome Convention merely protects broadcasting organizations against the “wireless transmission” of their signals, not against digital uses of broadcasts. Indeed, Rome does not even grant rights against cable retransmission.]

The broadcasters go on to point out that the neighbouring rights of performing artists and phonogram producers (their comrades from the Rome Convention) have been extended to the digital realm by the WPPT (adopted in 1996). So the broadcasters deserve a similar extension of their rights. In fact, the digital update they want is long overdue.

Let’s look at these arguments more closely.

First, a preliminary remark. If things were really that straightforward, surely the broadcasters would have received their extended rights during the Diplomatic Conference of 1996, and the WPPT would have been called the “WPPBT” – protecting the same triad of rightholders as does the Rome Convention. But this is 2018, and despite over twenty years of discussion in the SCCR, the Broadcasting Treaty is still no more than a consolidated draft.

Evidently, the arguments of the broadcasters for a new treaty are not as convincing as they initially appear. Note that the WCT took only a few years from initial drafting to adoption. Even the Beijing Treaty protecting audiovisual performers, which covers more controversial ground than any treaty on broadcasters’ rights, was adopted in 2012.

But this seemingly straightforward ‘update’ of neighbouring rights protection for broadcasters is taking decades to complete, assuming it ever happens at all.

The lack of progress in this dossier is particularly striking, since there seems to be almost universal general agreement (from maximalists to minimalists, from pro right holder to pro user lobbies) that broadcast signal piracy deserves qualification as an unlawful act, and should accordingly give rise to appropriate legal remedies.

So why is this taking so long?

Historians that one day look back, in some amazement, at this protracted process will probably identify a variety of reasons:

Unquestionably, the WIPO Development Agenda has turned the tide against unlimited proliferation of rights at the expense of developing nations.

Surely, international IP policy making at WIPO has moved away from its mission of unequivocally promoting international IP protection.

Certainly, at WIPO and other international fora the voices of user groups, intermediaries, and 'civil society' are better heard and factored into policy development.

And yes, the general climate for reaching agreement on any multilateral instrument in the field of IP has soured, in an age of increasing trade protectionism and bilateralism.

Still, this does not explain why an apparently uncontroversial proposition (giving broadcasters international protection against digital piracy) has led to such prolonged debates and staunch opposition.

So there must be something wrong with the proposition itself.

Opponents of the treaty (including the organizers of this seminar) have raised a multitude of issues against the treaty, which need not be repeated here. [I assume many of these objections will be revisited during this seminar.]

In this keynote I will focus on three general weaknesses of the draft treaty: one economic, one definitional or conceptual and one pragmatic.

Economic rationales

The first concerns the economic rationales (the reasons why) of granting IP rights to broadcasters.

Let me remind you that IP rights do not come naturally with conducting a business. Most entrepreneurial activities, like running a restaurant, operating a taxi fleet or providing an online flower delivery service, do not give rise to IP rights that prohibit parasitic behavior, even if running the business requires substantial investment making it vulnerable to free riding.

This is freedom of competition.

Even among the creative industries, certainly not all entrepreneurs enjoy international IP protection (think, for example, of content distributors, book publishers and concert organizers).

From an economic standpoint, a grant of IP rights is an exception to freedom of competition that must be economically justified.

The standard economic explanation for granting IP rights in such exceptional circumstances is:

- 1) that intangible ('informational') goods are produced that can be reproduced at near-zero or marginal cost; and
- 2) that producers of the goods have substantially invested in the production of the goods.

In this model the grant of a temporary exclusive right that prevents unauthorized uses will allow the producer to recoup its investment during the period of exclusivity. IP rights thus serve as an economic incentive to invest in the production and/or distribution of informational goods.

When we look back at the Rome Convention, this is exactly how neighbouring rights protection for phonogram producers and broadcasters was historically justified. Phonogram production and broadcasting were activities that required huge up-front investment, while its output (sound recordings, broadcasts) was vulnerable to piracy.

Indeed, during most of the last century this was an industry that required massive investment, both in production facilities (recording and broadcasting studios, microphones, camera's, mobile units, technicians, etcetera), and in broadcasting transmission infrastructure (terrestrial transmitters, gateways, transmission cables, microwave transmitters and receivers, etcetera).

Small wonder that in those good old days of broadcasting, when the Rome Convention was being discussed, the barriers of entry were exceedingly high, and each country could economically support only a few television and a handful of radio broadcasters – either publicly or commercially funded.

All this has radically changed.

With the proliferation of low-cost (but high quality) digital recording technologies, the technical costs of radio and television broadcasting have dramatically decreased. And with the advent and rapid rise of broadband Internet, the costs of distributing audiovisual content are approaching zero.

