The Possibility of granting new legal protection and IP rights to broadcasting organizations against the unauthorized exploitation of their broadcasts

Thèse présentée à la Faculté de droit
de l'Université de Neuchâtel
Pour l'obtention du grade de docteur en droit
Par

Gholamreza RAFIEI

Acceptée sur proposition du jury:

Prof. KRAUS Daniel
Faculté de droit de l'Université de Neuchâtel, directeur de thèse

Prof. MAVROIDIS Petros C.
Faculté de droit de l'Université de Neuchâtel, rapporteur interne

Prof. Kwakwa Edward K.
Institut de hautes études internationales et du développement (IHEID) rapporteur externe

Soutenue le 26 Mai 2015

Université de Neuchâtel
2015

UNIVERSITÉ DE
NEUCHÂTEL

FACULTÉ DE DROIT
Av. du 1er Mars 26
2000 Neuchâtel
+41 (0)32 718 12 00
secretariat.droit@unine.ch

IMPRIMATUR POUR LA THESE

The possibility of granting new legal protection and IP rights to broadcasting organizations against the unauthorized exploitation of their broadcasts

Gholamreza RAFIEI

UNIVERSITE DE NEUCHATEL

FACULTE DE DROIT

La Faculté de droit de l'Université de Neuchâtel,
sur le rapport des membres du jury

M. Christoph Müller (président)
M. Daniel Kraus (directeur de thèse)
M. Petros Mavroidis (rapporteur interne)
M. Edward K. Kwakwa (Conseiller juridique (OMPI) et Professeur (IHEID), rapporteur externe)

autorise l'impression de la présente thèse.

Neuchâtel, le 7 juillet 2015

Christoph Müller
Doyen de la Faculté de droit

Acknowledgement

I would like to express my gratitude to all those who made it possible for this doctoral thesis to see the light of the day. My deepest thanks goes to my supervisor, Professor Daniel Kraus, whose guidance and assistance were instrumental for me to complete the thesis. I would also like to express my appreciation for the excellent support and advocacy I received from the other members of the Jury, namely, Professor Christoph Müller, Dean of the Faculty of Law of the University of Neuchatel, Professor Edward K. Kwakwa and Professor Petros Mavroidis. Professor Mavroidis was an excellent mentor throughout this venture whom I admire wholeheartedly.

Let me also extend my sincere thanks to the management and staff of the Faculty of Law of the University of Neuchatel for all assistance and facilities extended to me during my doctoral programme. In writing this thesis, I very much benefited from the research facilities and resources of the library of the World Intellectual Property Organization (WIPO). I am specifically grateful to Ms. Ulrike FISCHER, Ms. Lise MCLEOD and Ms. Céleste CLARO for their excellent cooperation. Peter Ford also deserves great credit for how he edited the thesis.

At the end, I would like to acknowledge the unceasing support and encouragement by my beloved wife Leila to whom I am indebted for all my success, including this PhD thesis.

Key words:

Broadcast, broadcast signal, program-carrying signals, broadcasting organization, pre-broadcast signal, rebroadcasting, retransmission, broadcast piracy, signal piracy, post-fixation rights, communication to the public, making available fixation of broadcast, on-demand services, copyright, neighboring rights, related rights, WIPO Standing Committee on Copyright and Related Rights

Mots Clés:

Diffusion, signal de diffusion, signaux porteurs de programmes, organisme de radiodiffusion, signal antérieur à la diffusion, réémission, retransmission, piraterie diffusee, piratage des signaux, Droits posterieurs a la fixation, communication au public, mise à disposition, services à la demande, droit d'auteur, droits voisins, droits connexes, Comité permanent du droit d'auteur et droits connexes de l'OMPI

Abstract

Broadcasting is the final output of the 'production' of broadcast signal and its 'transmission' to the public. The broadcast's underlying content could not be received and perceived by the member of public unless it is converted to a signal or a program-carrying signal which is then transmitted. Thus, broadcast signal is not a natural occurrence. Broadcasting organizations are owners of their broadcast signals aside from the ownership in the underlying content. In this relation it does not matter whether the underlying content is an authorial work in copyright or it is a work, which currently falls in the public domain or even a non-protected content in intellectual property law. The use of 'property' as a regulatory mechanism to protect 'broadcast signal' (as an intangible good) has been accepted in both international and national intellectual property law. Its use conforms to both the character of 'tradability' and 'excludability' of other, more traditional properties. Several theories exist to justify granting new property-type rights (in the form of the intellectual property-type rights or copyright-like property protection) to broadcast signals. Although few differences may still remain, these justifications are similar to those that exist for protection of authorial works, performances and phonograms. Accordingly, underlying content and broadcast signal are two different subject matters in international copyright and related rights regime and their severability has been proved.

Granting new property-type rights to broadcasting organizations with regard to their broadcasts is compatible with the existing technical, structural and functional characteristics and realities of the industry. It should afford broadcasters the ability to control the unauthorized exploitation and unconsented-to dissemination of their broadcast signal over any medium. For, the broadcast signal does not exist only during actual broadcast, it might also be used after the fixation of the broadcast and be placed on online services by the broadcaster itself or by any other unauthorized parties for commercial purposes. Therefore, it is recommended that in a new international norm setting, possibly through adoption of a new WIPO broadcasting treaty, in contrary to the Rome Convention that is a technology-specific instrument, follow a technologically neutral approach in the both platform of origin and platform of exploitation of broadcast signal. In granting new rights and protection, the new treaty should provide that its principal protective mechanism be a 'mandatory' 'exclusionary property protection mechanism', in other words, granting an exclusive right of authorizing or prohibiting the exploitation of broadcast signal. This mechanism, has already been laid down by the Rome Convention, followed by WPPT (for protection of performers and producers of phonograms) and the WIPO Beijing Treaty and has recently been experimented by numerous national legislations, even in countries that are not party to the Rome Convention, but that have updated the rights and protections conferred to broadcasting organizations. However, in relation to the controversial issues in the negotiation in the WIPO Standing Committee on Copyright and Related Rights (SCCR) including some or all post-fixation rights and the protection of the pre-broadcast signal, technological protection measures and rights

management information there are other possible solutions. These solutions or proposals necessarily are not conforming to an individual national law. In this regard, the new WIPO broadcasting treaty can give sufficient freedom with greater flexibilities to its contracting parties which permit different level of discretion, and to decide whether they will grant new proposed rights and protections to broadcasters in their legislation as a mandatory or non-mandatory mechanism. However, the principle of reciprocity may be applied regarding these categories of rights and protections.

Since there have been concerns raised about possible consequences of an 'expansive exclusionary protection mechanisms' on the public interest, the new treaty may allow for its contracting parties to provide for the same kind of limitations or exceptions with regard to the protection of broadcast signal as they provide for, in their national legislation, in connection with the protection of copyright in literary and artistic works.

Founding a new treaty on the 'exclusionary property-protection mechanism' or on 'extended property rights' over broadcast signal would not prejudice the autonomy of authors and other right holders in the broadcast underlying content. For, they would still be able to disseminate the content itself as they wish, but not derived from the broadcast signal without being first consented to by the broadcasting organization. Finally, acquiring greater property rights for a broadcast signal would not lead to control, either directly or indirectly, over the content itself by broadcasting organizations. The new treaty may include non-prejudice and safeguard clauses to protect copyright and other right holders. In addition, with regard to the broadcast of authorial works and other protected contents, the exercise of the broadcasters' rights is subject to the rights they acquired from the authors or other right holders.

List of abbreviations

ADSL	Asymmetric digital subscriber line
ABU	Asia- Pacific Broadcasting Union
AIBD	Asia-Pacific Institute for Broadcasting Development
ASBU	Arab States Broadcasting Union
AVOD	Advertising-based VOD
CAS	Conditional Access Systems:
DBS	Direct broadcast service
DRM	Digital Rights Management
DTO	Download to Own
DDL	Direct Download Links
DSL	Stands for Digital Subscriber Line
CATV	Cable television
DAB	Digital Audio Broadcasting
DTH	Direct To Home
DTTV	Digital Terrestrial Television
DTV	Digital Television
DVB	Digital Video Broadcasting
DMB	Digital Multimedia Broadcasting
DVB-H	DVB- Handheld
DVB-T	DVB- Terrestrial
EBU	European Broadcasting Union
EC	European Commission
EU	European Union
ETSI	European Telecommunications Standards Institute
FVOD	Free VOD
FSS	Fixed satellite service
FTTH	Fiber to the home
GRULAC	Group of Latin American and Caribbean States
HDTV	High-definition television
Hz	Hertz
ICT	Information and Communication(s) Technology.
IPTV	Internet Protocol Television
ISP	Internet service provider
IT	Information technology
ITU	International Telecommunication Union
IP	Internet protocol
IPR	Intellectual property rights
LAN	Local area network
MPEG	Moving Pictures Expert Group
NRA	National Regulatory Authority
NVOD	Near Video On Demand
OFCOM	Federal Office of Communication
OTT	Over-The-Top (services)

P2P	Peer to peer
PPV	Pay per View
PSB	Public Service Broadcasting
SVOD	Subscription VOD
SCCR	Standing Committee on Copyright and Related Rights
TPM	Technological Protection Measures
TVOD	Transactional VOD
TV VOD	TV-based
UHF	Ultra High Frequency
VOD	Video on Demand
VHF	Very High Frequency
VHS	Video Home System
WBU	World Broadcasting Unions
WIPO	World Intellectual Property Organization

Table of Contents

Introduction

This thesis seeks to consider the possibility of granting new legal protection and intellectual property rights to broadcasting organizations against the unauthorized exploitation of their broadcasts, more commonly known as broadcast piracy. The International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (Rome, 1961) was the first international instrument, which recognized related or neighboring rights for the broadcasting organizations. Indeed these rights are intellectual property-type rights or copyright-like property protection granted to broadcast signal. Article 13 of the Rome Convention introduced minimum legal protection for broadcasting organizations. This minimum legal protection consisted of the right to authorize or prohibit the rebroadcast, fixation, reproduction and communication to the public of the broadcasts of broadcasting organizations. Although the ratification rate of the Rome Convention was relatively low, many countries, through incorporating its provisions into their domestic law have de facto implemented the Convention without necessarily ratifying it. Article 5 of the European Convention on Copyright Law and Neighboring Rights in the Framework of Transfrontier Broadcasting by Satellite (1994) and Article 14 of the WTO Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS Agreement) (1994) have also referred to the minimum legal protection introduced by the Rome Convention.

Without setting originality and creativity as conditions of protection, the Rome Convention intended to protect broadcasting organizations against the then prevalent forms of unauthorized exploitation of broadcast through giving them intellectual property-type rights. The international recognition of rights of broadcasting organizations by the Rome Convention was based on the then concepts of the act or conduct of broadcasting; the definitions of broadcast and broadcasting organizations; and the objectives and justifications of the protection of related rights accruing to the broadcasting organizations. These concepts were, in turn, inspired by information and communication technologies and the then existing methods of unauthorized exploitation of broadcast. At the time the Rome Convention was conceptualized and agreed to, the content of what broadcasting organizations, as public service organizations, were broadcasting to the public consisted mainly of the current daily news, public and governmental announcements and limited copyrighted works of authors and/or performing artists. Due to weakness of transmitters used, broadcasting organizations were broadcasting through limited land stations by wireless hertz wave and via terrestrial transmitters. The broadcast coverage area was also limited to a specific city or region within a country, or in rare cases, to an entire country. Accordingly, in contrast to the present situation, the extent and methods of unauthorized exploitation of broadcast were not widespread and variously carried out.

The rapid emergence of modern information and communication technologies and their profound impact has given rise to many concerns for broadcasting organizations with regard to their rights and legitimate interests over ownership of their broadcast or broadcast signal. The increasing phenomenon of broadcast piracy and the illegal and unauthorized exploitation of broadcasts has raised many questions as to effectiveness and adequacy of existing international legal instruments to provide the necessary legal protection to broadcasting organizations for their broadcasts, broadcasting activities and services as well as reliability of the enforcement of their rights and protection.

The increasing cost of piracy and other such unauthorized use of their broadcasts to broadcasting organizations has persuaded regional and international broadcasting unions to

ask national legislators, as well as regional and international organizations such as the European Union (EU) and the World Intellectual Property Organization (WIPO) to introduce new international rules in this area. Namely, to upgrade the minimum legal protection granted under existing international legal instruments for their broadcasts, thus giving them more effective legal protection.
In addition to this, the broadcasting industry (and therefore broadcasting organizations) is undergoing an unprecedented explosion in platforms of origin and platforms of exploitation, the use of innovative activities, creative services, interactivities, all caused by digitization and resulting in greater consumer choice. Broadcasting organizations now exploit new technological distribution platforms to broadcast their program-carrying signals and any other forms of mass communications to the public, a public and audience no longer limited to a specific region within a country, but rather, a worldwide audience. These major developments have all occurred after the conclusion of the Rome Convention. Therefore, we need to consider and compare the existing situation with the situation at the time of the Diplomatic Conference of the Rome Convention (1961). Unlike the Rome Convention era, broadcasting organizations of the 21st century no longer broadcast to the public limited copyright works of authors and/or performing artists, a clear shift from the original reason of their legal protection under traditional notion of the related or neighboring rights. Today, broadcasting organizations are among the main producers and/or investors in the production of all kinds of content and program, including sport events/programs, news, documentaries, drama, entertainment, some of which may not necessarily be protected by national or international copyright laws. They even broadcast content, programs and works that are in the public domain. Moreover, broadcasting organizations employ a wide range of innovative techniques in their different broadcasting activities. Many broadcasting organizations also invest a huge amount of resources in buying broadcast rights, they seek to employ the best expertise and human resources and obtain the latest digital technologies and equipment. At an editorial level, broadcasting organizations also record, schedule, package and assemble their programs. Accordingly, these unprecedented changes and technological developments have fundamentally changed the traditional notion of the act of broadcasting and as such have brought with it numerous advantages for broadcasters and their audiences. Business models have had to change to keep up with technology, and, on the reverse-side of this, considerable unresolved issues have emerged, particularly with regard to broadcast piracy and other misappropriation of a broadcaster's related rights in a cross border or international scenario.

Accepted concepts, notions, functions and challenges of the time when such a regime was created influenced the international legal regime of protection of broadcasting organizations. Nevertheless, the transformation of fundamental concepts, notions, functions and challenges, in light of new developments and changes, raises the question of whether the international protection regime for broadcasting organizations should be upgraded or even transformed completely. Answering this important question, however, requires ascertaining the degree of the conceptual, notional and functional transformation and evolution that has happened since the time of the Rome Convention; and studying the related concepts, notions and functions of that time. Therefore in order to make any sort of judgment as to whether an update of the legal framework is necessary, we must firstly explore the original concepts, missions and functions of broadcasting organizations and of the broadcasting industry. Secondly, we need to explore the latest developments in broadcasting technologies and platforms of origin and exploitation to find out whether, and in response to which developments, they experienced changes or transformation. Linked to this, whether it is these developments that have rendered protection regime irresponsive? If the answer to this question is yes, then we can seek to decide on whether there is a need for revision of the protection regime by updating

the existing rights and granting new rights or protection, or alternatively whether a total replacement by a new legal regime is required. In response to the questions above, there is a need to identify the contributing elements to the evolution happened in the broadcasting industry. This is also necessary to find out the nature of emerging challenges more specifically. Moreover, the ways and means to address challenges should be valued and judged as to their positive and negative attributes. It is through the evaluation of these attributes that a selection as to the best approach towards the evolving protection regimes can be made.

Over the years, the broadcasting organizations, their regional and international professional unions, like the World Broadcasting Union (WBU), began to claim that they were facing considerable challenges in respect of the protection of their related rights and other legitimate interests. The area within which broadcasting organizations operated had been increasingly affected by digital technology and the convergence of communication and information technologies, and broadcasting organizations found that they could neither defend their legitimate and/or fair interests nor claim their existing rights, as provided by the Rome Convention. Based on these facts, the industry had requested, since the beginning of the 1990s, international intellectual property policy makers as well as national, regional and international players to upgrade the existing regime of international intellectual property-based protection of the broadcast signal in a manner as effective and uniform as possible. Without adequate action, the industry would continue to face major threats, such as broadcast piracy, and suffer from the negative impacts that such activities can have on the ongoing sustainability of a broadcasting organization.

The above changes, developments and challenges emerged over a relatively short period of time. While in the WIPO Diplomatic Conference in 1996 an international consensus on the reasonable protection of broadcasting organizations seemed far from reach, national legislators had already started to modify existing law, upgrade the rights conferred to the broadcasting organizations and/or enact new laws and regulations based on different approaches and national legal tradition. This constituted an invaluable practice for implementation of the broadcaster's right at least in the national context.

However, it has widened the gap in the understanding of the related legal-technical issues of broadcasting and has added to the existing differences and variations in the major legal traditions around the world. These have, in turn, like in other intellectual property related issues, raised questions regarding the necessity for reconsideration, reconfiguration and even transformation of the existing legal regimes governing the rights and other protections conferred to broadcasting organizations in the international law of intellectual property rights. This important task has been assigned to the Standing Committee on Copyright and Related Rights of WIPO since 1998, where, according to WIPO's current Director General, Francis Gurry "one of the new strategic orientations of this organization in the coming years will be the question of global intellectual property infrastructure." [1]

In light of these considerations, the aim of this thesis is to propose solutions to give appropriate, effective and balanced protection to broadcasting organizations in the context of international intellectual property law in respect of their broadcast signal. In order to achieve this objective, we need to set up a linking mechanism between legal and technical analyses. The legal reasoning requires establishing first the relevant facts and the relevant legal rules

[1] Gurry, F. (2008, November 24-25). *Conference on the Collective Management of Copyright and Related Rights in Europe Brussels* . Retrieved October 04, 2014 from www.wipo.int: www.wipo.int/about-wipo/en/dgo/speeches/gurry_brussels_08.html

followed by applying those laws to the facts. The methodology applied in this thesis is predominantly analysis of broadcasting technologies and platforms, business models, broadcast services, identifying prevalent means, methods and stages of broadcast piracy whilst also considering rationales and justifications of protection of broadcasting organizations in the law of international intellectual property rights. Therefore, while the primary aim is to explore real challenges and problems that broadcasting organizations are facing, this thesis will also explore the potential solutions for the adoption and modeling of future norm setting in international intellectual property law with regard to the protection of broadcasting organizations. This will be based on identifying different solutions applied to the same challenges and problems in other relevant fields of copyright and related rights. Hence, we also need to analyze the extent to which the theories and justifications on copyright and related rights can be transposed to the international protection of broadcasting organizations. Such an approach requires distinguishing similarities and differences between copyright and related rights in general and between the traditional beneficiaries of related rights protection in particular. The final solution might possibly be different from the existing solutions provided by specific or individual national legal systems. Instead, such a potential solution should be proposed in such a way that if it is adopted in a possible new broadcasting treaty, it could be welcomed by different national legal systems offering sufficient flexibilities and freedom to its future contracting parties enabling them to implement it in compliance with their national jurisdiction and policies.

