

QUESTIONS AND ANSWERS ON THE PROPOSED BROADCASTING TREATY

A. Why a New Treaty?

- **Broadcasting seems to be a profitable, global industry. Why the renewed interest in a new Treaty now?**

Existing international protection of broadcasters dates from 45 years ago, when the Rome Convention was adopted. This protection reflects the technical, regulatory and competitive situation of 1961. It is totally inadequate today.

Today, we see a multiplicity of new broadcasters and specialty program channels, some local, some national and some transnational or transborder in character. Their sources of funding are also diverse; ownership structures are often complex; but the fact that a particular local broadcaster may have as its ultimate owner a large international player makes no difference to the common obligation for all broadcasters to provide services that satisfy their own viewers and listeners, to generate income in order to finance these services and to invest in content/infrastructure according to objectives set at the local level and a business plan specific to their own particular market.

Technological developments over the last decades have increasingly exposed broadcasting organizations to misappropriation of their signals both within and, in particular, across borders. Their daily program output must be planned, produced and/or acquired, scheduled and transmitted. The infrastructure resulting in the ability of the general public to receive broadcasters' program-carrying signals requires major technical, organizational and financial investment by broadcasters. In today's competitive world, broadcasters have demonstrated how they need as never before to have proper means to protect and build on this investment, enabling them to decide when and how they wish to authorize or prohibit use by others of their signals in upstream or downstream markets. Continued provision by broadcasters of programming to ensure a content-rich Information Society, including information for the general public on facts and events from all spheres of public life, is endangered as long as protection of signals is insufficient.

In 1996 the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) updated rights of authors, as well as performers and producers of phonograms. Since then, thorough discussion on updating broadcasters' rights has taken place in 14 sessions of the WIPO Standing Committee on Copyright and Related Rights (SCCR) and in regional consultations. Over 8 years, more than 16 governments from both developed and developing countries in different parts of the world have submitted proposed treaty texts for discussion. The overwhelming majority of governments agree that it is now high time to adopt a new Treaty to update broadcasters' protection.

- **What are the annual losses incurred by broadcasters as a result of inadequate protection?**

Inadequate protection means that others may freely profit from a broadcaster's substantial and costly organizational and technical investment in its signal. In Canada it is estimated that the loss of revenues to the TV industry is \$400 million per year from satellite signal theft alone. A study by the Cable and Satellite Broadcasting Association of Asia has found that signal theft is increasing at a rate of 11% a year in Asia. A study by Envisional estimated piracy of TV signals increased 150% between the 2004-2005 season with the UK, Australia and the U.S. being the leading offenders. National Basketball Association games featuring Yao Ming typically draw 50,000 peer-to-peer viewers with 1.5 million downloads in China. Of course, these examples only represent the tip of the iceberg, and the overall losses worldwide are impossible to estimate.

To appreciate the enormous implications of lack of proper protection for broadcasters' signals, just look at the example of broadcasts of sports events, when broadcasters acquire exclusive rights from event organizers. Such rights can easily cost millions, in any currency. When such broadcasts are taken without authorization and shown on other channels, this unfairly reduces the value of the broadcaster's rights, its advertising revenue (and reputation) will be substantially reduced, and income from sublicensing will no longer be a feasible prospect. Furthermore, public broadcasters may even see their sources of funding (receiving licence fee or state budget contribution) put into question, on the grounds that "why am I forced to pay for public broadcasting if I can get the

same - free of charge - also on other channels, including cable, the Internet (websites), or any other media platform"? Similarly, people who subscribe to pay-TV services may well question the value of their subscription. In the extreme, if misappropriation of signals were to become generalized due to a lack of sufficient legal remedies against it, this could even lead to broadcasters giving up making major investments in sport.

- **Why not just update national laws to take digital technology into account?**

Of course countries should not wait for a new international treaty before updating their national laws. For example, cable distribution was thought too new and not sufficiently widespread to be included in the Rome Convention in 1961, so you can see that we are not only talking about digital technology.

And of course a national law by itself will only protect domestic broadcasters against unauthorized use of their broadcasts within the frontiers of that country. To deal with unauthorized use beyond the borders of any single nation you need an international treaty. Broadcasting has an obvious cross-border nature, which satellites and the Internet have but emphasized. Protection of foreign broadcasters against misappropriation also has the effect of protecting legitimate national broadcasters against competitors trying to secure a competitive advantage by illegally exploiting foreign broadcasts.