Today, all you really need to be in broadcasting is a smart phone, a microphone, a headset and a broadband internet connection with access to a content streaming channel. See the myriad of video channels on YouTube and other social media. Listen to the countless web radio stations and podcasts available online. And note, that many of these low budget (or no-budget) broadcasting-like operations reach out to sizeable audiences and make substantial amounts of money – without the incentive of a broadcaster's right.

Even in the realm of traditional broadcasting, radio and television stations can now be operated on a shoestring budget. Not long ago, I was invited to the premises of the Netherlands' most popular commercial radio station. After meeting with its Director and a few marketing managers I asked: so where is the broadcasting studio? With a wry smile the Director pointed to what can best be described as a cupboard. Inside, a fairly large PC was broadcasting the radio program, automatically executing the playlists of the day.

This is the paradox of IP protection in the digital environment. While the ease of piracy and other unauthorized uses has vastly increased, the technical costs of broadcasting have dropped concomitantly.

But, you might object (if you are a broadcaster), even if the technical costs of broadcasting and transmission have significantly decreased, the costs of producing and purchasing audiovisual content have risen substantially. Think of highly expensive premium content such as Champions League sports coverage and premiere television series. But this argument is unsound. Neighbouring rights for broadcasters are meant to protect investment in producing and transmitting broadcast signals, and perhaps the preceding organizational effort, but not the efforts or costs of producing or acquiring audiovisual content as such. That is the domain of copyright – to which I will return at the end of this talk.

In other words, the economics that might have justified the introduction of a neighbouring right for broadcasters in the 1960's do not necessarily justify similar (or even stronger) rights for broadcasters in the digital age. Remarkably, in all the debates surrounding the Broadcasting Treaty, the voice of the economist remains mostly unheard. I have not come across any scientific economic analysis demonstrating the need for granting neighboring rights to broadcasters in the present digital age.

Obviously, granting IP rights for no good reason can have serious negative consequences, both for the economy and for society at large. The temporary monopoly that the IP right entails not merely creates an obstacle to freedom of competition. Because much of the content that broadcasters transmit is of some cultural significance, it also bears the risk of impeding access to culture. More generally, freedom of expression and information is at stake here.

In this digital age, the risks of overprotection should not be underestimated. The days when redundant IP rights were simply not exercised by the right holders and therefore could do little harm, are over. Today, enforcement of rights is increasingly automatic, or should I say 'robotic'. Platforms such as YouTube automatically detect and block infringing content, based on content 'fingerprints' provided by right holders. This is why, for example, Champions League football highlights uploaded by enthusiastic football fans, disappear from YouTube so rapidly. The forthcoming European DSM Directive will make this technology mandatory for YouTube, Facebook and other large platforms.

Definitional problems

This brings me to the conceptual problem that, perhaps even more severely, undermines the case for broadcasters' rights: properly defining a broadcaster and the act of broadcasting.

Since intellectual property regimes create property-type rights it is crucial – if only for the sake of legal certainty – that they be properly and precisely defined and delineated. Likewise, it is crucial that the holder of a right be clearly identified. With neighboring rights for broadcasters, defining the right and designating the right holder is highly problematic. This is because the definition of the neighboring right is directly connected to a specific state of technology.

In the old days when the Rome Convention was conceived, defining broadcasting was still fairly straightforward: “broadcasting” means the transmission by wireless means for public reception of sounds or of images and sounds (see Art. 3(f) of the Rome Convention). But in the digital environment, where wired and wireless technologies converge, broadcasting has become a very fluid notion. Unsurprisingly, much of the intellectual energy and debate in drafting the Broadcasting Treaty has gone into its definitions. And with every year that brings us yet newer technologies, the drafting becomes even more complex, and the notion of ‘broadcasting’ ever more fleeting.

Look at the many alternatives for defining “broadcast”, “broadcasting organization” and “signal” in the Draft Treaty, which have been discussed in the SCCR over the years.

Defining ‘broadcasting’ is not merely a legal-technical challenge, it is in essence an existential problem of the broadcasting industry. With technical modes of delivery converging, ‘broadcasting’ (like ‘publishing’) is losing its intrinsic meaning.

“Transmitting of programme-carrying signals to the general public, by wired or wireless means” (see the definition of ‘broadcasting’ in the Revised Consolidated Text, doc. SCCR/36/6): isn’t that what just about everybody does on the Internet?

But, you might say, that definition excludes Internet transmissions. Indeed, the bracketed text reads: “[Transmissions over computer networks shall not constitute “broadcasting”]”. But does it really? The definition apparently (and in my opinion naively) assumes that “wired or wireless means” can be properly distinguished from the use of “computer networks”. This is in complete denial of the digital convergence that has fused traditional means of broadcast transmission with digital broadband internet infrastructure. The reality is that the Internet (a “computer network”) has become an essential part of the transmission infrastructure of most if not all broadcasting operations. (And note, by the way, that the Revised Consolidated Text does not define “computer networks”.)