In addition to this, it is also useful to look beyond the existing international instruments on protection of broadcasting organizations. Here the question to be answered is whether the only possible solution would be an intellectual property type protection. This can be basically considered from two approaches. The first implies non-intellectual property type protections, which might be recognized as supplementary protections to broadcasting organizations. Many areas of copyright and related rights law typically contain supplementary protections to address concerns and challenges brought by new information and communication technologies. For this reason, this thesis limits this approach to supplementary protections provided in international instruments on copyright and related rights law, such as the WIPO Copyright Treaty (WCT), and the WIPO Performances and Phonograms Treaty (WPPT). A second approach consists of looking beyond the context of law. We will consider the issue of to what extent the employment of mere technological solutions is sufficient to enable broadcasting organizations to confront challenges brought by the new technologies. Finally for the purpose of giving appropriate and effective protection to the broadcasting organizations it should be noted that this should be without compromising other right holders' entitlements and interests. It may thus be useful to utilize the experiences from the rights and protections granted to authors, performers and phonogram producers particularly by the WIPO Internet treaties or WCT and WPPT. In addition to the comparative aspects of the unauthorized exploitation of copyright and other related rights, a second methodology applied in this thesis consists of a contextual analysis. Accordingly, the protection of broadcasting organizations will not be analyzed without paying due attention to the protection of authors and other beneficiaries of the related rights as well as the wider public interest.

Methodology, scope and structure

In light of the recent conceptual, technical and legal developments and the effect and challenges that these developments have had on the broadcasting industry and in line with the current negotiations in the WIPO SCCR for a draft WIPO treaty on the protection of

broadcasting organizations, this research seeks to study relevant issues and respond to related questions with proposals for possible new rights and protections.

Chapter one consists of three parts. Part one addresses the genesis and concepts used when we talk about broadcasting and broadcasting organizations. It defines the conceptual breadth of the notion and acts of broadcast, broadcasting, broadcasting organization and reflects as to whether such definitions need to be redefined by virtue of the recent developments in the broadcasting industry. New public missions, namely, social, cultural and economic functions of broadcasting organizations will be examined in part one. Part two discusses the functional evolutions of the industry, which covers different technological platforms used for broadcasting, and introduces new media services provided by broadcasting organizations and how these new services have impacted on broadcasting. Part three is devoted to broadcast piracy, defining broadcast piracy, and examining the different stages of piracy, as well as the means and methods of piracy.

In Chapter two we will discuss academic theories and justifications for protection of broadcasting organizations. In this Chapter, whilst acknowledging the old rationales or justifying arguments for the protection of broadcasting organizations in intellectual property law particularly, we will define some new rationales and justifying arguments for enhanced and more effective protection of broadcasting organizations. The importance of this issue is that the initial purpose for protection of broadcasting organizations through intellectual property-type rights was to protect their investment and entrepreneurial works, ignoring any intellectual creation and originality in their activities and broadcast signals. Due to the contribution of vast creativity in the means and methods of broadcasting and new broadcast services, we will judge whether -in addition to protection of broadcasters' investment and entrepreneurial works - there is any place to put forward new arguments to update their intellectual property-type rights or grant them new property rights and protections.

Chapter three will provide an in-depth analysis of the existing legal regime of protection of broadcasting organizations in the current international intellectual property law. Particular attention will be given to provisions relevant to the rights or protections afforded to the broadcasting organizations. This includes in particular the main international and regional instruments. The purpose of this Chapter is to have a realistic efficiency assessment of the current legal regime to judge whether it is capable of meeting the considerable changes and developments of the broadcasting industry and to address the major threat to broadcasters' legitimate interests and rights, i.e. piracy. The Chapter consists of two parts. Part one will examine international instruments including the Rome Convention, the Brussels Satellite Convention, the WTO-TRIPS Agreement, the European Agreement on the Protection of Television Broadcasts 1961 (EAT) and the European Convention Relating to Questions on Copyright Law and Neighboring Rights in the Framework of Trans-frontier Broadcasting by Satellite (European Satellite Convention) (1994). In the second part, we aim to discuss the main regional instruments including the Cartagena Agreement Decision No. 351 (1993); the North American Free- Trade Agreement (NAFTA) (1993); and the relevant European Union Directives i.e. Rental and Lending Rights Directive (1992), Satellite and Cable Directive (1993), Term Directive (1993) and Information Society Directive 2001.

Chapter four reviews the historical and current WIPO initiatives to develop a new treaty for the protection of broadcasting organizations. This Chapter consists of two parts. Part one looks into different activities and negotiations sponsored by WIPO and its relevant organs, namely the SCCR and its annual Assemblies. The activities and negotiations of these WIPO

organs will be reviewed since discussions in this area began in 1998 up until the present day. The next part is devoted to the content of the new draft treaty, where the following factors will be addressed: the potential objectives of protection, the scope of the proposed treaty (beneficiaries of protection), the object (subject-matter) of protection and the scope of application.

The final Chapter will conclude by proposing new rights and protections for broadcasting organizations in their pre-broadcast, actual broadcast and post-broadcast signals. It consists of three parts. Part one will explore the two main approaches raised during the SCCR negotiations namely the signal-based approach and the right-based approach. It explores to what extent these approaches may affect the fundamental elements of the new draft treaty introduced in Chapter four (the objectives of protection, the object (subject-matter) of protection and the scope of application). Part two seeks to recommend the best protection regime to the broadcasting organizations in an effective and uniform manner within the realm of international intellectual property law. It aims to propose individual intellectual property type rights and show how each individual right would be an appropriate and effective response to the current needs of broadcasting organizations. On this basis it will further reflect on the possible need for a new treaty and its optimal objectives and scope of its application (beneficiaries of protection). This will be built on recent WIPO- sponsored major trends (signal-based, right-based and technological neutral approaches) developed since 1998. It will show how the prevailing trend and each individual right would have a direct bearing on the protection of broadcasting organizations. Part three presents other non-intellectual property-type protections, which could be granted to broadcasting organizations. It will examine the possibility of establishing supplementary protection mechanisms for broadcasting organizations, including the protection of pre-broadcast signals, the protection of technological protection measures and the protection of rights management information employed by the broadcasting organizations.

CHAPTER ONE

THE CONCEPTUAL AND FUNCTIONAL EVOLUTION OF BROADCASTING

Chapter one

Conceptual and functional evolutions of broadcasting

Part One. Genesis and concepts

I. The origin

The term 'broadcasting' was initially used in agriculture and farming. It meant the act of cultivating the land or sowing over a wide area, especially by hand.[2] American engineers subsequently found the word appropriate to describe the concept of radio transmissions to the public. For, in the same way that farmers 'broadcast' seeds over a large field, radio transmitters broadcast their signals or amplified modulation (AM) radio waves over a large, or to, an open area.[3] The radio signal transmission was initially based on radiotelephony (primarily developed between 1887 and 1920), which is the ability to send sound by radio using amplitude modulation. However, though radiotelephony could be used for different kinds of point-to-point communication, point-to-point radio communications are not considered broadcasting. Broadcasting was based only on non-interactive point-to-multi-point communication, which started with the invention of radiotelephony in 1920. The United Kingdom and the United States of America were the first countries to use radio broadcasting in the 1920s to transmit the music and news. A small radio station in Pittsburgh, USA broadcasted the result of the American presidential election, the first time such an announcement was made in this fashion, but it was only after discovery of the short waves that global broadcasting became a possibility. [4]

In the beginning of global broadcasting, the vast majority of broadcasting activities were carried out by particular governmental agencies or public organizations entrusted with transmitting news and music to the general public. Broadcasting was also used as "a powerful weapon of war or propaganda broadcasting that recalls the Second World War and then the Cold War." [5] These organizations were financed by the public funds and editorially controlled by state authorities. Therefore, many years after the beginning of public broadcasting services, public-broadcasting organizations were the only broadcasters in the majority of the countries. It was only later when commercial broadcasting organizations appeared. The primary mission of these early broadcasting organizations was to provide the news, music and other approved broadcasts to the public. The invention of television in 1927 irrevocably changed the landscape of the broadcasting industry. Broadcasting organizations broadcasted a variety of programs, such as national and local news, sports programs, talk shows, music programs, movies, other entertainment, and advertisements. They produced some of these programs, most notably news programs, in their own studios. However, they were also dedicated investors in content production, with much of the content of the

---

[2] Farlex. *The Free Dictionary*. Retrieved October 3, 2014 from The Free Dictionary: http://www.thefreedictionary.com/broadcast

[3] Oxford University. (2002). *Oxford English Dictionary* (Fifth edition ed., Vol. 1). Oxford: Oxford University Press p. 294.

[4] Wood, J. (1994). History of International Broadcasting. IET. pp. 1-2.

[5] Ibid.

broadcasts being produced by other right holders like copyright holders, performers and phonogram producers.

Today, the vast majority of households have a radio and a television set. The World Intellectual Property Organization (WIPO) has published a study showing that the TV ownership had, by 2009, reached at least 90% in almost every region of the globe. [6]

The 21st century's broadcasting organizations generally fall into one of two categories; (i) public broadcasting organizations (also known free to air or public TV); and (ii) commercial broadcaster, or pay TV. The first category consists of broadcasting organizations that finance their activities through advertising and/or license fees. Their broadcasts are usually non-encrypted and free to air. Public broadcasting organizations, (as well as educational and religious broadcasters) are generally owned and managed by public or governmental sectors, (or religious and educational institutions), and generate their revenues primarily from donations by individuals, foundations, governments and/or corporations. The main feature of public service broadcasting is that its primary mission is providing a public service and not to pursue commercial interests and maximize its profits, though these can also be considerations.[7] Other commentators have stated, "that public service broadcasters, at their best are independent of government and commercial interest and their sole purpose is to serve the public interests."[8]

There is no standard definition for public service broadcasting.[9] Since 2005, UNESCO has been working to define public service broadcasting (PSB); though no definition has been globally accepted. For their own purposes, UNESCO describes public service broadcasting as: " a meeting place where all citizens are welcome and considered equals. It is an information and education tool, accessible for all and meant for all, whatever their social and economic status." [10] Nevertheless, aside from the debates within which the above description was conceived there exist more major objectives and principles that might assist in the formulating of a single, global common definition of public broadcasting services. According to the Asia-Pacific Institute for Broadcasting Development (AIBD)[11] public broadcast services serves the entire population (geographic universality) contributes to the region's socio-economic development. It offers quality programs of information, education and entertainment consistent with the community's moral and ethical values, and to all citizens regardless of where they live. It ensures a high technical standard with proper balance and a range of topics. It should have autonomous control over content (editorial responsibility) and financial independence with strong accountability practices, supported by creative and professional human resource, and strategic partnerships to enhance the mandate of public service broadcasting. Furthermore, it should adapt readily to changes in science and

[6] WIPO Document SCCR/ 19/12, Study on the socio economic dimension of the unauthorized use of signals: Part I: Current market and technology trends in the broadcasting sector of November 30, 2009, p. 58.

[7] Asia- Pacific Institute for Broadcasting Development (AIBD). (n.d.). *Defining public service broadcasting*. Retrieved October 3, 2014 from Asia- Pacific Institute for Broadcasting Development (AIBD): www.aibd.org.my/node/94

[8] Mendel, T., Kreszentia, D., Siochrú, S. Ó., & Bukley, S. (2008). *Broadcasting, voice, and accountability: a public interest approach to policy, law, and regulation.* University of Michigan Press, p. 37

[9] Ibid, p.193.

[10] Ibid.

[11] The Asia-Pacific Institute for Broadcasting Development (AIBD), established in 1977 under the auspices of UNESCO, is a regional inter-governmental organization servicing countries of the United Nations Economic and Social Commission for Asia and the Pacific (UN-ESCAP) in the field of electronic media development. The Government of Malaysia hosts it and the secretariat is located in Kuala Lumpur.

technology and exploit all significant digital platforms.[12] In other words, "public service broadcasting is an essential instrument to ensure plurality, social inclusion and to strengthen the civil society."[13] For the purposes of the law and policies of European Union (EU) public service broadcasters are "broadcasters with a public service mandate."[14] However, each Member State has the freedom to define this mandate at national, regional or local level but it "would be consistent with the objective of fulfilling the democratic, social and cultural needs of a particular society, and guaranteeing pluralism, including cultural and linguistic diversity."[15] Accordingly, they benefit from license fees or direct financial support from the state to fulfill this public mandate. In the USA, public broadcasting organizations that are known as Corporation for Public Broadcasting (CPB) are non-profit private organizations mostly owned by non-profit organizations or state or local government.[16]

The second category of broadcasting organization consists of commercial or pay-to-view television companies. Private or commercial broadcasting services are those broadcast services with profit making as their primary objective. Such companies pursue commercial interests and maximize profits through paid advertisements during their TV or radio programs or through the receiving of subscription fees and, more recently, through the provision of new media services, including on-demand services, to their audiences. Thus, commercial broadcasters use different conditional access systems and encrypt their transmissions carrying program signals to ensure that only their subscribed customers have access to receive any given program. The success of commercial television is subject to their exclusive licensing of certain programs for example films, series and premium sport events, on a geographical basis and for a limited period of time.[17]

II. Definitions and concepts

There is no globally agreed definition of broadcast, of broadcasting or of a broadcasting organization. These three concepts are defined differently in the national law of nearly every sovereign state. Yet, there are common criteria that imply notions of those terms and indicate their major aspects or constituent elements in the world broadcasting industry.

The most important and common feature of these organizations is that in almost all countries they are subject to some sort of regulatory license. Obtaining a regulatory license is usually subject to a broadcaster satisfying the existence of several qualifications of a relevant national regulatory authority, for example, OFCOM in the United Kingdom and Switzerland. An applicant should also be bound to obligations laid out by the regulatory authority, which they are obliged to meet through out the duration of their broadcast licence. One of the most

[12] Asia- Pacific Institute for Broadcasting Development (AIBD). (n.d.). *Defining public service broadcasting*. Retrieved October 3, 2014 from Asia- Pacific Institute for Broadcasting Development (AIBD): www.aibd.org.my/node/94

[13] Banerjee, I., & Seneviratne, K. (2005). *Public service broadcasting: A Best Practice Sourcebook.* Paris: UNESCO, p. 6.

[14] European Commission. (2012, 12 04). *Public Service Broadcasting*. Retrieved October 4, 2014 from Audiovisual and Media Policies: http://ec.europa.eu/archives/information_society/avpolicy/reg/psb/index_en.htm

[15] Ibid.

[16] MacLoughlin, G. .. (2006). The corporation for public broadcasting,Federal funding facts and statutes. In L. R. Lckes, *Public broadcasting in America.* (pp. 1-8). New York : Nova Science Publishers, p. 3.

[17] WIPO Document SCCR/7/8, Protection of broadcasting organizations, Technical background paper prepared by the WIPO Secretariat of April 4, 2002, p. 3.

common qualifications is that a broadcaster should be organized as a legally registered entity for example in the form of a registered company or organization. Regulatory obligations include broadcaster's legal and editorial responsibility in regard to their broadcast content. In some countries, for example in Switzerland and in certain Member States of the EU, regulatory obligations include an obligation to notify radio and television programs, application of national or local media policies, fulfillment to license requirement in terms of compatibility to the regulation on frequencies, antennas, equipment and installations, transmission technology and finally permanent surveillance and monitoring.[18]
Some broadcasting organizations produce their own content, and others purchase the rights to broadcast another rights holders' content. They also have decisions to make over when to broadcast, scheduling, assemblance arrangements, and converting the content to program-carrying signals and its final transmission to the public.

Regarding the concept and definition of broadcasting, a widely cited definition is that "it is a kind of mass communication, which is sending of message to a multitude of receivers."[19] This definition it is not accepted by all as the broadcasting has evolved over time, most notably by the rapid development of communication technology. In a more general sense, it could be defined as the transmission of broadcasts consisting of audio and/or video signals to an audience, which could be the general public or a relatively large subset of such public. In a strict technical language it is 'converting' data/information consists sounds, images, sounds and images and any representation thereof to the 'electronic signals' and communicating through electronic transmission to an intended addressee.

In the legal terminology, depending on in which legal context it is used, broadcasting is defined differently. In international telecommunication law, broadcasting is one of the telecommunication services that are under the competence of the International Telecommunication Union (ITU). ITU has responsibility for the global standardization of all telecommunication services including broadcasting services. It deals with the different technical aspects of information and communication technology issues, for example coordinating the shared use of the radio spectrum, assigning satellite orbits and establishing worldwide standards on telecommunication systems. In section 1.3 of the ITU Radio Regulations the term telecommunication is defined as "any transmission, emission or reception of signs, signals, writings, images and sounds or intelligence of any nature by wire, radio, optical or other electromagnetic systems"[20] Under section 1.38 of this Regulation[21] broadcasting as a telecommunication service is defined as "a radio communication service in which the transmissions are intended for direct reception by the general public. This service

[18] For example in the Swiss law, an applicant for broadcasting activities is must register before the Swiss Federal Office of Communication (OFCOM) before starting transmission and has to comply a package of regulatory license obligations. This obligation includes all broadcasters regardless of the type of transmission (internet, wire, frequencies, satellite) unless they are of minor significance in media terms. This relates to offerings, which fewer than 1000 receivers can receive or which transmit editorially unprocessed data (weather images, time information, emergency numbers, etc.). Anyone who does not comply with the registration obligation or who submits registration late or incompletely or provides false information may be subject to a charge of up to CHF 10,000.
For details of the Swiss law see:
Federal Office of Communication. (2012, 10 18). *Registration obligation for radio and television broadcasters*. Retrieved October 4, 2014 from Federal Office of Communication:
http://www.bakom.admin.ch/themen/radio_tv/01107/02357/index.html?lang=en
[19] Crisell, A. (2012). An Introductory History of British Broadcasting (2nd Edition), London, Routledge, p. 2
[20] International Telecommunication Union (ITU). (2012). *Radio Rgulations (RR) (2012).* Retrieved February 13, 2015 from www.itu.int: www.itu.int/pub/R-REG-RR-2012.
[21] Ibid.

may include sound transmissions, television transmissions or other types of transmissions".[22] The main reason that all broadcasting services should conform to the ITU Radio Regulations and standards is that all Member States of the ITU are allowed to have broadcasting activities only on the allocated[23] radio frequencies. ITU Radio Regulations (RR) do not define a broadcasting organization, but using the above explanation broadcasting organizations in international telecommunication law could be defined as organizations, such as; telecommunication service companies, satellite organizations and cable service providers, authorized by a national telecommunication administration to engage in signal transmission. Some commentators[24], while trying to define broadcasting organizations, have referred to the definition of a 'broadcasting station' in Article 1 of ITU Radio Regulations, which seems irrelevant to the broadcasting organization. ITU Radio Regulations define broadcasting stations as "one or more transmitters or receivers or a combination of the two, including the accessory equipment, necessary at one location for carrying on a radio communication service, or the radio astronomy service". Broadcasting stations are indeed stations with assigned frequencies for broadcasting.

In international intellectual property law the definition of broadcasting stems from the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations or the Rome Convention (1961). It is the "communication of a work or an object of related rights to the public by wireless transmission."[25] This definition only covers terrestrial wireless and possibly satellite broadcasting. Any wire-based transmission even to the general public i.e. cable casting, internet casting, webcasting and the interactive making available of works and objects of related rights over computer networks (where the time and place of reception may be individually chosen by members of the public) are excluded from this definition.[26]

To understand the meaning of broadcasting in the context of intellectual property law one must consider the history behind it. First, it is necessary to consider the provisions of the Rome Convention (1961), which still governs the neighboring rights of broadcasting organizations in an international context. In addition to this, the provisions of the Convention have been adopted in much of the national legislation of the 91 countries, which adhere to the Convention[27]

According to paragraph F of Article 3 of the Rome Convention "Broadcasting means the transmission by wireless means for public reception of sounds or of images and sounds."[28]

According to this definition, there are three clear points that determine the scope of this definition; first, the subject matter of broadcasting should be audio, either by radio or television; second, the means of transmission should be wireless; and third, the transmission

[22] Ibid.