- **Would existing national or regional legislation provide the levels of protection comparable to what might be included in a new Treaty?**

For some countries it may be a question of clarification or filling only a few gaps in protection. Certain other countries have so far simply stayed with the present (i.e. 1961 vintage) international standard. The adoption of the new international treaty will ensure that there is a generally accepted standard of updated protection around the world protecting against unauthorized use of broadcasts in foreign countries.

- **What are the differences between the coverage of broadcasters under the 1961 Rome Convention (the first to cover broadcasting) and the proposed new treaty?**

The world of broadcasting has fundamentally changed since 1961. Then, in most countries there was only one TV broadcaster. Since then, technology has provided so many innovations: e.g. FM, stereo, audio and video recorders, color, satellite, cable, digital, on-line delivery. Governments' proposals for the new treaty, reflected in the consolidated text now under discussion, therefore seek to build on the existing rights of broadcasters so as to extend protection to deferred (not just simultaneous) transmission to the public by any type of technical means (not just wireless), communication to the public in places accessible to the public, a broad reproduction right, distribution, making available on-demand. Adequate and effective protection is foreseen for pre-broadcast program-carrying signals (i.e. signals sent via a telecommunications link, e.g. a Eurovision feed, to broadcasters for use in their broadcasts). Provision is also made for obligations concerning technical measures and rights management information.

- **How does the TRIPS Agreement protect broadcasters? Isn't that good enough?**

The short answer is that TRIPS does not guarantee any protection to broadcasters.

- **Isn't broadcasting more of a telecommunications issue than an intellectual property issue? Isn't the 1974 Brussels Satellite Convention adequate?**

Broadcasting involves many aspects, of which telecommunications (e.g. allocation of frequencies) and the broadcasters' neighboring rights (rights related to copyright) are but two. The neighboring rights protection was recognized internationally for performers, record (phonogram) producers, and broadcasters 43 years ago in the Rome Convention, and national laws all around the world give such protection to broadcasters. The approach of the Brussels Satellite Convention (which anyway addressed only one specific problem) is inadequate notably because it left it open to Contracting States to implement measures under either public or private law. So there has never been any clarity or uniformity in

its application, and broadcasters are unable to get an injunction from the court when they urgently need one. You won't get telecoms authority rushing down to court on behalf of a broadcaster against a foreign telecoms authority because pre-broadcast signals have been taken from a telecoms satellite without authorization of the broadcaster!

B. Scope of the Treaty

- **What exactly would the treaty protect (giving real life examples)**

The essential purpose of the Treaty is to update the rights of established broadcasting organizations in their broadcast signals. A broadcast signal is an electronic signal carrying radio or TV programs for reception by the public, irrespective of the origin of such programs or the ownership of the content thereof.

For example, when a radio broadcaster broadcasts a concert given by its own - extremely costly - symphony orchestra or other bands representing different styles of popular local music, why should its competitors or anyone else be free, without the consent of the broadcaster, to relay that broadcast, live or deferred, by whatever technical means, and without making any payment? When a TV broadcaster pays a huge sum of money to broadcast a football match, why should its competitors be able to relay that broadcast (or pre-broadcast satellite signal of the match intended only for use in the authorized TV broadcaster's broadcast), live or deferred, in full or in summary form, also by cable, satellite or Internet, without having to ask for permission or to make any payment yet probably also eliminating the broadcaster's original advertising and replacing it with their own?

- **Would the Treaty create new intellectual property rights?**

The Treaty will update the existing international neighboring rights protection of broadcasting organizations. Insofar as such updated protection has already been enacted in national law, the Treaty will thus also provide harmonization effective on the international level.

- **Could the rights granted in this Treaty impinge on existing rights, such as authors' rights or performers' or producers' rights?**

Unlike an increase in the neighboring rights protection of performers and record producers, the updated protection of broadcasters would not be to the detriment of these other two parties protected under the Rome Convention, nor to the detriment of authors. On the contrary, all the rightholders in the content of broadcasts will automatically benefit from the reinforced position of broadcasters against pirates of their broadcasts. When a broadcaster obtains an injunction against unauthorized use of the broadcast signal, the order to cease and desist necessarily stops equally unauthorized use of the program content.