In the Netherlands, traditional over-the-air (terrestrial) television broadcasting was terminated several years ago. TV broadcasts are now solely distributed via digital gateways to broadband video providers (cable networks) that have over 90% market penetration. The same is about to happen in Belgium, and other countries are soon to follow.

So traditional television broadcasting , which was the focus of the Rome Convention and the starting point of the current debate on a Broadcasting Treaty, may soon be extinct in large parts of the world not long after this treaty is adopted (if it ever is).

To be fair to the drafters, trying to define 'broadcasting' in terms that exclude its application to forms and modes of broadcasting online, is an increasingly hopeless undertaking. Digital transmission technology is nowadays so pervasive that definitions that exclude digital delivery modes risk throwing away the baby with the bathwater.

However, if we do accept in our set of definitions that broadcasting does entail digital transmission, the consequences may be unforeseen. Do we really want to give strong exclusive rights to any intermediary that electronically disseminates audiovisual content? Are we sure that we are not inventing a right that will eventually end up in the hands of the *Big Five* (Google, Apple, Netflix, Amazon and Microsoft)?

So the choice is really between a traditional definition of broadcasting that may be too narrow, and one that is way too broad. Given the fact that the demands for this treaty come primarily from the traditional broadcasting industry, it would in my opinion make more sense to opt for the narrow definition, which requires a protected broadcast signal to be initially transmitted by wireless means.

We could discuss definitional issues for several hours more, but I will leave this to the experts later in the program.

Suffice it so conclude, that if an IP regime is incapable of properly defining its subject matter and right holder, such a regime should probably not exist.

Pragmatic objections

I come, finally, to the pragmatic perspective. Is there really, truly a need for this new treaty?

Yes, say they broadcasters. Look at what's happening on the Internet. Look at all the illegal sites streaming sports and other broadcast content without our permission. Something should be done about this.

The broadcasters are right. Illegal streaming of broadcast signals has become a serious problem. But the question has to be asked: does solving this problem require a whole new treaty?

This calls for a thorough analysis of the law that is already in the books. Is the legal protection that broadcasters derive from existing bodies of law (IP or other fields of law) not enough?

I believe in many if not most cases it is.

In most cases broadcasters will derive protection against unauthorized rebroadcasting from the laws of copyright that are internationally secured in the Berne Convention, TRIPs and the WCT. Broadcast content, with few exceptions, will qualify as audiovisual works or cinematographic works protected under national laws on copyright or author's right. Broadcasters may invoke copyright protection for these works under a variety of doctrines: either as employers of the creators, under 'work for hire' rules, as film producers benefiting from a statutory presumption of transfer or license, or simply as transferee of copyright pursuant to a film production agreement. Even in cases where broadcasters cannot rely on copyright, because the content has been produced by a third party, the broadcasting license agreement will usually include a power of attorney giving the broadcaster standing in court.

But what about copyright protection for events broadcast 'live', i.e. in real time? Doesn't copyright require prior fixation of a work? Well, in countries like the United States and the United Kingdom it does. In most countries of the civil law tradition, however, fixation is not required, and live coverage of a sporting event will qualify as a protected audiovisual work if it is the product of creative choices. Live coverage of, for example, a Champions League football match, which involves (at the very least) multiple camera operators, several commentators and a director, will easily pass this test. Even in countries where fixation is a prerequisite, broadcasters may rely on copyright protection for ancillary content such as leaders, graphics, animations, replays and other (pre)recorded audiovisual content regularly included in live sports broadcasts [see e.g. Football Association Premier League and Others, Court of Justice EU, Case C-403/08, para. 149].

Apart from copyright, broadcasters in many jurisdictions may rely on general rules of unfair competition to support claims against signal pirates. Moreover, theft of pre-broadcast signals will in many jurisdictions qualify as a criminal act, punishable under general criminal statutes or special provisions on telecommunications secrecy or cybercrime.

All in all, broadcasters in most countries already enjoy solid legal protection against signal piracy and other unauthorized uses. And even if existing protection may not be perfect, this is no good reason for concluding an international treaty that would create rights of uncertain scope for a poorly circumscribed group of intermediaries, which might negatively affect access to culture and have other (as yet unforeseeable) consequences as well.

A treaty, moreover, that would surely be tragically outdated shortly after its adoption.

There is, in my opinion, one easy way out of this conceptual conundrum: abandon work on the Broadcasting Treaty, and move on to other, more pressing issues in IP.