[23] Allotment (of a radio frequency or radio frequency channel) is entry of a designated frequency channel in an agreed plan, adopted by a competent conference, for use by one or more administrations for a terrestrial or space radio communication service in one or more identified countries or geographical areas and under specified conditions.

[24] Ogawa, M. (2006). Protection of broadcaster's rights. Leiden: Martinus Nijhoff Publishers p. 26

[25] World Intellectual Property Organization (WIPO). (2003). *Guide to the Copyright and Related rights Treaties Administered by WIPO and Glossary of Copyright and Related Rights Terms* (Vol. 891(E)). Geneva: World Intellectual Property Organization (WIPO), p. 270.

[26] Ibid.

[27] International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, 26 October 1961, 496 UNTS 43 (entered into force 18 May 1964) [WIPO Rome Convention]

[28] WIPO Rome Convention, Article 3.

should be for public reception[29], which is a non-interactive point to multi point transmission.

A second definition of broadcasting in the context of intellectual property law may be constructed from the Berne Convention.[30] Paragraph 2 of Article 2*bis*[31], paragraph 3 of Article 3[32] and paragraph (1) (i) of Article 11*bis* of the Berne Convention[33] refer to broadcasting as communication to the public of works by wireless means.[34] It should be acknowledged that the two above definitions of broadcasting in the Berne and the Rome Conventions conform to the concept and level of development in broadcasting and communication technology in the first decades after the invention of free to air radio and television. Considering the subsequent development of communication technology, which has caused new platforms for signal transmission and content delivery, for example satellite TV, the international community (led by WIPO) has been seeking to modernize broadcasting in the Berne and the Rome Conventions.

Article 1(viii) of the Brussels Satellite Convention[35] defines distribution in a way that reminds us conceptually, it is a developed or supplementary definition of broadcasting in the Rome and the Berne Conventions. According to this Convention distribution is the operation by which a distributor transmits derived signals to the general public or any section thereof.

Fourthly, The Cartagena Decision 351 (1993)[36] defines a broadcast in place of broadcasting as "broadcast shall include the production of program-carrying signals intended for a broadcasting or telecommunication satellite, and also distribution to the public by a body that broadcasts or disseminates the transmissions of others received by means of such a satellite. (Article 40)" Two things should be noted here; firstly, that the decision defines broadcast as

---

[29] WIPO. (1981). Guide to the Rome Convention and to the Phonograms Convention. Geneva: WIPO Publication No. 617 (E), p. 24.

[30] Berne Convention for the Protection of Literary and Artistic Works, as revised at Paris, 24 July 1971, 1161 UNTS 3 (entered into force 15 December 1972) [Berne Convention]

[31] Berne Convention, Article 2 bis, paragraph (2) "It shall also be a matter for legislation in the countries of the Union to determine the conditions under which lectures, addresses and other works of the same nature which are delivered in public may be reproduced by the press, broadcast, communicated to the public by wire and made the subject of public communication as envisaged in Article 11bis(1) of this Convention, when such use is justified by the informatory purpose". In this Article "broadcast" is distinct from communication to the public by wire.

[32] Berne Convention, Article 3, paragraph (3) "The expression "published works" means works published with the consent of their authors, whatever may be the means of manufacture of the copies, provided that the availability of such copies has been such as to satisfy the reasonable requirements of the public, having regard to the nature of the work. The performance of a dramatic, dramatico-musical, cinematographic or musical work, the public recitation of a literary work, the communication by wire or the broadcasting of literary or artistic works, the exhibition of a work of art and the construction of a work of architecture shall not constitute publication." In this it is clear that the communication by wire is not broadcasting.

[33] Berne Convention, Article 11 bis, paragraph (1) "Authors of literary and artistic works shall enjoy the exclusive right of authorizing:
(i) The broadcasting of their works or the communication thereof to the public by any other means of wireless diffusion of signs, sounds or images." In this Article, broadcasting is equal to wireless communication to the public.

[34] WIPO, Guide to the Copyright and Related rights Treaties Administered by WIPO and Glossary of Copyright and Related Rights Terms, WIPO Publication No. 891(E), (Geneva, WIPO, 2003) 270.

[35] Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite, 21 May 1974, 1144 UNTS 3 (entered into force 25 August 1979) [WIPO Brussels Convention]

[36] ANDEAN Decision No. 351 - Common Provisions on Copyright and Neighboring Rights, Gaceta Oficial del Acuerdo de Cartagena, 17 December 1993, X - No 145 (entered into force 21 December 1993) [ANDEAN Decision No. 351].

the 'production' and 'distribution' of program-carrying signals either intended for broadcasting organization or distributed to the public. Secondly, that satellite broadcasting is also added to the scope of application.

Furthermore, the European Convention Relating to Questions on Copyright Law and Neighboring Rights in the Framework of Trans-frontier Broadcasting by Satellite (European Satellite Convention) (1994)[37] defines the notion of broadcasting in Article 1 as follows:

1. The transmission of works and other contributions by direct broadcasting satellite is broadcasting.
2. The transmission of works and other contributions by fixed service satellite under conditions which, as far as individual direct reception by the general public is concerned, are comparable to those prevailing in the case of direct broadcasting satellites, shall be treated as broadcasting.
3. The transmission of program-carrying signals in encrypted form is considered to be broadcasting, in cases where the means for decoding the broadcast are made available to the general public by the broadcasting organization, or with its consent.
Finally, the last definition of broadcasting in international law is contained in Article 2(f) of the WPPT (1996)[38] which is very close to the definition presented by the European Satellite Convention and reads as follows:

"Broadcasting means the transmission by wireless means for public reception of sound or of images and sounds or of the representation thereof; such transmission by satellite is also broadcasting; transmission of encrypted signals is broadcasting where the means for decrypting are provided to the public by the broadcasting organization or with its consent."

It seems even after the WIPO Internet treaties, the broadcasting industry has evolved. Since new platforms for example mobile broadcast came into existence and the existing definitions of broadcasting needs to be revised. Based on a technologically neutral approach, the definition should be able to cover both radio/ sound broadcasting and television broadcasting over all present distribution platforms; applicable to all wireless transmission systems and compatible with the new audiovisual media services. Therefore, we can define broadcasting as the wireless transmission of electronically generated program-carrying signals for reception by the public by a broadcasting organization or on behalf of a broadcasting organization on whatever medium or platform and regardless of the means of transmission.

III. Public missions and economic significance

1. Public missions

The first function of the original broadcasting organizations was the fulfillment of their mission to provide services to the general public. Broadcasting organizations are key players in improving public awareness, guarantee freedom of expression, allowing for the access to knowledge and information and the facilitation of the application of some of the basic human rights around the world. According to the level of development in countries, a broadcasting

[37] European Convention relating to questions on Copyright Law and Neighbouring Rights in the Framework of Transfrontier Broadcasting by Satellite, 11 May 1994, ETS No 153 (entered into force 1 December 1999) [European Satellite Convention]
[38] WIPO Performances and Phonograms Treaty, 20 December 1996, 2186 UNTS 203 (entered into force 20 May 2002) [WPPT]

organization, as far as the public of that country is concerned, meets their needs by transmitting any of the following; news, documentaries, entertainment and drama productions. Broadcasting organizations therefore can provide a showcase for local talent and creativity and act as manifestation of expression and a catalyst for political, social and cultural development.[39] They can also contribute in social cohesion and adaptation to dynamic changes in the process of modernization. As an example, according to the Swiss Broadcasting Act[40], SRG SSR "must in particular promote understanding, cohesion and contacts between the different parts of the country, their language communities, their cultures and their social groups."[41] Other important social functions of the broadcasting industry are the encouragement of learning, of increasing the knowledge of the general public and finally the creation of various artistic works such as musical and cinematographic works. The industry encourages authors and other content producers to create valuable works and video and/or audio programs. Authors and performing artists often owe their popularity and reputation to those broadcasting organizations that share their work because it is they who distribute or communicate content and make huge financial investment towards the dissemination of works, performances and other artistic creations to the public.

Broadcasting organizations are the main source of live news and reporting throughout the world, having adopted a model, which is the easiest and cheapest for the public to consume. However, the flip side of this is that it is very costly and expensive for the industry. The public is used to having access to reporting on international and national events as they occur.

Broadcasting organizations are not the sole source of news media, and newspapers and other media sources also provide news and current affairs to the public. Newspapers, however, are not able to compete with broadcasting organizations for the following reasons:

- Most newspapers are published once a day and therefore cannot transfer live news or live reports to their addressees;
- The addressees of each newspaper are different from the others and due to the limitation of the number of people interested in buying and reading each newspaper, the coverage of information among the general public is not the same;
- Most newspapers are faced with territorial limitations, both in publication and distribution in a given country. Therefore, in addition to the minute-by-minute attraction of the people of the world to the news, broadcasting organizations can became the primary influencing tools of governments even replacing their choice of military forces.

National governments can also benefit from the reach of broadcasting organizations by using them to publicize messages relating to public health, early warning and disaster management, combating infectious diseases, and weather forecasting especially in emergency situations. Nevertheless, within the history of broadcasting there are also examples when national governments have used broadcasting organizations in other countries to further their own geopolitical goals; For example, Nazi Germany used radio to terrorize neighboring countries,

[39] World Broadcasting Unions (WBU), Declaration on the WIPO Draft Treaty on Protection of Broadcasting Organizations in the twentieth session of WIPO Standing Committee on Copyright and Related Rights (SCCR), Geneva, June 21 to 25, 2010.
[40] Swiss Federal Radio and Television Broadcasting Act of 24 March 2006, Section 24.
[41] European Audiovisual Observatory. (2013). *2013 Year Book, Television, cinema, video and on-demand audiovisual services in 39 European States* (Vol. 1). Strasbourg: European Audiovisual Observatory. p. 42.

the former Soviet Union maintained a vast global broadcast network to promote communism in the world and finally the American government established the Voice of America in numerous languages to convey the USA perspective on world events and familiarize a foreign audience with the American political system and culture.[42]

Finally, we can conclude that the broadcasting industry operates as a highway for global traffic of culture and information. The increased number of broadcasting organizations, satellite television and radio stations, which are equipped with the new communication and information technologies, has led to increased global traffic of culture, traditions and knowledge and achieving common or better understanding of the world.

2. Economic significance of the industry

Information and communication technologies (ICTs) "have played an essential role in the globalization of the economy. The protection of intellectual property rights (IPRs) is an essential factor in international economic affairs".[43] As far as the economic impact of the sector is concerned, the broadcasting industry continues to be a flourishing one. "The flourishing industries bring incentive for investment, thus contributing to the economic prosperity of the nation."[44] This is why the economic arguments of granting intellectual property rights (IPR) are in support of the broadcasting organizations. Broadcasting organizations create jobs, provide training and expertise, and stimulate economic development, which has positive effects extending far beyond the broadcasting sector itself. Today, there is no doubt that the program output of broadcasting organizations could be counted as intellectual capital of such organization and "with the growing importance of intellectual capital, particularly to the Triad countries (i.e. countries of the European Union, the United States and Japan), which produce most of it, intellectual property rights have taken center stage in international economic affairs."[45] Therefore, the broadcasting industry seeks to recoup its investments and expenses through licensing rebroadcasting of their live broadcasts and fixation of their broadcast or through lending, sales, making available and other forms of communication. Accordingly, proper protection of the broadcasting industry will encourage the dissemination of all categories of broadcasts e.g. sports, TV shows, films, series, news, documentaries and valuable copyrighted works, which will then benefit the broadcasting industry, content producers, authors of works, commerce and society as a whole.[46]

---

[42] Puddington, A. (2003). Broadcasting Freedom: The Cold War Triumph of Radio Free Europe and Radio Liberty. Kentuky: University Press of Kentucky, 2003, p. ix.

[43] Rao, P. M. (2008). The Information and Communication Technologies and Enforcement of Intellectual Property Rights: A Relationship, perspective. *The Journal of World Intellectual Property , 11* (2), 105. p.105

[44] Sterling, J. (2003). World Copyright law: protection of authors' works, performances, phonograms, films, video, broadcasts, and published editions in national, international and regional law (2nd ed.). London: Sweet and Maxwell, p.59.

[45] Rao, P. M. (2008). The Information and Communication Technologies and Enforcement of Intellectual Property Rights: A Relationship, perspective. *The Journal of World Intellectual Property , 11* (2), 105, p. 108.

[46] In 2003 WIPO published a "Guide on Surveying the Economic Contributions of the Copyright- Based Industries". The Guide summarizes existing experiences in assessing the economic contribution of the copyright-based industries to national economies and offered guidelines to those studying the creative outputs in economic terms. Based on the Guidelines, WIPO also published "National Studies on Assessing the Economic

Today's broadcasting industry is a very highly competitive one and the center of this competition is the attraction of a national and international audience. To offer a unique combination of news, entertainment, sports and other types of programming, any new entrant to the market requires significant amount investments in utilization of qualified human resources and other different technical and managerial facilities. A program watched or listened to by addressees is the result of the collective efforts of many individuals, exercising significant creative, organizational and technical skills, and utilizing considerable economic and financial resources. However, investment return is not guaranteed in this industry. It is due to some extraordinary risks brought by the ever-developing communication technology. Digital technology with its all-impressive achievements and facilities also brought problems and created some rather new challenges. Amongst the considerable challenges that broadcasting organizations encountered are unauthorized use of their broadcasts and the phenomenon of signal piracy that jeopardizes their investments and resources very gravely.

The broadcasting industry is one of the core copyright industries, according to WIPO.[47] This industry provides a considerable contribution to the national economy and development, and also has direct and indirect consequences on other core copyright industries. In 2003, WIPO started an annual research project to assess the economic contribution of industries, which are dependent on copyright and related rights protection including the broadcasting industry. This is based on a series of major indicators including contribution to GDP, employment and foreign trade. Based on this study, the contribution of the broadcasting industry to the overall core copyright industries GDP is 12.18%. On the other hand, the industry contributes contributed 6.77% out of all core copyright industries contribution to the employment.[48]

Contribution of the core copyright industries to GDP by industry
(Chart and data prepared by the WIPO) [49]

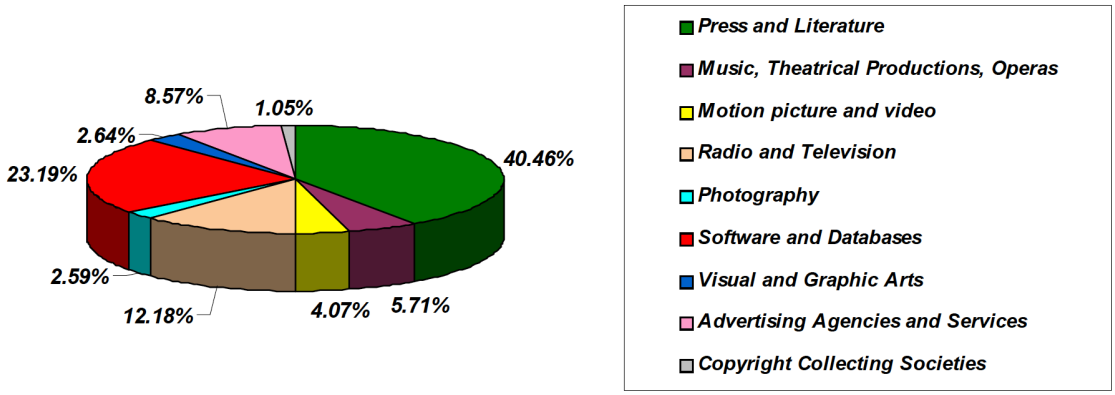
Contribution of the Copyright-Based Industries" which now available as WIPO Publication No. 624. A sample excerpt from the book (US study) is also available at the following site: http://www.wipo.int/ip-development/en/creative_industry/pdf/ecostudy-usa.pdf (Last visited October, 2014)

For instance, according to the above study the "value-added" to the economy of the United States of America by the Core copyright industries reached $626.2 billion or 6% of the United States of America's economy in 2002. In the same year, the value added by the total copyright industries was $1.254 trillion or 12%. Another example is a study on Latvia where the core and interdependent copyright industries contributed 4.0% of the GDP and 4.4% employment to the economy in the year 2000.

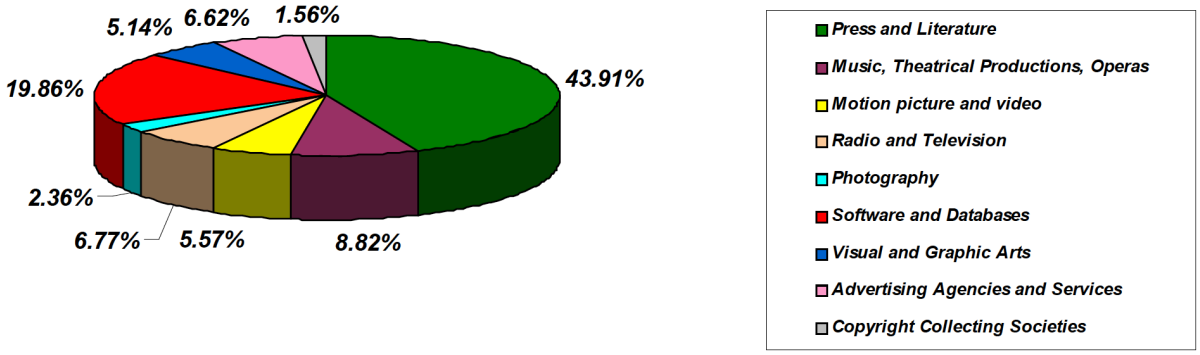
[47] The core copyright industries are classified into press and literature, 'music, theatrical productions and operas', motion picture and video, radio and television, photography, software and databases, visual and graphic arts, advertising agencies and services and copyright collecting societies.

[48] In terms of employment the main categories of jobs in the broadcasting industry are program production occupation, news related occupation, technical occupations (editing, selecting and programming, recording and creating graphics), sales and related occupations and finally management occupations

[49] World Intellectual Property Organization (WIPO). (2012). *WIPO studies on the economic contribution of the copyright industries.* Geneva: World Intellectual Property Organization (WIPO), p. 15.
Available at:
www.ip-watch.org/weblog/wp-content/uploads/2012/02/WIPO-Copyright-Economic-Contribution-Analysis-2012-FINAL-230-2.pdf (Last visited October, 2014|)



Contribution of the core copyright industries to employment by industry
(Chart and data prepared by the WIPO) [50]



Broadcasting organizations play an important role in employment. It is often an entrepreneurial industry in every country regardless of their different levels of economic development. As a leading media industry and due to its special features and popularity, the broadcasting industry continues to be a very attractive industry for job seekers in the national and international employment market. Statistics on direct and indirect job creation by the broadcasting industry in different countries leads us to draw some important conclusions, some of which we will discuss here. The position of the industry in the USA is one of the best examples of the major economic aspects of the industry.[51] The broadcasting industry

[50] Ibid.