Owing to the independently existing rights in the program content, these other rightowners will naturally also continue to be able to exercise their own respective rights against pirates or any other infringing parties. It goes without saying that, in cases where a broadcaster wishes to grant a license to a third party, it can only grant rights that it holds. So use of the program-carrying signal will therefore not be possible if content rightholders do not wish to license their material contained in the broadcast program.

C. Signal Protection

- **What is signal piracy? (give examples)**

Piracy is not a legal term, nor is it precise. It is sometimes used to refer to unauthorized use of protected copyright or neighboring rights material. Here are some examples of unauthorized use of broadcast signals experienced by broadcasters in various countries:

- *retransmission of live or recorded broadcasts by a pirate station operating in a neighbouring country*
- *commercial sale to the public of videocassettes of unauthorized copies of a sports program, in the broadcaster's country and abroad*
- *cable distribution of complete broadcast programs in the broadcaster's neighbouring country*

- *sale to the public of records of a music concert derived from an unauthorized reproduction of the soundtrack of a live television broadcast*
 - *rental of unauthorized recordings of a television broadcast by a video club*
 - *offering the "service" of making an unauthorized copy of a pre-selected television program with a view to its sale in video form*
 - *commercial use by a business firm of privately-made copies of a radio broadcast*
 - *manufacture, importation and distribution of pirate decoders and/or smart cards specifically designed to permit unauthorized access to encrypted television services*
 - *showing of unauthorized copies of television programs to customers in various types of shops, or to the public at fairs or exhibitions*
 - *sale to the public of unauthorized recordings of broadcast programs by a dealer in radio or television equipment*
 - *broadcasting or cable distribution of pre-broadcast satellite signals, which carry sports and other types of programs*
 - *publication in newspapers, magazines and books of still photos taken from the television screen, particularly of broadcasts of news and sports programs*
 - *retransmission of live broadcasts of football games via the Internet.*
- **Why do broadcasters need to protect signals? Don't they have rights in content when they produce broadcasts or acquire rights to broadcast?**
For a specific answer as to the basis on which broadcasters' signals have been protected on the international level since 1961, and why that 1961 protection needs updating, see response to first question under A. above.

As regards the question asking why broadcasters cannot just rely on rights in content to protect themselves, a number of points should be made.

When broadcasters produce their own content, yes, they have rights in that content. But when they acquire or license rights from others to broadcast existing material, they generally have only the right to broadcast and no other rights. But this treaty is not about content, nor about protecting content. This treaty is about protecting broadcasters' rights in their SIGNALS, regardless of what or whose content is being broadcast. It is about recognizing and protecting against unauthorized exploitation the technical, financial and organizational investment (i.e. time, effort, energy and resources) which broadcasters devote to planning, producing, scheduling and disseminating their signals. The reasons why broadcasters cannot just rely on rights in content are:

- First, if someone misappropriates the broadcaster's signal containing content which is not the broadcaster's own, or is not otherwise protected, the broadcaster must have independent grounds and remedies which it can pursue to deal with such misconduct. For example, some national laws do not permit a broadcaster, in its capacity as a program licensee, to bring a copyright infringement suit. Some material may not qualify for copyright protection in the first place (lack of originality/creativity). Although this may seem surprising, news and sports programming, produced by broadcasters, is not infrequently considered to fall into this last category. (See further below under heading D. regarding use of unprotected material.)*

- Second, especially in sports and news programming, where the real value normally lies in the exclusive first transmission, it is vital for the broadcaster to be able to obtain an injunction immediately. Because of the difficulty in producing the necessary evidence in time, it would hardly ever be possible to obtain an injunction if the broadcaster had to rely on rights derived from third parties. This is even more the case when the underlying licensing agreement with a film distributor or sports event organizer is in a foreign language, and where an authenticated translation needs to be submitted to the court. In one real-life example, a court was still asking a broadcaster to produce yet more evidence to prove its right to bring the action more than a year after the European Football Championships in question had finished!*

Finally, the fact that broadcasters are granted neighboring rights protection in respect of their broadcasts, as a protection separate from any protection in the program content (e.g. a motion picture film) of the broadcasts, is nothing new or unusual. Phonogram producers are also granted neighboring rights protection in respect of the entrepreneurial activity in producing a phonogram, as another layer of protection on top of the copyright protection of the author/composer of the musical work contained in the phonogram. A signal, like a phonogram, is the vehicle - itself requiring major technical, financial and organizational investment - enabling content to arrive at the destination.