[51] According to the report published by the USA Commerce Department's Economics and Statistics Administration and the USPTO titled 'Intellectual Property and the U.S. Economy: Industries in Focus' "intellectual property-intensive industries in the United States support at least 40 million jobs and contribute more than $5 trillion – or 34.8 percent of – US gross domestic product (GDP). In 2010, 22.6 million jobs were in the 60 trademark-intensive industries, while 3.9 million jobs were in the 26 patent-intensive industries, and 5.1 million jobs in the 13 copyright-intensive sectors." Porteus Viana, L. (2012, April 12). *US Government Report: IP Boon To US Economy, Accounts For 40 Million Jobs*. Retrieved October 4, 2014 from Intellectual Property Watch: http://www.ip-watch.org/2012/04/12/us-government-report-ip-boon-to-us-economy-accounts-for-40-million-jobs/

provided about 316,000 waged and salaried jobs in 2008.[52] Thousands of direct and indirect jobs in the world are also created or reliant on the broadcasting industry, and it is therefore considered to be, in many countries, a competitive and glamorous industry to be involved in.[53]

Part Two. Functional evolutions in the industry

The broadcasting industry began with terrestrial analogue signal transmission. Traditionally it is based on analogue system and audio or video contents converted on a one to one basis into a modulated radio wave signal. Therefore, it was totally dependent on limitation in spectrum. Spectrum is a unique and very expensive asset of any country and therefore countries seeks to maximize the exploitation of the spectrum within their borders. Spectrum can be used for broadcasting, mobile, emergency and wireless broadband communication. The International Telecommunication Union (ITU) has defined analogue as "transmission of voice and images using electrical signals"; and the analogue system of signal transmission as a "telecommunication network in which information is conveyed as a continuously varying electronic signal."[54]

The invention of digital signal transmission and emergence of new platforms other than that of terrestrial signal transmission has dramatically changed the landscape of the broadcasting industry. According to the definition provided by the ITU 'digital' is the representation of voice or other information using 0 and 1. These digits are transmitted as a series of pulses. The digital system of signal transmission is a telecommunication network in which information is converted into a series of distinct electronic pulses and then transmitted as a digital bit stream. Digital networks allow for higher capacity, greater functionality and improved quality.[55] After the digital signal transmission was adopted by the broadcasting industry, it has had considerable economic impacts on the industry, both positive and negative. In regards to the positive impacts of digitalization the increase in quality and resolution of watched or listened programs are the most noteworthy and most obvious to the consumer. It has brought capability of compressing audio and video signals by one of two different compression algorithms, MPEG-2 and MPEG-4 resulting in broadcast signal transmission requiring less space.[56] As a result of digitalization, satellite broadcasters have

[52] United States Department of Labor, Bureau of Labor statistics. (n.d.). *Occupational Employment Statistic, Broadcasting (except Internet)*. Retrieved June 2, 2010 from United States Department of Labor: www.bls.gov/oco/cg/cgs017.htm

[53] In the United States employment in broadcasting industry is expected to increase by 7 percent over the 2008–18 periods, less than the 11 percent increase projected for all industries combined. Factors contributing to the relatively slow rate of growth include industry consolidation, the introduction of new technologies, and competition from other media outlets. The slow growth will be tempered, however, by growth in the cable and subscription division of broadcasting. United States Department of Labor, Bureau of Labor statistics. (n.d.). *Occupational Employment Statistic, Broadcasting (except Internet)*. Retrieved June 2, 2010 from United States Department of Labor: www.bls.gov/oco/cg/cgs017.htm

[54] International Telecommunication Union (ITU). (2008). *ITU-infoDevToolkit-Glassory, April 2008*. Retrieved October 4, 2014 from ICT Regulation Toolkit: www.ictregulationtoolkit.org/en/Document/3390/Regulation_Toolkit_Glossary_April_2008

[55] Ibid, p.4.

[56] MPEG-2 compressed video typically uses roughly one fifth of the space required to transmit the comparable analogue video signal. MPEG-4 can push this compression even further, to as low as ten per cent of the space that the analogue signal requires. WIPO Document SCCR/19/12, Study on the socio economic dimension of the unauthorized use of signals: Part I: Current market and technology trends in the broadcasting sector, prepared by Screen Digest Ltd, London of November 30, 2009, para 35-38.

reduced the capacity required in satellite transmissions and therefore have also reduced their expenses in regards to the renting of transmission capacity on communications satellites orbiting the Earth. In addition to this, broadcasting organizations can increase the number of channels on all platforms and to encode their television signals. This has also given rise to new digital platforms that are fully dependent on digital signal transmission, such as webcasting and IPTV. [57]

It has not, however, all been positive. In regards to the negative economic impacts of digitalization, the broadcasting industry has suffered, as it is now easier than ever to create an unauthorized fixation of a broadcast transmission, and to copy or reproduce broadcast signals without any decrease in the quality and resolution of those signals. [58] Moreover, it makes it almost impossible or at least very difficult to recognize unauthorized persons intercepted broadcast signals from which digital platforms. Despite the negative impact that digitization of the industry has had in some areas, both the world broadcasting industry and national governments are determined to shift from the analogue broadcast signal transmission to digital. This would lead to more efficiently utilisation of spectrum currently used by analogue broadcasts.[59]

I. Broadcast platforms

1. Terrestrial

Terrestrial broadcasting was the first platform used for broadcasting to the public. It was also known as the major traditional broadcasting platform through which transmission for direct reception by the general public was used. The concept of traditional broadcasting originates from "the ITU Radio Regulations under which a broadcasting service is defined as a service, which the transmissions via hertz waves (i.e., electromagnetic waves of frequencies propagated in space without artificial guide) intended for direct reception by the general public."[60] It is confined to wireless and *over the air* transmissions of conventional TV and radio broadcasts, which is the initial form of *point to multipoint* transmission. Point to multipoint technology is a process by which the same signal flows, or is transferred, from a single origin point to multiple consumers (multipoint). The signal sent from the single point is intended to arrive at all endpoints at roughly at the same time.[61] Terrestrial radio broadcasting (experimentally from 1906, commercially from 1920) is an audio (sound) broadcasting service, broadcast through the air as radio waves from a transmitter (single point) to an antenna and, thus, to a receiving device (multipoint, as of course, any person can own such a device). Stations can be linked up to radio networks to broadcast common programming, either in syndication or simulcast or both. The terrestrial television broadcasting as a video-programming medium, started in an experimental fashion from 1925, and then commercially from the 1930s.

As a terrestrial platform, be it with an analogue or digital transmission system, broadcasting

[57] WIPO Document SCCR/19/12, Study on the socio economic dimension of the unauthorized use of signals: Part I: Current market and technology trends in the broadcasting sector, prepared by Screen Digest Ltd, London of November 30, 2009, para 35-38.

[58] WIPO Document SCCR/19/12, Study on the socio economic dimension of the unauthorized use of signals: Part I: Current market and technology trends in the broadcasting sector, prepared by Screen Digest Ltd, London of November 30, 2009, para. 35-38.

[59] Ibid, para 15.

[60] WIPO Document SCCR/7/8, Protection of broadcasting organizations, Technical background paper prepared by the WIPO Secretariat of April 4, 2002, p.7.

[61] Ibid, p.5.

organizations need to install a chain and different kind of transmitter and receiver towers that are interconnected to cover the region or territory that they intend to broadcast their program. This means a huge investment in terrestrial infrastructure; considerable financial resources and skillful human resources are required in order to maintain the continuity of a stable broadcast service. In the terrestrial platform, broadcasting organization broadcast through two specific radio wave bands i.e. very high frequency (VHF) or ultra-high frequency (UHF) transmission. Both VHF and UHF are portions of the electromagnetic spectrum typically reserved for short-range communication because it minimises overspill into neighbouring regions or countries and prevents interference with alternative TV signals in such areas. The disadvantage of the terrestrial signal transmission is that in a region with natural barriers such as mountains, or man-made barriers such as tower blocks or other large buildings, these obstacles can act as a barrier to a broadcast signal and therefore an increased in the number of transmitter towers is required to ensure that a given area has a complete coverage. For example, in the UK over 1000 transmitter towers are needed to reach 99% of the population, in China this figure is over 30,000 and in Iran, 13,000. [62]

2. Satellite

Satellite communication is the second platform for broadcasting. Today this platform is used, not only for extraterritorial coverage, but also for local and national coverage of broadcast signal. Regarding this platform, although the science-fiction author, Arthur C. Clarke first proposed using satellites for communication in 1945, "the United States launched its first active communications satellite in late 1958 and in 1962, ATandT launched a satellite that relayed television programming between Europe and the United States."[63] According to other research "television programs were first broadcast via satellite in the 1960s, however it was not until the 1980s and 1990s that the platform really began to take off as a means for domestic television reception."[64] Due to its distinguishing feature, a wireless signal has removed many of the limiting deficiencies that exist in terrestrial signal transmission. Satellite transmissions are carried out in higher frequencies, including C-band or K_u-band, and in contrast to the VHF and UHF frequency bands, these satellite transmissions are less regulated by the ITU. Satellite transmission frequencies are also capable of transmitting more television channels.

The transmission of a broadcast signal from satellite to the earth means that its intended footage does not risk being blocked by natural barriers, for example high buildings and mountains, as is the case with terrestrial transmission. Therefore, satellite broadcast signals are usually transmitted with a stable quality unless those signals encounter unusual atmospheric changes. Notably, unlike cable and terrestrial TV, due to the fact that analogue satellite broadcasts are encoded at different frequencies to broadcasts via terrestrial or cable TV, analogue and digital satellite broadcasts always require a specialised satellite set-top box to decode the signal.[65]

---

[62] WIPO Document SCCR/19/12, Study on the socio economic dimension of the unauthorized use of signals: Part I: Current market and technology trends in the broadcasting sector, prepared by Screen Digest Ltd, London of November 30, 2009, para 42.

[63] Leslie Smith, F., Wright (II.), J. W., & Ostroff, D. H. (1998). *Perspectives on Radio and Television: Telecommunication in the United States* (4th Edition ed.). US: Psychology Press. p. 147.

[64] WIPO Document SCCR/19/12, Study on the socio economic dimension of the unauthorized use of signals: Part I: Current market and technology trends in the broadcasting sector, prepared by Screen Digest Ltd, London of November 30, 2009, para 50.

[65] Ibid.

Satellite broadcasting also has other advantages. Many countries use satellite signal transmission to reach rural areas with no terrestrial or cable TV coverage, as satellite transmission does not require the infrastructure required by terrestrial transmission. Current broadcast satellites include a signal of high definition television (HDTV), and recently "satellite broadcasters license the use of popular cable or broadcast channels. The tuner descrambles selected programs sent out on a specific frequency. This allows satellite providers the option of pay-per-view movie rentals or the blocking of adult-oriented or premium movie channels."[66]

3. Cable

Cables made of different materials including those made from copper, fiber and coaxial cable can also be used as a conveyor or carrier for different purposes. Such cables are capable to carry different types of analogue and digital signals. Cable is another platform, which the broadcasting organizations use for their broadcasting activities. Broadcasting organizations usually use cable to transmit their wireless television and radio signals to areas that a wireless broadcast signal is not able to reach. To reach this area, broadcasters can connect a transmitting tower through cable to the premises of habitants in the inaccessible area, or 'shadow zones/dark areas' as they are sometimes known. [67] This connection can also be set up through a satellite down link to the cable establishment center. Therefore, in such situations broadcasters make use of cable as the most effective platform for their broadcasting to the public. The cable radio (since 1928) and cable television (since 1932) is the wire-based transmission of radio and television signals.

There are other uses of cable that are known as 1) cable retransmission; and 2) cablecasting. Cable retransmission and cablecasting are different from the aforementioned situation whereby a broadcasting organization uses cable as the platform with which wireless signals are broadcasted to 'shadow zones'. In the case of cable retransmission, cable or telecommunication companies, merely convey or carry signals, data and information that belong to third parties through their cables and communication facilities without any alteration or changes in them. Cablecasting follows another business model more similar to broadcasting in that such organizations have cable-originated programming.[68] Like broadcasting organizations, cablecasting organizations have, as part of their business, work involving programming, selecting, and scheduling of their cable-originated programs. Thus, a cablecasting organization is another entity that is engaged broadcast-like activities. Accordingly in many jurisdictions broadcasting organizations and cablecasting organizations are treated equally.[69]

---

[66] Pollick, M. (2014, September 2). *What is satellite TV?* Retrieved October 4, 2014 from www.wisegeek.com: www.wisegeek.com/what-is-satellite-tv.htm

[67] WIPO Document SCCR/19/12, Study on the socio economic dimension of the unauthorized use of signals: Part I: Current market and technology trends in the broadcasting sector, prepared by Screen Digest Ltd, London of November 30, 2009, para 46-47.

[68] WIPO Document SCCR/7/8, Protection of broadcasting organizations, Technical background paper prepared by the WIPO Secretariat of April 4, 2002, p.6.

[69] Depending national legislation, cablecasting organizations may transmit through their cable network, simultaneously, programs (might be altered or unaltered) which are being broadcast over the air by broadcasting organizations or they can make deferred (delayed) retransmissions of programs, which previously have been broadcast over the air and on the basis of a fixation or a reproduction of a fixation.
See: WIPO Document SCCR/8/INF/1, Protection of Broadcasting Organizations: Terms and Concepts, working paper prepared by the Secretariat of August 16, 2002, p.3 para 1.

Cable as a platform, conveyor and carrier of signals has numerous advantages over the terrestrial platform. Cable enjoys no signal interference from other wired or wireless signals; it has made possible multi-channeling and interactivity due to applicability of establishing a one-to-one connection between broadcaster and user. Since the creation of the Internet, cable has been widely used for broadband and telephony connection, and is used to send television signals and high-speed Internet transmission vis a cable modem for the uploading and downloading of internet transmissions.[70]

In terms of the safety and security of signal transmitted using cable, it is possible to digitally encode a signal, thereby safeguarding it from interception by a third party. Nevertheless, to use cable as a platform, broadcasters need to establish connected networks of their audiences that require financial resources and investment. Hence, setting up a national cable network in developing countries particularly large developing countries can be very difficult due to the financial and logistical costs. The character of networked connections in cablecasting motivates broadcasting organizations to set-up pay televisions. For, cablecasting is secured only for authorized subscribers to watch cable programs. Today, the main advantages of cable systems are seen as being "their ability to provide viewers with large amounts of programs (received from terrestrial broadcasts), and sometimes produced specifically for cable distribution, with a technically very high quality."[71]

The penetration of cable television subscriptions in many developed countries that employed infrastructure for cable television is increasing. However, not all developed countries have the same levels of penetration. For example whilst 77.8% of the households in Switzerland are cable television subscribers, this figure is 11.4% in France, 55.1% in Finland, and 0% in Italy.[72]

4. Internet

The Internet is now a leading platform for broadcasting organizations. Broadcasters use the Internet for a variety of different purposes. The live webcasting of a broadcast signal or online transmission of broadcast signal through the Internet is now a regular activity of many broadcasters in both developed and developing countries. Broadcasters use the Internet for (a) simultaneous and near simultaneous transmission of their traditional broadcast signal, which is known as simulcast, (b) deferred casting or time-delayed transmission of broadcasted signal, (c) webcasting of their only-web-originated programs, and (d) Web/Internet based services, for example on-demand services and making available of fixations made from their broadcasts. In addition to this, broadcasting organizations, use the Internet for other purposes including their point-to-point signal transmission between different stations of their organization or for news report exchanges between different broadcasting organizations or with news agencies. The latter of these examples is not subject of this research as it is not a matter of broadcasting or webcasting to the members of the public.

All the above activities are carried out either via a 'broadband connection to a closed network' known as Internet protocol television (IPTV) or via 'broadband connection to the

[70] WIPO Document SCCR/7/8, Protection of broadcasting organizations, Technical background paper prepared by the WIPO Secretariat of April 4, 2002, p.6.
[71] Ibid, p.6.
[72] European Audiovisual Observatory. (2013). *2013 Year Book, Television, cinema, video and on-demand audiovisual services in 39 European States* (Vol. 1). Strasbourg: European Audiovisual Observatory. p. 42, 119, 110 and 186.

open Internet known as 'Web-television', 'Internet Television' or 'Online television'. Instead of sending broadcast signals over radio frequency, both of these methods are based on enclosing or delivery of the signal in a set of codes, which then allow for a transfer across a closed network or the open Internet. Indeed, the signal transmitted through IPTV using communications standard for delivery of data within computer networks. Thus, no section of the spectrum is used for the sharing of signals using the Internet, a common feature of named methods, IPTV and 'web-television' that they are dependent to broadband connection and they are only digital-based transmission.

I. Closed broadband-based networks

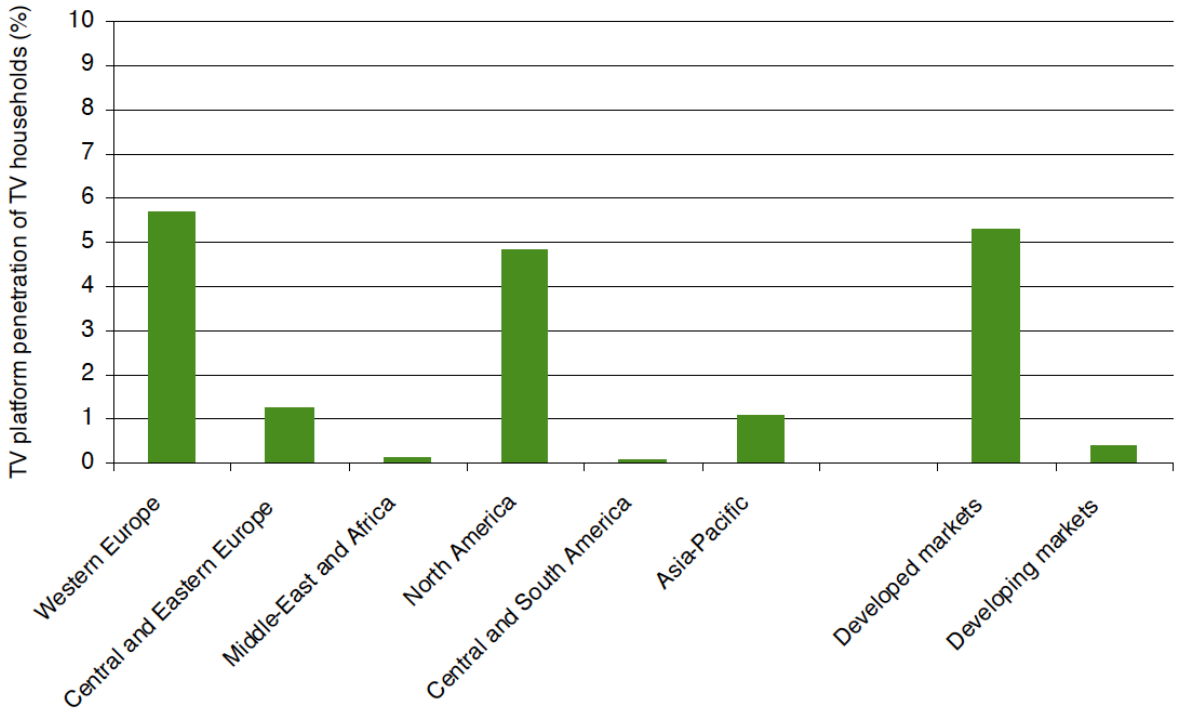
Broadcasting organizations in the form of 'broadband-based closed network' can make use of the Internet as a broadcast platform. One of the major examples of this is Internet Protocol Television or IPTV. Internet Protocol Television (IPTV) is "the delivery over a broadband connection of television content using Internet Protocol within a 'walled garden' environment."[73]

IPTV works through asymmetric digital subscriber line or ADSL broadband communication technology. This technology connects users or subscribers to the Internet via existing copper or fiber telephone lines. There is a 'broadband-based closed network', which is a geographically closed location. Only the subscribed users that exist in the network and use the interface or set-top boxes are allowed and able to have access and to receive data including media files, television and radio programs. Usually, broadcasters enter into contract with telecommunication companies who own such infrastructures, for example a telephone and broadband network, and transmit their program to their subscribers via that companies network or alternatively authorize the telecommunication companies to transmit their radio and television programs. Today, the majority of IPTV service providers are telecommunication companies, since provision of this service needs use of a closed network (telephone lines), broadband connection and ADSL communication technology with standard receiving data or downstream rate (from 1.5 to 9 Mbps) and sending data or upstream rate (16 to 640 Kbps). This kind of 'broadband-based closed network' is on the surface, similar to cablecasting, and similarly, only subscribers are allowed to receive and watch radio and television programs.

Therefore, 'broadband-based closed networks' such as IPTV is capable to transmit live or simulcast, near simultaneous cast, deferred cast, casting 'only web-originated program'. Due to existence of two-connection, it is capable of interactivity on the part of the subscriber, for example, time shifting and provision of other on-demand services.

[73] WIPO Document SCCR/19/12, Study on the socio economic dimension of the unauthorized use of signals: Part I: Current market and technology trends in the broadcasting sector, prepared by Screen Digest Ltd, London of November 30, 2009, p. 56 (Glossary).

IPTV penetration of TV household 2009[74]



II. Open broadband-based network (Internet)

The platform of Internet is capable of being used by broadcasting organizations as an 'open broadband-based network'. The Internet of course being the largest open network of the world and gets larger and larger every second of every day. Broadcasting organizations use this network for broadcasting, other different kind of casting and providing media services to the public. Webcasting (or Web television), Internet casting (or Internet television) and Online television, are phrases that can be used interchangeably in this context, and area phenomenon of the open broadband-based network. Like IPTV, it is another worldwide platform for live audio and video broadcasting, any other casting and for providing new media services. The "webcasting of video/television and audio/radio is an Internet-based content delivery that offers a mix of traditional radio and television station broadcast, programmed with internet-dedicated webcast programming." [75] In more general sense though not in specific legal terms, one of the first definitions of webcasting was stated at WIPO's Standing Committee on Copyright and Related Rights (SCCR) in 2002. The definition states that webcasting is " a new model of content delivery on the internet providing automated and possibly, personalized delivery of services and normally refers to on-demand uses as well as real-time streaming." [76] Webcasting is, in fact, the "transmission of broadcasts over the Internet"[77]using streaming technology. Today, almost all major broadcasters of the world

[74] Ibid, p. 27.
[75] Kozamernik, F., & Mullane, M. (2005, October 26). *An Introduction to the Internet Radio*. Retrieved October 4, 2014 from www.ebu.ch: http://tech.ebu.ch/docs/techreview/trev_304-webcasting.pdf
[76] WIPO Document SCCR/7/8, Protection of broadcasting organizations, Technical background paper prepared by the WIPO Secretariat of April 4, 2002, para 11.
[77] Rossini, Mara, (2010), Draft Basic Proposal for a Treaty on the Protection of Broadcasting Organizations, iris Plus, New Services and Protection of Broadcasters in Copyright Law, 2010-5, p. 29.

offer transmissions of their broadcasts over the Internet. However, this technology is also used to provide live and recorded video streaming of lectures in universities, speeches at conferences, and a wide variety of other events.[78]

From a technical perspective, there are two technical forms of content delivery involved in webcasting; 1) downloading; and 2) streaming, that allow web users access to sound and images, or a combination of both. Downloading is the act or process of a computer file transferring by coping data from one computer system to another. After downloading, a copy of the file is left on the device unless software intervenes to remove it.[79]

The second is streaming, which has been defined as:

"Internet data transfer technique that allows users to see and hear audio and video files without lengthy download times. The host or source 'streams' small packets of information over the Internet to the user, who can access the content as it is received. The stream may be a real time (live) [transmission] or it may be an archived file." [80]

As opposed to downloading, "the streaming method of media delivery does not store the entire copy of the media file on end user's device. It aims to ensure an uninterrupted real-time viewing experience."[81] There are different methods of streaming but the common underlying feature is that files are not saved locally on the user's computer or device; the content is transmitted on the Internet only. [82]

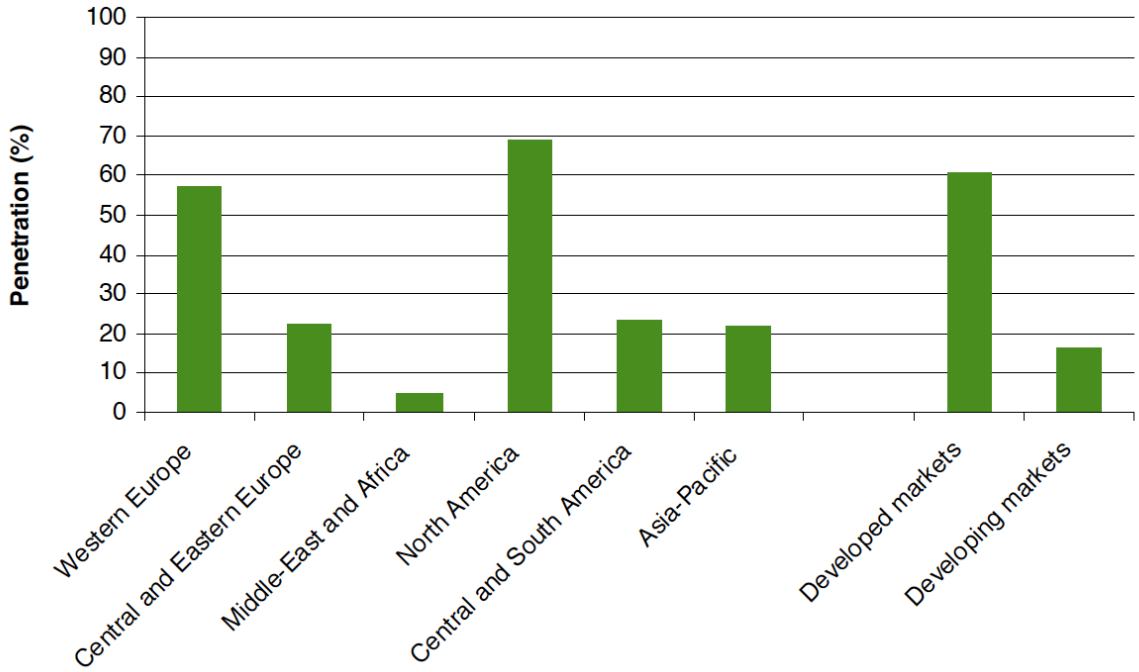
As opposed to simultaneous streaming of a traditional broadcast signal, Internet or web-originated streaming is not a relay or retransmission of a simultaneous traditional broadcast. Web-originated programing is streamed specifically on the Internet and the content can be perceived only at the time when it is transmitted. Nevertheless, it is a point-to-point transmission, even though the same program is transmitted to multiple recipients. The receiving persons can decide to access to this stream at a time individually chosen by him or her.[83]
In a live webcast, the data is sent in real time. Therefore, Internet TV services, which show live broadcasts, typically rely on streaming, as all users are viewing content at the same time.[84] But in an on-demand webcast, the data is hosted on a server, and users can choose when and where to watch or listen to it; but users may need to download a proprietary

[78] McMahon, M. (2014, September 28). *What is a webcast?* Retrieved October 4, 2014 from www.wisegeek.com: http://www.wisegeek.com/what-is-a-webcast.htm
[79] WIPO Document SCCR/19/12, Study on the socio economic dimension of the unauthorized use of signals: Part I: Current market and technology trends in the broadcasting sector, prepared by Screen Digest Ltd, London of November 30, 2009, para 64-68.
[80] Flower, Eric, Streaming Video, http://socrates.uhwo.hawaii.edu/BusAd/Flower/video/sld018.htm , quoted by WIPO Document SCCR/8/INF/1, Protection of Broadcasting Organizations: Terms and Concepts, working paper prepared by the Secretariat of August 16, 2002, p.4.
[81] WIPO Document SCCR/19/12, Study on the socio economic dimension of the unauthorized use of signals: Part I: Current market and technology trends in the broadcasting sector, prepared by Screen Digest Ltd, London of November 30, 2009, para 64-68.
[82] WIPO Document SCCR/8/INF/1, Protection of Broadcasting Organizations: Terms and Concepts, working paper prepared by the Secretariat of August 16, 2002, p.4.
[83] Ibid, p.4.
[84] WIPO Document SCCR/19/12, Study on the socio economic dimension of the unauthorized use of signals: Part I: Current market and technology trends in the broadcasting sector, prepared by Screen Digest Ltd, London of November 30, 2009, para 64-68.

platform to access the content.[85] Finally, it should be noted that both streaming and downloading methods are able use various network protocols to transfer the data, with both technologies able to work using peer-to-peer and TCP/IP and UDP standards.[86] However, strictly speaking, it is not the end user experience that defines the difference between the two delivery methods, but how the end user's device receives and stores media files.[87]

As a concluding remark, the Internet as an open broadband-based network acts as a new platform for broadcasting organizations. Broadcasters use this platform for the live streaming of their traditional broadcast signal, for web-originated programming and for placing their video or audio files (or other pre-broadcasted programs) on their websites, or user generated sites (such as YouTube or Facebook). As a result, these programs are available to be accessed by anyone with access to open Internet around the globe, without the need for a set top box, as is the case for IPTV and other closed broadband-based networks. Increasingly, broadcasters use the Internet as a platform to provide on-demand services to the public.

Broadband service penetration households 2009[88]



[85] The best examples of webcasting are Yahoo! Broadcast (www.broadcast.com), Net Talk Live, which is a Webcasting Company that combines webcasts with live events on television or radio. CNET Networks' TV.com, which provides previews and cuts from movie and TV shows.
[86] WIPO Document SCCR/19/12, Study on the socio economic dimension of the unauthorized use of signals: Part I: Current market and technology trends in the broadcasting sector, prepared by Screen Digest Ltd, London of November 30, 2009, para 64-68.
[87] Ibid.
[88] Ibid, p. 36.

5. Mobile

Mobile wireless networks have, relatively recently, become another platform of broadcasting. This platform is used for transmission of broadcast signals to the public through a mobile phone and similar mobile receiver terminal or device. It allows for the watching of live TV programs on mobile phones. This can be known as; web-to-go, broadcast-to-go, mobile television and/or mobile casting. The transmission of signal is wireless and IP-based networks. This platform can be used for other data casting, for example, traffic information, weather updates and top news and other on-demand services.

Mobile casting is generally defined as follows:

Mobile casting or mobile TV is a mobile-based content distribution with television programs delivered to the mobile device. "It is the transmission of on demand, recorded or live audiovisual content to a receiver - at a rested position or on the move."[89]

Mobile TV operates in one of two technical paths: 'cellular' and 'broadcast networks'. Firstly, over the cellular networks, there are two possibilities. It acts either through the unicast solution using streaming, which is point-to-point broadcasting on a cellular network. In unicasting the existing mobile telephone networks are used and the broadcast program can be streamed over the cell phone networks to individual mobile devices. Alternatively through multicast solution (point to multipoint) on cellular networks that uses the 'multimedia broadcast multicast service' (MBMS) standard that allows for multicasting on cellular networks. The disadvantage of multicasting a broadcast transmission is that it requires one part of the 3G spectrums to be reserved for it and therefore only a limited number of channels would be able to broadcast.[90]

Secondly, it can act in the form of a 'mobile broadcast on broadcast networks'. Such a solution was described as follows:
"This solution requires the allocation of a specific spectrum and the construction of a new network, either terrestrial or terrestrial and satellite based"[91], which is similar to the traditional TV broadcast. In such a solution the broadcast signal is capable of being received by the all members of the general public who own mobile sets or cell phones with the required TV application. The program-carrying signals can be distributed by aerial or satellite dishes. The broadcast Mobile TV blanket covers an area giving unlimited device access to the same signal, whereas streaming Mobile TV sent as data packets over cellular networks to individual devices is restricted by the number of devices accessing the same TV program due to bandwidth.[92] Mobile broadcasting works through a DVB-H[93] digital television standards or

[89] Mobile TV World. (n.d.). *Glossary*. Retrieved October 4, 2014 from www.mobiletvworld.com: www.mobiletvworld.com/p./Glossary.aspx
[90] European Audiovisual Observatory. (2007). *European Audiovisual Observatory, Yearbook"Trends in European television"* (Vol. 2). Strasbourg, France: European Audiovisual Observatory. p. 105.
[91] Ibid.
[92] Mobile TV World. (n.d.). *Glossary*. Retrieved October 4, 2014 from www.mobiletvworld.com: www.mobiletvworld.com/page/Glossary.aspx
Prominent standards include ATSC-M/H for North America, variations of ISDB-T for Japan and South America, CMMB in China and DVB-H and T-DMB for various other regions around the globe.
[93] Digital Video Broadcasting is an open standard for digital television maintained by the DVB Project, an industry consortium with more than 270 members, and published by a Joint Technical Committee (JTC) of the European Telecommunication Standards Institute (ETSI), the European Committee for Electro technical Standardization (CENELEC) and the European Broadcasting Union (EBU). A number of DVB standards exist including DVB-C (Cable), DVB-H (Handheld), DVB-T (Terrestrial Television) and Return Channel via

through one of its competing standards, streamed or downloaded via a 3G connection, or side-loaded onto the mobile device, after being downloaded via a fixed Internet connection.[94] Like digital terrestrial broadcasting, mobile broadcasting with DVB-H system is suitable only for linear or pre-scheduled broadcasting. DVB-H does not allow for interactivity or on-demand services. Mobile and wireless broadcast services have proved to be popular in many African countries that lack sufficient fixed or wired infrastructure for cable services. Nevertheless, due to the fact that 3G networks typically require additional spectrum and substantial investment - but support on-demand services and interactivity- the majority of mobile casting in African countries is done through DVB-H broadcast service.[95]As a result of this, the number of active smartphones that have the capability of receiving mobile broadcasts is increasing in many developed countries. Based on the statistics provided by the European Audiovisual Observatory, at the end of 2012, the penetration in individual active smartphones stood at63.5% individuals in Switzerland, 45.9% in Germany, 52.8% in Spain and 68.1% in Finland.[96] This growing figure of smartphone ownership has led to an increase in mobile television packages.

II. Broadcaster's new media services

At the outset, broadcasting organizations were public service organizations that were only obliged to fulfill limited public missions, beginning with news broadcasts and covering public interest events. Gradually, their scheduling increased to popular music, theatrical and entertainment broadcasts, but it remained that all broadcasts were based on one-way relationship between broadcaster and audiences. In the second half of the 20th century however, advancement in technological infrastructure revolutionized the broadcast industry, and has led to a complete restructuring of the relationship between broadcaster and audiences, due, in no small part, to increased connectivity. There have emerged new broadcast platforms and new media services available through these platforms. Now, providing new media services or so-called new television offerings is possible throughout the world, offerings far removed from the traditional public broadcast services that were the industry's origin. On-demand services have also opened up a new era of connectivity and TV engagement for audiences. The provision of such services inevitably varies from one broadcasting organization to another and from one country to another. The reason is that these services are dependent on the communication and telecommunication infrastructures, and on the penetration of broadband connectivity and a household's ownership of televisions or other connected devices. In the following sub-sections, the main categories of new media services now provided by the broadcasters or provided by other third parties are outlined and discussed.

Satellite. International Telecommunication Union (ITU). (2008). *ITU-infoDevToolkit-Glassory, April 2008*. Retrieved October 4, 2014 from ICT Regulation Toolkit: www.ictregulationtoolkit.org/en/Document/3390/Regulation_Toolkit_Glossary_April_2008 (Last visited January 2011).

[94] WIPO Document SCCR/19/12, Study on the socio economic dimension of the unauthorized use of signals: Part I: Current market and technology trends in the broadcasting sector, prepared by Screen Digest Ltd, London of November 30, 2009, para 60.

[95] Ibid, para 160 and 162

[96] European Audiovisual Observatory. (2013). *2013 Year Book, Television, cinema, video and on-demand. audiovisual services in 39 European States* (Vol. 1). Strasbourg: European Audiovisual Observatory. pp. 42, 69, 98 and 110.

1. Platform new offerings (services)

Platform offerings are new media services that broadcasting organizations increasingly provide to the public in addition to their traditional broadcasting services. Contrary to traditional broadcasting services that a broadcasting organization could set up with its audience (one-way and with a pre-scheduled programming) in the 'platform new offerings' interactivity between broadcaster and audience plays an increased role. The choices and demands of the audience and his or her decision as to when and where to receive these services are a crucial consideration. Not only have broadcasting organizations welcomed this new era of new media services by making available on-demand services, but also the audiences are constantly seeking new content choices and watching television programs in new and non- traditional ways.

Watching television anywhere and at any time refers to availability of on-demand services in regards to traditionally broadcasted program on the television set or on any other devices like smart phones, personal computers and tablets. Video on-demand (VOD) and audio and video on demand (AVOD) services are new media services that are now major business models employed by broadcasting organizations. These services give an audience the possibility to select and choose when and where to watch or listen to their favorite programs. It consists of a variety of interactive features including catch-up services[97], recording, 'preview' of future broadcast programs, full playback control, slow-down, fast-forwarding and pausing of the video or live broadcast feeds, jumping forward or backwards, reversing, parental control, search functioning, time shifting[98] and space shifting[99]. It also can offer dual sound and language options or multiple subtitling, integration with social networks for example Facebook and Twitter, showing behind-the-scene footage, live chat function, viewer comment functions and hybrid broadcast broadband (HBB) services.[100]

2. Over-the- top offerings (OTT services)

Indeed OTT service includes video for television delivered 'over the top' of broadband data. OTT services are those services that a third party aggregator platform, for example iTunes or YouTube provide to the public through the open Internet. OTT service providers are websites or computer programs that collect related items of specific content for example news, information and data, movies and television programs and display them to the public or provide links for the public to access. However, their main task is not production of the content itself, rather it is collecting or aggregating content, including broadcasted programs or contents that belong content producers. In practice, content owners can also use OTT

[97] Catch up service is defined as availability of broadcasted programs on a broadcaster's websites.

[98] Time shifting is the recording of broadcasted programs to a storage medium to be watched or listened at a later time.

[99] Space shifting or place shifting is a media shifting process that permits consumers to access and watch broadcast programs that are stored on one device, from another place and through another device.