- **The US has proposed limiting some of broadcasters' rights to a so-called "right to prohibit". What is the difference between a right "to authorize and prohibit" and a right "to prohibit"? And why is the right to authorize so important?** *A "right to prohibit" seems to be intended as something less than a "right to authorize or prohibit", on the alleged grounds that a right to authorize or prohibit for some of broadcasters' rights would adversely affect content owners' rights.*

It is difficult to see what advantage could possibly result from such a novel two-tier approach, which was never suggested for rights of phonogram producers in the WPPT. Why should broadcasters - and only broadcasters - be excluded from the possibility of commercial exploitation of downstream markets?

If the broadcaster can only prohibit, that means no use and therefore also no revenue for content rightowners. Is this really what is intended?

It is a basic principle of copyright law that a licensor can only license rights that it holds. All the relevant rights have to be cleared before a potential licensee can go ahead and use the material. If a broadcaster, having a right to authorize or prohibit, wishes to grant a license to a third party but content rightholders do not equally wish to license their material contained in the broadcast, use cannot in any event take place.

As in the Rome Convention, broadcasters should have the right to authorize or prohibit use of their signals.

D. Consumers' Concerns

- **Why are some civil society groups advocating a limited scope for the treaty?**

For some at least, the reason may simply be opposition in principle to any intellectual property rights, ignoring the fact that copyright and related rights underpin the entire creative business sector. For others, there appears to be a misapprehension that broadcasters' protection would block access to public domain material. In any case, it needs to be pointed out that private reception and private recording of broadcasts is not affected by the broadcasters' neighboring right.

- **How would granting more rights to broadcasters serve the public interest?**

Since every country has its domestic broadcasting organizations, every country has an interest in updated protection on the international level for its own broadcasters.

Broadcasters in most countries have specific public service obligations that they are expected to fulfill. Freedom of expression, as enshrined in Article 19 of the Universal Declaration of Human Rights, entitles the public to be informed of facts and events from all spheres of public life. Broadcasting is a specific manifestation of freedom of expression, including in particular the right to receive and impart information. It is a primary task of broadcasting organizations to satisfy the public's need for information.

At the same time all broadcasters are subject to tremendous competitive pressure. When domestic broadcasters find that their signals are misappropriated abroad, and that they are unable to take the necessary action, the consequent financial losses adversely affect their ability to invest in a wide variety of quality programming, including popular domestic content or sports rights.

If domestic broadcasters are indeed expected to continue to fulfill their duty to provide their own public with the information (including education), culture and entertainment that it requires in this increasingly globalized society, they must also be provided with effective means to protect and to exploit their signals. (See also answers to first and second questions under A. above.)

- **Would extending the term of protection to 50 years affect consumers' interests?**

No. First, it should not be forgotten that the broadcasters' neighboring right concerns only the signal, and not the content of the broadcast itself. Protected broadcast content is anyway separately protected for a term of 50 years or even longer. Second, protection of the broadcaster's investment in its broadcast is subject to normal public interest exceptions and limitations (like fair use) throughout the term of protection. (Private reception and private recording of broadcasts is not affected by the broadcasters' neighbouring right.) Public interest exceptions and limitations strike a balance with the legitimate interests of the broadcaster regarding licensing of its own broadcasts.

- **Would the treaty affect the use of material in the public domain?**

No. The idea that broadcasters' protection blocks public access to public domain material confuses the question of use of the signal with use of the content. Anybody is free to take and use public domain material from the same source as the broadcaster did. On the other hand, when a broadcaster expends its financial, technical and organizational efforts on making a public domain work available to the public, another party should not be able commercially to exploit the product of such efforts, i.e. the broadcaster's signal. The broadcasters' neighbouring right does not affect private reception and private recording of broadcasts. Equally, nothing in a treaty on broadcasters' rights can affect or curtail exceptions and limitations applicable to copyright-protected material.

- **Would the treaty make it more difficult for consumers to watch archives of sporting or news events?**

No. The treaty would be subject to normal public interest exceptions and limitations including, for example, provision for libraries to retain such archives. The owners of archives, such as public libraries, cinémathèques, government and academic institutions set their own terms of access and in many countries benefit from special intellectual property regimes that are designed to facilitate use of and access to material which they hold by members of the general public. The protection of a broadcaster's right in its signal has nothing to do with the public's

independent access to archives. Often, a broadcaster's transmission of material from an archive is the best way for the public to find out about the existence and contents of archived material.