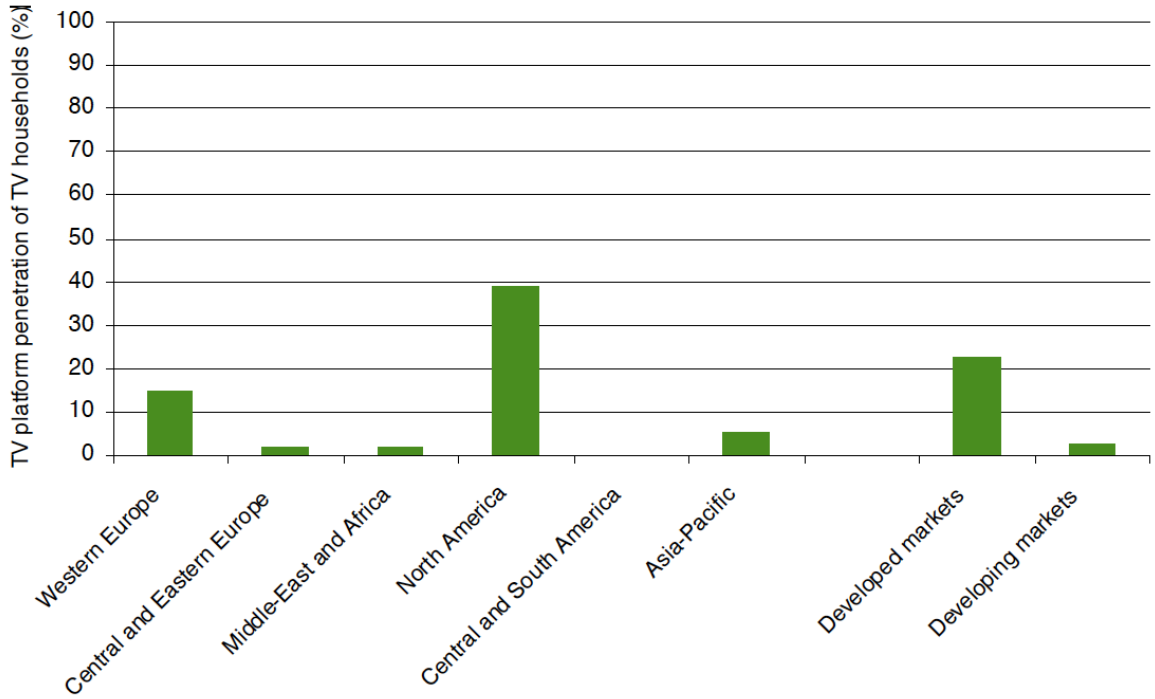
[100] HBB services includes numerous interactive services such as on-demand catch-up television programs, best of the web, over-the-top content (such as YouTube, Facebook, etc.), browser-based digital teletext, advanced access services (signing, multi-lingual commentaries, captions and subtitles), multiple camera angles, embedded picture-in-picture, user-controlled information widgets on a TV display, live and on-demand streamed content, interactive adverts, interactive live multiplayer games, voting, ranking, instant messaging and chatting and etc. European Broadcasting Union (EBU). (2010, September 8). *Ten things you need to know about hybrid broadcast broadband*. Retrieved October 4, 2014 from www.ebu.ch: https://tech.ebu.ch/docs/events/ibc10/presentations/ebu_ibc10_hbb.pdf .

services to provide content directly to their consumers, because the OTT service is an unmanaged service that is based on open-Internet and does not require any investment in infrastructure. Although there are many similarities between OTT and IPTV, particularly in regard to dependence on broadband connections and interactivity feature, the difference is that IPTV is a managed service that is provided in a closed networks to registered subscribers, whereas OTT is on the open internet, available for all users.

3. Contingent content offerings (services)

This example sees content providers provide services directly to audiences but that service is contingent or exists only if that audience member is a subscriber to a pay television or IPTV platform. This kind of service is different to the 'Stand-Alone Content Offerings' that the content providers provide to the public independently of any subscription.

Video on-demand penetration enabled TV households 2009[101]



4. TV any time, any place and over any device

The above discussions revealed that the broadcasting industry has changed in both purpose and means since it's beginning. It has developed increasingly in parallel with the development of the information and communication technology and consumers now enjoy a variety of platforms and demand and expect new features and offerings. Broadcasters must respond to this consumers demand accordingly if they are to survive in the new competitive environment. Advancement in technological infrastructure and a great increase in connectivity have come to assist the broadcasting industry as well. These have resulted in the

[101] WIPO Document SCCR/19/12, Study on the socio economic dimension of the unauthorized use of signals: Part I: Current market and technology trends in the broadcasting sector, prepared by Screen Digest Ltd, London of November 30, 2009, p. 31.

emergence of new broadcast platforms and the spreading of various new media services. The broadcasting industry is therefore experiencing a rapid increase in the overall number of broadcast platforms on which an audience can watch traditional terrestrial television programs, and an increased number of mediums through which programs can be watched, with online being the biggest departure from traditional broadcasting. It has long been assumed that an audience wishes to have the option and the capability to watch television programs at any time, at any place and using any number of devices. This means the industry must adapt to meet audience's demand for greater choice. Interestingly, Hybrid Broadcast Broadband (HBB) service or broadband-connected television service is the best example that shows the revolution in the broadcasting industry. For it has been able to merge the two worlds of broadcast and broadband to the households. In addition to the conventional linear television (traditional home TV receiver), HBB provides new attractive services to the viewer with greater flexibility and choice in access to on-line interactive and personalized services on a traditional receiver.[102]

As a concluding remark it seems that the traditional broadcasting platforms could be compared to the webcasting of the radio and television programs in new transmission platforms that are based on the broadband connection. The importance of this comparison is the practical implications and legal consequences that are associated with the new technological developments and efficiency and relevance of existing protection of broadcasting organizations in the context of existing intellectual property law.

Traditional broadcasting can be carried out through one of these major platforms; (1) terrestrial transmission that is wireless transmission over the air, (2) satellite that is wireless distribution and (3) cable that is the wired retransmission of an original broadcast signal. The main characteristics of the traditional broadcasting platforms are that the transmission is addressed to an indefinite number of the public with the same investment in the infrastructure. In other words, the addressees are potential and actual audiences or members of the public. All audiences present in the reception target area could receive broadcast signals simultaneously at the time solely decided, scheduled and transmitted by the broadcasting organization. In addition to this there is no interactivity or new media services and it is solely a one-way transmission. However, in the case of the majority of new broadcasting platforms, especially those platforms that are based on broadband connection, reception of signals by users or audiences is restricted to the servers, bandwidth and existing infrastructures. Large number of users or audiences requires an increase in servers, bandwidth and investment in infrastructure. Unless multicasting[103] was used, "typical audio servers can support only 100-500 simultaneous listeners and the largest servers can now handle up to only 10,000 simultaneous streams (live transmissions or on-demand services)

[102] European Broadcasting Union (EBU). (2010, September 8). *Ten things you need to know about hybrid broadcast broadband*. Retrieved October 4, 2014 from www.ebu.ch: https://tech.ebu.ch/docs/events/ibc10/presentations/ebu_ibc10_hbb.pdf .

[103] 'Multicasting' is a one-to-many transmission. It is an efficient way to transmit text, audio, and video on the Internet or an internal network to a select group of people, much like a conference call includes a select group of people. Instead of sending information in individual packets to each recipient (unicasting), a single message is sent to a multicast group. Most multicasts are multimedia related that works with RTP (Real-time Transport Protocol) that is a protocol that works in conjunction with multicasting to transport real-time audio, video, simulation data, and other information over multicast networks.
Tom Sheldon and Big Sur Multimedia. (n.d.). *Multicasting*. Retrieved October 4, 2014 from www.linktionary.com: www.linktionary.com/m/multicast.html.

one for each customer." [104] This means that when a user request to access a stream exceeds the capacity provided by the server, there can be no access to the server and no way of the user receiving that stream. "In the case of traditional broadcasting, viewers can simply perceive the broadcast by switching on the receiver, as the signal transmitted by the broadcasting station is directly available; whereas, in Internet originated streaming or webcasting, users access the content by requesting its transmission from a server".[105] In contrast to the traditional broadcasts *via* satellite, cable or over the air, which have an inherent limitation in their reach in terms of geographical coverage, in some of the new broadcast platforms there is no limitation in regards geographical accessibility. For example, in simultaneous retransmission of a broadcast signal over the open-Internet, webcasts can be accessed globally from any point that has Internet access, unless specific technological restrictions are applied. The majority of broadband-based platforms or IP-based networks overcome restrictions on the number of programs offered, can adapt to the user's preferences and benefit the interactivity feature.[106] Indeed the broadcast platforms has made radio and television programs audible and visible any time, any place and over any device. This is an irrevocable conceptual and functional evolution of the broadcasting industry. As a consequence the numbers of the households with broadband connections is rapidly increasing in developed and developing countries. Although there are no precise statistics on the percentage of the households with broadband connection in the developing countries no one can deny this increase in the developing markets. Based on the latest statistics published, the percentage of households with broadband connections at the end of 2013 was 81.9% in Norway, 80.0 % in Switzerland, 78.7 % in the Nederlands, 60.6 % in France and 31.5% in Turkey.[107]

Part Three. Broadcast piracy

Broadcasting organizations of the 21st century are faced increasing with a phenomenon known as 'piracy' or, more specifically, 'broadcast piracy'. Generally speaking, this refers to any unauthorized access, use and/or exploitation of a broadcast signal. As with other owners of intellectual property rights, broadcasting organizations are most vulnerable to piracy in an international or cross-border context. There are three major classifications of broadcast piracies, which include the main types and models of broadcast piracy. In general, broadcast piracy occurs in the form of either *i.* piracy of pre-broadcast signal, *ii.* Piracy of live broadcast signal, and *iii.* Piracy of fixed broadcast signal or post-fixation broadcast piracy. Each category of broadcast piracy may be conducted through a number of different methods and by several means.

Therefore, we intend firstly to define broadcast piracy; secondly, we will identify and present a technical analysis of the three major classifications and existing types and models of broadcast piracy as well as the means and methods of the respective classifications. Finally,

[104] WIPO Document SCCR/7/8, Protection of broadcasting organizations, Technical background paper prepared by the WIPO Secretariat of April 4, 2002, p.11.
[105] Ibid, p.11.
[106] Ibid, para 53, 55 and 56.
[107] European Audiovisual Observatory. (2013). *2013 Year Book, Television, cinema, video and on-demand audiovisual services in 39 European States* (Vol. 1). Strasbourg: European Audiovisual Observatory, pp. 245, 42, 236, 119 and 317.

we will analyze the challenges which piracy presents to broadcasting organizations in terms of their efficeny, and then their effectivenss in preventing broadcast piracy will be assessed. The importance of the above issues is that such discussions have practical impacts on ongoing debates regarding the subject matter, object of possible IP protection, scope of application and rights and protection to be given to broadcasting organizations to overcome broadcast piracy. On the other hand, giving protections to broadcasting organizations against each type or model of broadcast piracy and adoption of final legal solutions may be different from others.

I. Definition of piracy

The traditional usage of the word 'piracy' refers to an act of robbery carried out on the high seas, its word and meaning has been adopted and adapted by the IP industry and now its use has extended to refer to the unauthorized use of another's production and invention or conception especially in infringement of a copyright and the illicit accessing of broadcast signals.[108] 'Piracy' as Professor Silke von Lewinski rightly has pointed out is not a legal term and it is not defined in any neighboring rights treaty[109] furthermore the concept of piracy in the context of IP subject matter is different from the others. Therefore, 'broadcast piracy' has not been clearly defined in intellectual property law as yet; but it is possible to use existing general definitions of piracy in the context of the other IP areas to help in the beginning of our analysis. This can be done despite the fact that any true definition of 'broadcast piracy' should, of course, comply with the technical and practical characteristics of the broadcasting industry. Generally, the common feature of the broadcast piracy is that like music, video, film and software piracy; broadcast pirates vastly deploy digital technology and facilities brought by the new information and communication technologies (ICT).

In IP law, as Nixon K. Kariithi argues, "Although broad extant literature exists on piracy and its many elements, the field lacks a universally acceptable definition"[110]. He argues also, that for many like van Wijk, piracy involves the "unauthorized replication of copyrighted material in general and software".[111] Peitz and Waelboeck give piracy a general definition as a "violation of copyrighted material in general and software", [112] and it is widely held that books, software, music and video files are the main targets of Internet piracy.[113] However, according to another general definition of piracy provided by De Castro and Shepard "piracy is the misappropriation of intellectual property by a party other than the rightful owner, resulting in the making of unauthorized copies of a product."[114]

Much of the existing literature agrees that piracy gains currency from its role in information

[108] Britannica Company. (n.d.). *Piracy*. Retrieved September 16, 2014 from www.merriamwebster.com: www.merriamwebster.com/dictionary/piracy?show=0&t=1312378447.
[109] Lewinski, S. v. (2008). *International Copyright Law and Policy.* Oxford: Oxford University Press, p.522, Footenoote No. 56.
[110] Kariithi, N. K. (2011). Is the devil in the data? A literature review of piracy around the world . *The Journal of World Intellectual Property , 14* (2), p. 133.
[111] Wijk, v. J. (2002). Dealing with Piracy: Intellectual Asset Management in Music and Software. *European Management Journal , 20* (6), pp. 689-698.
[112] Peitz, M. a. (2006). Why the music industry may gain from free downloading—the role of sampling. *International Journal of Industrial Organization , 24* (5), p. 450.
[113] Kariithi, N. K. (2011). Is the devil in the data? A literature review of piracy around the world . *The Journal of World Intellectual Property , 14* (2), p. 133.
[114] De Castro, J. O., & Shepherd, D. A. (2008). Can Entrepreneurial Firms Benefit from product Piracy? *Journal of Business Venturing , 23* (1), p. 77.

goods.[115] Information goods have large fixed costs and small variable costs of reproduction. Technological advancements have greatly reduced the costs of copying and also increased the availability of technologies to pirate these products.[116]Although, some commentators have tried to create a common definition of piracy as the "unauthorized use or reproduction of another's work"[117], in practice the definition of piracy in each subject matter of IP law is different from one another. Differences have led to differences in strategies and practical efforts to combat piracy in each IP area.

Regarding literature or written works as the works of authorship, authors are the owners of a series of exclusive rights listed in the Berne Convention, the WIPO Copyright Treaty (1996) (WCT), and other international and regional instruments, and in all national copyright legislations. Essentially, any violations of author's exclusive economic rights or moral rights are deemed as 'copyright infringement'. 'Book piracy', as it is sometimes called, is one of the oldest forms of copyright infringement though it is normally referred to as one of the three main forms of copyright infringement in this area; *i* 'unauthorized reproduction', *ii* subsequent 'distribution of illegal copies' and *iii* unauthorized 'communication to public' of a book. Due to the changes in the publishing industry, these three major forms of copyright infringement have developed from illegal physical reproduction and subsequent distribution of physical copies of those books to the illegal reproduction of a digital book (format), and the further distribution or communication to the public of those illegal digital copies via the internet or other digital medium. In both the international law and also in national legislation, authors who are copyright owners are well protected against different methods of book piracy. In this respect the WCT has updated the international regime of copyright law to protect against new models of 'book piracy' in the digital age.[118]

In the audiovisual (cinematographic and film) industry the definition of audiovisual works[119] includes cinematographic works, for example films, TV series and cartons. As with written works, audiovisual works, cinematographic works and films are protected in both most national copyright legislation and in international IP law. Authors of audiovisual works are faced with a number of different methods of piracy of their works, which have increased in the digital environment, e.g. illegal downloading, uploading and file sharing of audio and video files. In this regard, the situation is very similar to broadcast piracy; as piracy in this instance means the illegal reproduction, illegal distribution and unauthorized communication to the public of an audiovisual work whether that work has digital rights management information or not.

Though national legislation and international instruments, including the WCT has not been able to eliminate all methods of audiovisual piracy, the WCT has been successful in updating the provisions of the Berne Convention and therefore helps in the prevention of piracy against audiovisual works. The WCT, in addition to granting new exclusive economic rights,

---

[115] Kariithi, N. K. (2011). Is the devil in the data? A literature review of piracy around the world . *The Journal of World Intellectual Property , 14* (2), p. 133.

[116] Andrés, A. R.-1. (2006). Software piracy and Income Inequality . *Applied Economics Letters , 13* (2), p.10.

[117] Yang, D. M.-7. (2004). Intellectual property abuses: how should multinationals respond? *Long Range Planning , 37* (5), p. 460.

[118] WIPO Copyright Treaty (1996), Articles 6,7 and 8.

[119] Audiovisual work is a shorter synonym of the expression of "cinematographic works to which are assimilated works expressed by a person analogous to cinematography" appearing in the non-exhaustive list of literary and artistic works in Article 2(1) of the Berne Convention. See: World Intellectual Property Organization (WIPO). (2003). *Guide to the Copyright and Related rights Treaties Administered by WIPO and Glossary of Copyright and Related Rights Terms* (Vol. 891(E)). Geneva: World Intellectual Property Organization (WIPO), p. 268.

has provided certain complementary protective mechanisms including obligations concerning technological protection measures (TPM)[120] and obligations concerning rights management information.

The music industry is no exception to the piracy phenomenon. Music fixed in phonograms is subject matter of protection in related rights; but the methods and means of music piracy are similar to those of the piracy of audiovisual works. One may purchase an original phonogram from a local retailer and make several illegal copies; alternatively if the music is stored in a digital carrier or memory, it could be used to create millions of copies near-instantaneously and in a near-perfect condition equal to original phonogram or digital file. Today, music piracy refers to unauthorized reproduction, duplication or multiplication of a musical work, which is fixed in audio format (phonogram) and any subsequent distribution of it be that through physical illegal copies or digital illegal copies or any other forms of unauthorized exploitation in the digital environment e.g. internet file sharing and illegal uploading of music in user generated websites.[121] Phonogram producers were provided protection first by the Rome Convention in 1961 and the Phonograms Convention (1971)[122] later updated these rights. In the late 1990's, the music and phonogram industries started to demand the updating of the rights provided under the aforementioned treaties and other mechanisms to assist the growing threat they faced from piracy facilitated by improvements in technology and the ease in which phonograms could be copied. Their demand was a reasonable one given the fact that the then-current international legislation was no longer suitable for their needs in the digital environment and failed to protect their rights from being infringed by pirates. The WIPO Performances and Phonograms Treaty (1996) updated existing rights of phonogram producers and granted them new exclusive rights and also providing complementary legal mechanisms.[123]

As regards the software industry, it is again the WCT, which provides copyright protection to this particular type of intellectual property. In the existing literature on piracy, there are many definitions of software piracy. Some commentators define it in a narrow sense. They state "software piracy is the practice of making unauthorized copies of software that is neither site-licensed nor in the public domain."[124] Following this definition, to make a judgment whether software piracy has occurred or not; three elements should be considered, *i* the piece of software in question should be protected as a 'work' in copyright *ii* it should not be site licensed and *iii* it should not have fallen into the public domain. There are other definitions regarding software piracy, which follow a more holistic approach. According to this approach, which the Business Software Alliance (BSA) presented and has been adopted by many recent scholars[125] software piracy is "the unauthorized use of computer software or the unauthorized distribution of copies of software without permission being given by the

[120] WIPO Copyright Treaty (1996), Article 11.

[121] According to WIPO Performance and Phonogram Treaty (1996) it is understood that the storage of a protected performance or phonogram in digital form in an electronic medium constitutes a reproduction. (See: Agreed Statement to Article 16 of WPPT).

[122] Convention for the protection of producers of phonograms against unauthorized duplication of their phonograms (1971).

[123] WIPO Performers and Phonogram Treaty, Articles 11 to 15 and Articles 18 and 19.

[124] Rahim, M. M. (1999). Software piracy among computing students: a Bruneian scenario. *Computers & Education , 32* (4), p. 302.

[125] For example in: Kariithi, N. K. (2011). Is the devil in the data? A literature review of piracy around the world . *The Journal of World Intellectual Property , 14* (2), p. 134.

owner".[126] It seems that though the definition presented by the BSA includes 'unauthorized use' and the 'use' could be extended to cover unauthorized copying or reproduction of software; but it seems that due to existence of serious concerns regarding the interpretation in many national legal systems, it is more favorable that software piracy be defined as misappropriation or unauthorized use, reproduction and distribution of a software.

The concept of broadcast piracy is broader than the concepts of piracy in other IP areas. The reason for this is that in broadcast piracy, in addition to pirating the live broadcast signal, piracy can also encompass different unauthorized activities at different stages. Broadcasting organizations, therefore, face broadcast piracy at three distinct stages *i.* pre-broadcast; *ii* live broadcast (during actual broadcast) and *iii* post-broadcast. We will discuss different types of piracy in greater detail later in the chapter at these three stages. In this context, therefore, it is possible to state that broadcast piracy is the carrying out of any unauthorized acts in respect of broadcast signal by a third party other than the original broadcasting organization. Such unauthorized acts could potentially include; unauthorized access to and uses of pre- broadcast live broadcast or post-broadcast signals. Unauthorized acts can also include uses of signal not consented to by the original broadcaster, for example, the fixation of a broadcast signal for commercial uses other than private recording and other limitations and exceptions to copyright law permitted under relevant legislation. Other acts include; the reproduction of fixations made from a broadcast on any medium; physical distribution or making available of those fixations in digital networks with interactive applications such as online on demand services; rebroadcasting and retransmission of broadcast signal by any platforms, via any means and over any devices.

II. Stages of broadcast piracy

In practice, there are three distinct types of broadcast piracy (i) piracy of pre-broadcast signal; (ii) piracy of live or actual broadcast signals, (iii) piracy of post-broadcast signal. The piracy of a pre-broadcast signal is, chronologically, the first stage of the broadcast piracy. Pre-broadcast signals are those program-carrying signals that are not intended for direct reception by the public. Pre-broadcast signal transmission normally is a point-to-point transmission by telecommunications links or the broadcasting organizations themselves. The broadcasting organizations "use this kind of signal transmission to transfer program materials from a studio or e.g. from the site of a sport event to the place where a transmitter is situated; or to transfer program material between two or more broadcasting organizations for final broadcast to the public."[127] Other commentators consider pre-broadcast signals to be also "the signal in the form in which it is simultaneously relayed over another broadcast network, a cable distribution system, the Internet, broad-band, mobile telephony or similar present or imminent systems".[128] Currently there are no precise statistics regarding the extent of piracy of pre-broadcast signals, but it is an increasing issue as pre-broadcast signals are often transmitted in a digital form, and therefore perfect digital copies can be created from these program-carrying signals allowing for copies, downloads or re-broadcasting to be made. Such copies are disseminated simultaneously with the official transmissions or even

[126] See : Peitz, M. a.(2006). Why the music industry may gain from free downloading—the role of sampling. *International Journal of Industrial Organization , 24* (5), pp.907 - 913; and Hinduja, S. (2008). Deindividuation and internet software piracy . *CyberPsychology & Behavior , 11* (4), pp.391-8.

[127] Guibault, L., & Melzer, R. (2004 November). The legal protection of broadcast signals. *IRIS Plus, Legal observations of the European Audiovisual Observatory* (10), p. 7.

[128] European Broadcasting Union (Legal Department). (2001, May 3). *Why should the right also cover pre-broadcast program-carrying signals?* Retrieved May 20, 2012 from www.ebu.ch: www.ebu.ch/CMSimages/en/leg_t_broadcasters_neighbouring_right_signals_tcm6-4351.pdf.

before the scheduled time for the official, legal transmissions.[129] Examples of pre-broadcast signal transmission could include sports coverage or coverage of news or cultural event which is transmitted via a telecommunications link (terrestrial or satellite) to one or more national and/or foreign broadcasters for the purpose of serving as the basis of the recipient broadcaster's broadcast of such event, if for example, that event takes place in another country. Remarkably, unauthorized access to/or use of the pre-broadcast signal will normally occur simultaneously or with delay; and it may not be easy on all occasions for the broadcaster to prove whether a 'pirate' accessed or used pre-broadcast signal or whether a live broadcast signal intended for public reception was used.[130] While misappropriation of pre-broadcast signals is technically possible, such signals are not protected in the Rome Convention due to its narrow concept of broadcasting. Under the Rome Convention, only the broadcast, which is intended to be for the public, is protected and is considered to be the broadcaster's neighboring rights. Accordingly the pre-broadcast signal is not currently protected under any present international binding instrument.[131]

The second stage of broadcast piracy that occurs is the pirating of the broadcast signal during a live or actual broadcast. At this stage the piracy occurs during the process whereby the output signals of a broadcasting organization- either unencrypted or encrypted - is transmitted from its point of origin to the point of destination, where such signal is made available in its final content format; or is conveyed from the point of origin to any intended broadcast area. It is in this stage that the majority of broadcast piracy occurs. This stage includes the simultaneous rebroadcasting of the original broadcast signal by another broadcasting organization and the online or real time retransmission of a broadcast signal over the Internet, computer networks or any other platforms and devices.

An example of this type of broadcast piracy is highlighted by the statistics published regarding FIFA World Cup in 2014 in Brazil. During this major sporting event, approximately 20 million people watched the football matches in real time on website that streamed live, illegal content of the games. Only one entity contracted with the owners of the FIFA broadcast right has monitored, detected and sent more than 3,200 takedown notices to pirate website owners and sixty percent of the football event viewers streamed at least one match online in the real time.[132] Interestingly, specific piracy groups used Facebook, Twitter and other social media networks. For example, out of 707 takedown notices sent to pirate site owners during a single football match, 51 were sent to content platforms referenced on Facebook.[133]

The third stage of the broadcast piracy occurs at post-broadcast. Broadcast piracy at this stage is based on fixation made from the broadcast signals. In national legislation that recognizes broadcaster's related rights or neighboring rights over their broadcast, this category of

---

[129] Guibault, L., & Melzer, R. (2004 November). The legal protection of broadcast signals. *IRIS Plus, Legal observations of the European Audiovisual Observatory* (10), p. 7.

[130] European Broadcasting Union (Legal Department). (2001, May 3). *Why should the right also cover pre-broadcast program-carrying signals?* Retrieved May 20, 2012 from www.ebu.ch: www.ebu.ch/CMSimages/en/leg_t_broadcasters_neighbouring_right_signals_tcm6-4351.pdf.

[131] Ibid.

Also See: WIPO Document SCCR/8/INF/1, Protection of Broadcasting Organizations: Terms and Concepts, working paper prepared by the Secretariat of August 16, 2002, para 23 and 26.

[132] Mcadams, D. D. (2014, July 25). *Viaccess-Orca: 20 Million Watched World Cup on Illegal Streams, 3,200 takedown notices to pirate site owners*. Retrieved September 25, 2014 from www.tvtechnology.com: www.tvtechnology.com/article/viaccess-orca--million-watched-world-cup-on-illegal-streams/271508

[133] Ibid.

broadcast piracy is identified as the infringement of a broadcaster's post-fixation rights. The post-fixation rights of broadcasting organizations, which were recognized for the first time by the Rome Convention[134] have now entered some of the national legislation of WIPO Member States and are being updated due to the technological developments of the last decade.[135]

It should be noted that this stage of broadcast piracy occurs after the broadcasts, program or program output is received at the point of destination (i.e. targeted area, addressee's homes or any other place by any means) in an audio-visible format and is permanently[136] fixed (legally or illegally) in any mediums such as tapes, flash memories, CD, DVD or computer's hard drive. Fixation technically means the embodiment of sounds, images or a combination of both or of the representations thereof, from which such images and sounds can be perceived, reproduced, distributed, communicated through a device and thus are capable of being made available for further use. The distinctive feature of post-broadcast piracy is that it is dependent on a legally or illegally made fixation from a broadcast and does not relate to any simultaneous rebroadcasting or retransmission of the live program-carrying signals or online real-time or live distribution of program-carrying signals.

Today, due to convergence of the information and communication, a number of new types and models of post-broadcast piracy have appeared. These include, but are not limited to; unauthorized fixation of broadcasts, unauthorized reproduction of fixed broadcasts, unauthorized package distribution of reproduced fixation of broadcast in videotapes, DVD, unauthorized performance in public of pre-recorded broadcast, unauthorized uploading of fixed broadcasts on the internet and making available of fixed broadcasts to the general public or individuals (through other interactive or non-interactive services e.g. cable etc.), unauthorized non-simultaneous rebroadcasting of fixed broadcast by another broadcasting organization and deferred retransmission of fixed broadcasts by any other persons for example cable operators, Internet service providers, webcasters etc. in the form of the 'online non real-time broadcast piracy' and unauthorized communication to public of fixed broadcasts. The Rome Convention does not cover most of the above models of post-broadcast piracy, as the Convention only provides minimum rights and a minimum level of protection to broadcasting organizations consistent with the level of information and communication technology in the 1960s.

III. Methods and means of broadcast piracy

The global piracy of broadcast signals is the most notable concern facing the broadcasting industry today. Pirates use a combination of methods and devices in order; to pirate broadcast signals; to make illegal fixations of broadcasts; to reproduce signals in different formats and distribute them; and to make them available via internet or world web and other distribution platforms. All of these methods are hugely detrimental; not only for broadcasters' rights, but also for other copyright and related rights owners, as well as for other content owners, for example, sport organizations.

Broadcast signal piracy, in all three stages highlighted, is capable of being carried out by both individual and commercial entities, and can be used for commercial and non-commercial

[134] WIPO Rome Convention, Article 13.
[135] For example see amendments made in Swiss Copyright Law in 2008.
[136] There are ephemeral recording or fixation, which a broadcasting organization makes by means of its own facilities and for its own broadcasts. See: Article 15 (d) of the Rome Convention.

purposes. In this research, we are not going to discuss the more generic and comprehensive technical typology or the various forms of broadcast piracy. The methods and means of piracy are changing as the broadcasting industry undergoes being digitized and the ICT develops. Whilst noting that one of the main purposes of this research is to answer the question '*how best to protect broadcasting organizations against broadcast piracy?'* we should also look to describe the main existing models and means of broadcast piracy. The interaction between the different aspects of broadcast piracy should be identified in order to find acceptable ways to combat it through an updated regime of international intellectual property law.

1. Unauthorized interception/access

Other than in analogue free to air broadcasts that are easy to access and intercept, broadcasting organizations use technological protection measures on their traditional broadcasting platforms to limit or prevent pirates and any other unauthorized third parties from accessing the digital broadcast signals. There are several reasons that broadcasters use technological protection measures to limit access to their broadcast signal. Firstly, it is used for limiting the signals for use by paid subscribers only. Secondly, they are under contractual obligations to content owners to confine receiving area of the terrestrial broadcast signal and satellite footprints to the specific region or territory that is mentioned in the contract with the owners of broadcast right. These technological measures consist of technical arrangements, for example, the encoding and encrypting broadcast signal, employing conditional access system and other security measures that are primarily hardware based. On the other hand, to ensure legitimate access to the broadcast signal by their intended audiences or subscribers, broadcasters provide additional devices, for example a set top box (STB), smart cards or integrated circuit cards (ICC). These devices enable intended audiences to legally decode, encrypt and make audible and visible the broadcast signal.

The first method of broadcast piracy is the unauthorized interception and accessing of broadcast signals by unauthorized persons. Although this method of piracy is usually attributed to the users or viewers it is commercial pirates that facilitate this kind of broadcast piracy for public through use of different circumventive tactics and illegal devices. Such hardware-based tactics and devices enable pirates and ultimately users to access broadcast signals in regions or countries that the original broadcaster had not intended to transmit those broadcast signals. As mentioned above, broadcasters are obliged to confine their broadcast area to a specific area, region or country for which they have obtained broadcast right. For example, according to International Olympic Committee, the broadcast right of the 2008 Beijing Olympics within the USA were sold for $893million to USA broadcasters, while Canadian broadcasters acquired the broadcast right within Canada for $45million.[137] The aforementioned method of broadcast piracy is linked to the territory within which that broadcast signal could be accessed. Often, unauthorized access to a broadcast signal within a territory may happen in regards to pay-tv, but unauthorized access to a broadcast signal outside of the original intended broadcast reception area is known as extra-territorial access to program-carrying signals. Technically, the extra-territorial access of a TV program-carrying signal is, in fact, access to TV signals outside the region or territory where the originator broadcasting organization intended it. Home viewers/platform and cable operators and broadcasting organizations other than the originating broadcasting organization, which

[137] WIPO Document SCCR/20/2 Rev, Study on the socio economic dimension of the unauthorized use of signals: Part II: Unauthorized access to broadcast content – cause and effects: A global overview prepared by Screen Digest Ltd, London of November 30, 2010, para 57.

are outside of the legal coverage area of broadcast signals are potential receivers.[138] This kind of unauthorized access to TV signals are witnessed in two main instances; *a)* it is an overspill phenomenon of terrestrial TV signals that it is unintentionally flow over of the TV signals into border regions of neighbouring countries; *b)* satellite distribution of free to air (FTA) and pay TV signals. Indeed overspill of terrestrial TV signals to a neighbouring country results from close geographical proximity and restrictions on precise measurement of the intended transmitting area. There is not an appropriate circumvention act by the receiving habitants in the border region of a neighbouring country. Hence, the originating broadcaster itself provides the reception of the TV signals. In the reception of satellite TV signals extra-territorially, the case is different from the overspill of terrestrial TV signals. The reception of the extraterritorial satellite TV signals, being possible by two reasons, either by inability to place specific restrictions on where the signals are transmitted[139] by satellite (intended coverage area) or the recipients use equipment e.g. satellite dishes, digital receivers and signal decoders to extra-territorial access to satellite signals. The latter case might be accessed by original or legal acquired equipment or by illegal devices e.g. illegally modified set top boxes and pirated or cloned smart cards. Usually, cable companies in other countries capture satellite broadcast signal intended for country X and distribute it for their customers in country Z. The case of *Football Association Premier League Limited (FAPL) v. Ms. Karen Morphy* in UK is a clear example of this issue whereby the subscription fees of pay TV in the country from which the signals originated were higher than elsewhere, therefore encouraging extra-territorial access. In this case FAPL a private company representing the broadcasting interests of the 20 English Premier League Clubs, brought the prosecution against Ms. Morphy, a pub landlady in the south coast town of Portsmouth, who used Greek TV services to receive broadcasts of the Premier League's matches in her pub. The plaintiff said only Sky TV and ESPN had exclusive rights to show its games in the UK. Thus, the defendant had to pay nearly GBP£8000 in fines and costs. The defendant claimed that based on the fact that the subscription fee of the Greek TV services was cheaper than the subscription fees of the both Sky TV and ESPN; she decided to use Greek TV services for her pub and, in the single European market, everybody is free to buy any goods and services in the internal markets of any EU member country.[140]

Unauthorized interception and access to broadcast signals carried out by different means have a common feature that is their circumvention function. They circumvent conditional access systems (CAS) used by broadcasters. The circumventive devices include Internet key sharing or card sharing (IKS), which is a legal or valid smart card shared between with a number of unauthorized users. As a popular method of illegal decryption of program-carrying signals, an authorized subscriber shares a valid smart card with a number of other satellite receivers to watch scrambled or encrypted pay TV channels. It is achieved by using satellite TV receivers whose software is patched or cracked to enable key sharing. In this method, one digital satellite receiver, with a valid or legit smart card, serves as a host (server) and shares the smart card key over the Internet to decrypt/de-scramble the encrypted channels at client

[138] Ibid, para 66.
[139] Ibid, para 68.
[140] Further details of this case can be find in the following links: www.bbc.co.uk/news/uk-15172730; www.bbc.co.uk/news/business-15162241; www.bbc.co.uk/news/business-12355022 and www.bbc.co.uk/news/business-12356251 (last visited October 2011)

side.[141] In many cases pirates also create sharing network group and share their valid card with the network and in turn receives many other channels shared by others.[142]

The circumvention of digital video broadcasting (DVB) and common scrambling algorithm (CSA) is the second means of this kind of piracy. DVB or Digital Video Broadcasting uses common scrambling algorithm (CSA) to encrypt or scramble television channels. CSA algorithm uses 64-bit decryption; hence by using a brute force attack, it can be hacked and the decryption key can be obtained to decrypt channels. This is widely used on smart card hacking or free to air emulator programming. Other means of receiving or illegally decrypting pay TV channels are hacked smart cards or cloned smart cards, modified set top boxes and program encryption emulator to a free to air receiver. In smart card hacking, hackers read the smart card internal encryption details, then tweak or change the card internal details to enable the card to have access to paid channels. In the other method of unauthorized access, the relevant free-to air receiver software is patched or reinstalled with customized software, which has within it the module to act as a valid smart card thus providing access to all encrypted channels. According to a WIPO report, the monetary impact of hardware based unauthorized access is 'impossible to evaluate, but it is estimated that approximately €1bn is spent every year in the EU on pirated cards and set top boxes. In relation the extra territorial access of signals in Asia, industry-wide losses from extra territorial access in 2008 (resulting from satellite overspill) were estimated to be in the region of $17m – less than 10 per cent of the total estimated losses from unauthorized access/piracy.'[143]

2. Unauthorized rebroadcasting

"Unauthorized re-broadcasting of signals involves redistribution of broadcast signals without the express consent of the rights holder/broadcaster."[144]This method of broadcast piracy covers instances where there is intervention and/or involvement of a broadcasting organization that conducts an unauthorized terrestrial and satellite rebroadcast of the broadcast signal of another (the original) broadcasting organization. Unlike the first method of broadcast piracy, which is primarily user-executed, in this method of broadcast piracy the perpetrators are other broadcasting organizations. Currently, unauthorized rebroadcasts of the original broadcast signal in a neighboring country and the unauthorized rebroadcast of satellite broadcast signals in another country are major examples of this method of piracy. Therefore, it is felt by many that this method of broadcast piracy is almost always carried out on a commercial basis and mainly by industry professionals[145], because it requires perpetrators with extensive technical knowledge about broadcast signals and its redistribution get involved in the broadcast piracy. The serious challenge that the original broadcasting organizations face from this method is the detection of this method of piracy is difficult due to the fact that it needs actual presence of the victim broadcaster/right holder in in the country - particularly in an unauthorized terrestrial rebroadcasting - where rebroadcasting conducted and this accordingly requires actual monitoring of rebroadcasters, which is a time consuming task and need access to both manpower and financial

[141] *How to watch pay TV channels for free*. (2012, October 26). Retrieved September 24, 2014 from http://psf.hubpages.com: http://psf.hubpages.com/hub/How-to-watch-pay-TV-channels-for-free-Piracy-in-digital-TV-broadcasting on Twitter.
[142] Ibid.
[143] WIPO Document SCCR/20/2 Rev, Study on the socio economic dimension of the unauthorized use of signals: Part II: Unauthorized access to broadcast content – cause and effects: A global overview prepared by Screen Digest Ltd, London of November 30, 2010, para 61, 2 and 5
[144] Ibid, para 55.
[145] Ibid, para 3.

resources.[146] The Cable and Satellite Broadcasting Association of Asia (CASBAA), in its 2008 and 2009 report on piracy, estimated that losses from unauthorized redistribution over traditional platforms was in the range of $365m (2008) [147] and $ 416 (2009)[148] in the Asia Pacific region.

3. Unauthorized retransmissions

The expressions redistribution and retransmission of broadcast signal are commonly considered to be synonyms. But in the broadcasting industry, retransmission is a type of redistribution of broadcast signal over modern or non-traditional platforms. Redistribution of broadcast signal by a broadcasting organization over traditional platform is known as rebroadcasting. Retransmission can be simultaneous or can be a delayed act of relaying, redistribution or streaming of broadcast signal over any platform. If retransmission of broadcast signal is not consented by the original broadcaster then it is broadcast piracy. This kind of broadcast piracy, which constitutes the main category of modern day broadcast piracy, usually happens where pirates can easily access the free to air analogue or digital terrestrial and satellite signals. The technological platform used for such unauthorized retransmission may occur varies, and its variants include unauthorized cable retransmission, unauthorized retransmission over mobile networks and unauthorized online retransmission or unauthorized retransmission over computer networks. The perpetrators of unauthorized retransmission can be any person including cable companies, satellite service providers, Internet service providers, mobile operators and telecommunication companies. One of the best examples of the unauthorized cross-border retransmission of broadcast signal is the case of iCrave TV in Canada. In this case, a Canadian company captured over-the-air broadcast signals from the United States and Canada and streamed them in real time over the Internet. This retransmission has enabled others to view television broadcasts on their computers, for a subscription fee. [149]

Unauthorized retransmission over the Internet is called online piracy. Today, pirates use the Internet, broadband connection, its associated technologies and software protocols for the purposes of online piracy of broadcast signal in the following ways:

A) Unauthorized retransmission of live broadcast signals, which is called real-time or live broadcast signal piracy.