- **Would the treaty provisions on technological protection measures (TPMs) go too far in restricting public access to information?**

No. It is the broadcasters, which bring a lot of information to members of the public of which they would not otherwise be aware. Also, the principles of the TPM provisions are the same as those already applicable to other rightowners who create such information. In fact, broadcasters are the strongest advocates of ensuring public access to information. That is what broadcasters are in business to do. The Treaty is not designed to restrict access, but to prevent exploitation and misappropriation of broadcast signals by unauthorized third parties.

- **Would it become more expensive for the general public to receive broadcasts as a result of the treaty?**

No. On the contrary, without the protection of the rights to be provided to broadcasters by the Treaty, others will continue to be able to exploit and misappropriate broadcast signals. Broadcasters lose money as a result of inadequate protection. Such loss of revenue hits the broadcasters' ability to fulfill their public service obligations and to continue to provide quality programming. Accordingly, failure to adopt the Treaty could result in more expense and reduced services for the general public.

- **Would the treaty affect whether consumers are able to copy TV programs?**

No. Private reception and private recording of broadcasts is not affected by the broadcasters' neighboring right. The Treaty provides for the usual kinds of possibilities of exceptions and limitations.

E. Technological Measures

- **Will the Treaty allow for TPMs such as the broadcast flag, enabling the manufacture of equipment like DVD and VCR players that automatically withdraw features present at the time of purchase (such as recording devices that disallow Internet transmission of copies of recorded broadcasts)?**

Equipment that recognizes TPMs, such as broadcast flags, is available now. Hence, the Treaty is not necessary to "enable" the manufacture of such equipment. The Treaty would neither prohibit nor mandate any particular TPM. Rather, it would require countries to provide "adequate legal protection and effective legal remedies" against the circumvention of measures that broadcasters might use to protect the rights afforded them under the Treaty. This is no more and no less protection than the 1996 WIPO treaties provided to authors and the producers and performers of sound recordings. These provisions allow countries considerable flexibility in how they comply, as is demonstrated by the various ways in which countries have complied with the technological measure section of the WCT and the WPPT.

F. The Negotiating Process

- **What are the major issues in the negotiations, and where are the divisions?**

There is a large measure of agreement on what should be included in a treaty for broadcasters so as to plug the gaps that have emerged over the last 45 years since the Rome Convention was adopted.

The USA shares the view of most other Member States of WIPO that broadcasters should be protected. However, its proposal would also provide protection for webcasters, would establish a novel two-tier system whereby for some rights broadcasters would have a right to authorize or prohibit and for others only a right to prohibit, and would oblige countries to join the WCT and WPPT (1996 treaties protecting other right owners) before they could join the broadcasters' treaty. Few if any other countries have supported this approach. However, many governments feel that, while it is premature to include webcasters in the present treaty, this issue should be considered in a second-stage process after adoption of the treaty updating conventional broadcasters' rights. Broadcasters are gratified

by the flexibility shown by the U.S. and other countries at the last SCCR meeting to adopt this approach.

- **Between North & South?**

There is no such division on the content of the Treaty. (See answer to first question under A. above.) Whether broadcasters are big or small, what they have in common is more important than where they are situated in different parts of the world or the size of the national economy. All broadcasters agree that updated protection is important to them.

- **Will the treaty benefit equally developed and developing countries? Will the treaty promote the use of broadcasting for economic development in developing countries?**

Since every country has its domestic broadcasting organizations, every country has an interest in updated protection on the international level for its own broadcasters. Moreover, conventional broadcasters are motors of social and economic development, not least in developing countries. Just think of the significance of broad (cost-effective) accessibility and ease of use of radio and TV broadcasting facilities for provision of information of all kinds, especially in under-developed rural areas. The broadcasting sector also provides important opportunities for employment. The effects of misappropriation of broadcasters' signals in developing countries are just as harmful as the effects in developed countries; indeed, the broader social and economic implications of failure to adopt the Treaty could be even more serious in developing countries. Most developing countries are now adopting the policy to encourage their domestic broadcasters to exploit their signals in a commercial way. If broadcasters in developing countries are deprived of a Treaty giving them proper effective means to protect and exploit their signals, this will tilt the playing field in favor of pirates and other parasites and frustrate the countries' policy to promote use of broadcasting for economic development.