B) Unauthorized distribution of pre-recorded broadcasts (recorded broadcast contents), which are also called non-real time retransmission of broadcasts.

---

[146] Ibid, para 3, 55 and 64.

[147] Beasley, L. (2008). *CASBA Cost of Piracy, Digital Deployment, Asia- Pacific Pay-TV Industry Study, October 2008.* Cabel & Satellite Broadcasting Association of Asia.CASBAA, October 2008: CASBA Cost of Piracy 'Digital Deployment, Asia-Pacific Pay-TV industry study'.

[148] (CASBA), C. &. (2009). *CASBA Cost of Piracy, Digital Deployment, Asia- Pacific Pay-TV Industry Study, November 2009.* Cabel & Satellite Broadcasting Association of Asia.

[149] Balganesh, S. (2008). The Social Costs of Property Rights in Broadcast (and Cable) Signals. *Berkeley Technology Law Journal* (22), 1303-1385, p 1324.

As Balganesh explained retransmission of broadcast signal over the Internet was permitted in the Canadian law. Nevertheless copyright owners in U.S. initiated their action for copyright infringement and succeeded to get an injunction; since users in the United States could access this online service, iCrave TV in the United States.

The full judgement 2000 WL 255989 (W.D.Pa.) is available at:

www.ipinbrief.com/wp-content/uploads/2012/08/icrave2findings-facts-conclusions-injunction.pdf (last visited February 16, 2015).

The common feature of both real-time and non-real time broadcast piracy is that, they need broadband connections. Although the most important distinction between the two aforementioned methods of online piracy is that in non-real time broadcast piracy, pirates commit unauthorized distribution of recorded or fixed broadcast contents; but in real-time or live broadcast signal piracy live broadcast signals are retransmitted over the Internet or other computer networks. The real-time or live broadcast signal piracy usually happens through the optimized P2P (or peer2peer) protocols or by a user-generated lives streaming service that has client-server architecture. There are countless unauthorized live broadcast websites, Cyber lockers sites that offer a file hosting service, p2p file sharing sites, distributors' sites, blogs and forums that profit either through advertising, or by selling special software to access unauthorized stream of broadcast signal.

There are two predominant architectural paradigms used in modern network applications: the 'client-server architecture' and the 'Peer-to Peer (P2P) architecture'[150]. In the client-server architecture, there is an 'always-on' host, called the server, which services requests from many other hosts, called clients. The client hosts can be either 'sometimes-on' or 'always-on'. A classic example is the Web application for which an always-on Web server services requests from browsers running on client hosts. The clients (or browsers in the web application) do not directly communicate with each other. Another characteristic of the client-server architecture is that the server has a fixed, well known address, called IP address that enable to be traced. Because the server has a fixed, well-known address and because the server is always on, a client can always contact the server by sending a packet to the server's address. Some of the better-known applications with 'client-server architecture' include the Web, FTP, Tel net, and e-mail. Application services that have intensive infrastructure, since they require the service providers to purchase, install, and maintain server farms. Additionally, the service providers must pay recurring interconnection and bandwidth costs for sending and receiving data to and from the Internet. Popular services such as search engines (e.g., Google), Internet commerce (e.g., Amazon and e-Bay), Web based e-mail (e.g., Yahoo Mail), social networking (e.g., MySpace and Facebook), and video sharing (e. g., YouTube) are based on client-server architecture.[151]

Contrary to the client-server architecture, in the P2P architecture, there is minimal (or no) reliance on always-on infrastructure servers. Instead the application exploits direct communication between pairs of intermittently connected hosts, called *peers*. The peers are not owned by the service provider, but are instead desktops and laptops controlled by users, with most of the peers residing in private homes, universities or even offices. Because the peers can communicate without passing through a dedicated server, the architecture is called 'peer-to-peer'. Many of today's most popular and traffic-intensive applications are based on P2P architectures. These applications include file distribution (e. g., BitTorrent), file searching/sharing (e. g., eMule and LimeWire), Internet telephony (e. g., Skype), and IPTV (e.g., PPLive).[152] P2P architectures are also cost effective since they (normally) do not require significant server infrastructure and server bandwidth. In order to reduce costs, service providers (MSN. Yahoo, and so on) are increasingly interested in using P2P

[150] F. Kurose, J. a. (2008). *Computer Networking, A Top-Down Approach* (8th Edition ed.). Boston: Pearson Education Inc, p. 82.
[151] Ibid.
[152] There are also some applications, which have hybrid architectures combining both client-server and P2P elements. For further Technical Details and more examples *See:* F. Kurose, J. a. (2008). *Computer Networking, A Top-Down Approach* (8th Edition ed.). Boston: Pearson Education Inc, p. 82.

architectures for their applications.[153] Although p2p file sharing software is used as means of online piracy, users for online piracy use recently Android-based 'Black Boxes' tolls. In addition to this, many Cyber locker centralized file storage services have appeared that assist professional or commercial pirates to upload broadcast signal and any other protected content for access by users without any fear of being traced. Users can easily access the stored broadcast signal with a web browser and require no additional software to download and access the shared content.

In regard to the real-time or live 'broadcast signal piracy' by P2P protocols most of the Internet protocols, which are serving pirates in real- time or live broadcast signal piracy, are updated protocols of existing Internet protocols to be compatible and used in piracy of live broadcasts signals. As an example, Bit Torrent, which is currently one of the most popular P2P protocols, is optimized for transferring large TV files. Therefore, the majority of TV content circulating on P2P file sharing networks is of broadcast quality (or even high-definition Blu-ray disc quality).[154] As Clay Shirky describes"P2P is a class of applications that takes advantage of resources - storage, cycles, content, human presence - available at the edges of the Internet". [155] Because accessing these decentralized resources means operating in an environment of unstable connectivity and unpredictable IP addresses; he adds that P2P nodes must operate outside the DNS system and have significant or total autonomy from central servers. The distinctive feature of P2P is that, the distributed clients that contact the server need no fixed IP address and have a high degree of autonomy in performing and reporting their calculations, and can even be offline for long stretches while still doing work for the popular power network. [156] Peer-to-peer (P2P) file sharing is a direct system of file sharing between network users. Network users have no need for assistance or interference of a central server. Files, which exist in computers of users all over the world, are shared bit by bit between those users directly. The decentralized nature of peer-to-peer file sharing removes the need for a central server and the possibility of a centralized controlling system.[157] In a nutshell, based on BitTorrent P2P protocol, file sharers first download a small torrent file and open it with a bit torrent client. The torrent file gives the client all the information they need to connect to other file sharers, which have the pieces of the file, download them, and put them together.[158] Pirates, who are engaged in real-time broadcast signal piracy, use P2P protocols, since; P2P protocols have it convenient to stream a direct broadcasting system. It is a simple, free way to broadcast video and audio or to watch the video and listen to radio on the Internet. Indeed, P2P technology with minimal delay in the P2P streaming, fast buffering (10-30seconds), allows for anyone to become a broadcaster without the costs of a powerful server and vast bandwidth. Everybody can build his or her own TV stations comparable with large commercial sites with minimal resources and serve 10,000 online users with a personal computer and a home broadband connection.[159] A clear existing example of an online real-time broadcast, which is based on direct streaming of

[153] Ibid.

[154] See more details in WIPO Document SCCR/20/2 Rev, Study on the socio economic dimension of the unauthorized use of signals: Part II: Unauthorized access to broadcast content – cause and effects: A global overview prepared by Screen Digest Ltd, London of November 30, 2010, para 74.

[155] Shirky, C. (2000, November 24). *What is p2p?* Retrieved September 20, 2014 from www.openp2p.com: http://openp2p.com/pub/a/p2p/2000/11/24/shirky1-whatisp2p.html?page=1.

[156] Ibid.

[157] Internet file sharing also takes place by virtual storage services. Users can access to stored content like copies of broadcast programs through devoted download URL.

[158] *P2P File Sharing*. (2013, April 3). Retrieved March 2, 2014 from www.tech-fac.com: http://www.tech-faq.com/p2p-file-sharing.html.

[159] SopCast Organization. (n.d.). *SopCast Technology*. Retrieved October 8, 2014 from www.sopcast.org: http://www.sopcast.org/info/sop.html.

broadcast signal is SopCast.[160] SopCast and similar P2P technology users not only made possible for everybody to stream real time streams, real time monitoring of broadcasting source quality and network quality to help viewers to select an appropriate channel; but also helps pirates to build their own channels and broadcast it over the Internet, share the data among all viewers, and to make the channel available and stable for them. All these points aside, what is really striking is that Sopcast expressly declares as the P2P streaming broadcast platform provider, has no ability to monitor illegal reproduced, piracy and is not legally liable for such violations and infringement by others.[161]

In summary, P2P networking is one of the latest innovations in the information and communication technologies. As Kurose and Keith have stated, a P2P networking application exploits the resources in users' computers-storage, content, CPU cycles, and human presence- and has significant autonomy from central servers. This is made possible, typically, as the users' computers (i.e. the peers) have intermittent connectivity. There have been numerous P2P success stories in the past few years, including P2P file sharing for example Napster[162] and Kazaa, file distribution for example BitTorrent, voice over IP for example Skype, and IPTV for example PPLive and ppStream.[163]
Finally, although user generated live streaming services e.g. Livestream and Ustream have a variety of authorized live streaming including music, radio, sports events, seminars and news channels[164] and people are eager to watch TV and browse the Internet simultaneously;[165] due to the global broadband connections and web-enabled connected television these services are now increasing used for the unauthorized retransmission of broadcast signal either for real or for non-real time streaming over the web. Commercial pirates and many individual users abuse the availability of free live streaming services, for example YouTube to illegally retransmit broadcast signals. The problem in monitoring this kind of broadcast piracy is that all user-generated websites are not searchable and users upload the pirated broadcast signals themselves. Most recently, website-hosted streaming moved to user-initiated streams. According to data gathered regarding broadcast piracy during FIFA World Cup 2014, more than 20 million people watched live matches on illegal websites throughout a 32-day period. 3,200 takedown notices sent to pirate site owners. Specific piracy groups and links used social media networks such as Facebook and Twitter and for example, out of 707 takedown notices sent to pirate site owners during a single football match, 51 were sent to content platforms referenced on Facebook, highlighting the increasing user-generated nature of

[160] SoP is the abbreviation for Streaming over P2P. http://www.sopcast.org/.
[161] SopCast Organization. (n.d.). *Terms of Service*. Retrieved September 10, 2014 from www.sopcast.org: www.sopcast.org/info/terms.html.
[162] The first generation of P2P file sharing networks for example Napster were easier targets for anti-piracy efforts than current networks reliant on BitTorrent protocol, because Napster network was dependent on to a central server, which indexed all the available material. By contrast, sites indexing torrent files, e.g., the Pirate Bay, are not working with the P2P network operation. See: WIPO Document SCCR/20/2 Rev, Study on the socio economic dimension of the unauthorized use of signals: Part II: Unauthorized access to broadcast content – cause and effects: A global overview prepared by Screen Digest Ltd, London of November 30
[163] F. Kurose, J. a. (2008). *Computer Networking, A Top-Down Approach* (8th Edition ed.). Boston: Pearson Education Inc. No. 1.7.5.
[164] For example there is a Persian Radio station in Stockholm, which without using a user generated live streaming service of www.livestream.com it is impossible to hear this radio station any where, except in Stockholm (Sweden). See: radio hamsafar Stockholm www.livestream.com/hamsafar (last visited October 2011).
[165] Netflix with more than 25 million members worldwide is one of the Internet Subscription Service for enjoying movies and TV shows. It's members can instantly watch unlimited movies and TV episodes streaming over the Internet to computers and TVs. See: signup.netflix.com/global (last visited October 2014).

broadcast piracy.[166]

4. Unauthorized communication to a new public

All broadcasting organizations have its intended audience, signal receiving area, means and a methods of communication of its broadcast to the public. Indeed, if the content owner licenses the broadcast content, the above matters should be clarified in the broadcast license agreement because they affect the size of the license fees to be paid to the content owners. If a local broadcaster intends to broadcast its signal through wireless terrestrial means, any other unauthorized cable retransmission, satellite distribution, and retransmission over the Internet or any other computer networks of the original broadcast signal will constitute an unauthorized new communication to the public even if those retransmissions or distributions are carried out in the same intended area for the same audience or the same public. Therefore, live streaming of the traditional broadcast signal, which is known as simulcasting, simultaneous cable retransmission and simultaneous satellite distribution of terrestrial wireless broadcast signal are other forms of communication to the public that need to be consented by the content owner and the original broadcaster. [167]
Unauthorized communication to the public of the broadcast signal forms a major method of broadcast piracy in the world. Due to the potential intervention of several foreign elements and the cross-border character of the simultaneous retransmission of the broadcast signal, this kind of piracy often goes unidentified and even when it is identified, it is near-impossible to prevent.

5. Unauthorized reproduction and distribution of fixed broadcast

Unlike the physical reproduction of works or content, digital technology has made reproduction or copying convenient as now all types of content can be reproduced with minimum costs and without affecting the quality of the reproduction. Digital technology has also made the distribution of the digital copies very easy. Using digital networks, any user can send a digital copy of a piece of content to hundreds of recipients in a matter of seconds. Broadcasting organizations have adopted in their business models (as far as is permitted

[166] Mcadams, D. D. (2014, July 25). *Viaccess-Orca: 20 Million Watched World Cup on Illegal Streams, 3,200 takedown notices to pirate site owners*. Retrieved September 25, 2014 from www.tvtechnology.com: www.tvtechnology.com/article/viaccess-orca--million-watched-world-cup-on-illegal-streams/271508.

[167] Regarding the unauthorized communication of broadcast to a new public there are several cases in the national and regional jurisprudences.
For example See:
- Sociedad General de Autores y Editores de Espana (SGAE) v Rafael Hoteles SA C-306/05, Court of Justice of the European Union, December7, 2006.
- Organismos Sillogikis Diacheirisis Dimiourgon Theatrikon kai Optikoakoustikon Ergon v Divani Akropolis Anonimi Xenodocheiaki kai Touristiki Etaireai (Case C-136/09), Court of Justice of the European Union, March 18, 2010.
- Joined Cases Airfield NV and Canal Digitaal BV v Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (Sabam) (C-431/09) and Airfield NV v Agicoa Belgium BVBA (C-432/09), Court of Justice of the European Union, October13, 2011.
- Phonographic Performance (Ireland) Limited v Ireland and Attorney General (Case C-162/10) Court of Justice of the European Union, March15, 2012.
- Società Consortile Fonografici (SCF) v Marco Del Corso (Case C-135/10), Court of Justice of the European Union, March15, 2012.

under licence) the reproduction and distribution of their broadcast either in physical format e.g. tape, CD, DVD or in digital formats. As with the situation for the copyrightable works such as a piece of literature or piece of music, an unauthorized reproduction of fixed broadcast becomes detrimental to the interests of both content owners and broadcasters. Broadcast pirates fix the broadcast signal with equal quality as the original broadcast and reproduce that broadcast either physically or virtually without being licensed or authorized by the content owners and broadcasters. Unauthorized physical reproduction is increasingly being dealt with through stronger legal enforcement and criminal or civil sanctioning within national legislation but this is more complicated in regard the virtual world. Since, the virtual world does not recognize any boundary, all interested parties; user, recipients, Internet service provider, domain registrar, URL shortener, provider of payment gateway, manufacturer and retailer of relevant hardware and software used for broadcast piracy may reside within different national jurisdictions. This characteristic of the virtual world has allowed for increased unauthorized reproductions and the distribution of fixed broadcasts. This has inevitably frustrated national anti-broadcast piracy policies aspirates put unauthorized fixed broadcasts in the private or public available storage services or clouds. Users may easily access fixed broadcast for example television drama, series and shows and reproduce it on personal computers, devices by downloading or as a result of video streaming. Pirate use advertisement skipping software and attach such software to their illegal copies of fixed broadcast, replacing the original broadcaster's advertisements with their advertisements and thus can place its own payment gateways the receive subscriptions.

Currently, Cloud personal video recording (Cloud PVR) is named as network or remote personal video recording are used for unauthorized reproduction of fixed broadcast and other methods of broadcast piracy. These services enable users to record live broadcasts and video streams within a cloud located at a dedicated server that is able to provide time shifting and/or place shifting of broadcast television for users. The recorded content or fixed broadcast are then transmitted or streamed from the cloud to one or more user devices.[168] There are two business models of cloud service. First, is a user initiated cloud service that a user initiates through the recording of broadcast television, as they would with their PVR set -top box. The recording is then made and stored remotely and the recorded program is only accessible to the user that initiated the recording, in their private cloud. Second, is a non-user initiated cloud service that the cloud PVR service provider captures all contents on specific channels centrally as that content is broadcast, without being initiated by the end user?[169] End users can then access the programs, either via simultaneous streaming that constitutes unauthorized retransmission or in some cases on demand that constitutes unauthorized making available, and unauthorized reproduction if it remain a copy of content or fixed broadcast either in the user's device or in the cloud server itself. [170]

---

[168] Pollins, M., & Todd, E. (2013, october 22). *Content meets the cloud, what is the legality of cloud TV recorders?* Retrieved August 20, 2014 from www.olswang.com: www.olswang.com/articles/2013/10/content-meets-the-cloud-what-is-the-legality-of-cloud-tv-recorders/

[169] Ibid.

[170] Legal analysis of the nature of cloud TV services varies in different national law. During last decade, several claims brought against Cloud TV service providers. These claims were judged and almost this service was seen infringing different broadcasters' rights. To see more details on these cases in different jurisdiction See: Pllins, M., & Todd, E. (2013, october 22). *Content meets the cloud, what is the legality of cloud TV recorders?* Retrieved August 20, 2014 from www.olswang.com: www.olswang.com/articles/2013/10/content-meets-the-cloud-what-is-the-legality-of-cloud-tv-recorders/

Also see: Pollins, M. (2014, July 4). *what happen to TV when content meeets the cloud?* Retrieved 2014 16, August from www.olswang.com: www.olswang.com/articles/2014/07/what-happens-to-tv-when-content-meets-the-cloud/.

6. Unauthorized making available of fixed broadcast

The unauthorized making available of fixed broadcast is a modern method of broadcast piracy. It refers to the making available of the fixed broadcast, after converting it to the digital format, in websites for public access and viewing. In the unauthorized making available of a fixed broadcast, pirates place fixed or recorded broadcasts, for example through uploading particularly in the user-generated services e.g. YouTube, or social networks within storage or recently in cloud services. With this method of broadcast piracy, other users or members of the public can access and watch the fixed broadcast by using video streaming technology or by downloading the whole file at the time and place and over any devices that they choose. The main feature of this kind of broadcast piracy is its interactivity. Pirates will make available, for example, television shows on websites or open and closed networks for commercial purposes. They then get revenues through advertisement, subscription fees and by selling relevant software for the accessing of the unauthorized content.

IV. Challenges of broadcast piracy

The revolution in communication and information technologies and the appearance of the cable casting, global television coverage by the satellite transmission, and, perhaps most significantly, the world web or Internet (broadband) has led to the vast exploitation of these platforms by broadcasting organizations. This revolution in technology has resulted to significant financial benefits, and resulting accompanying costs, for broadcasting organizations, and great advantages to their customers and the general public as a whole. In addition to this, digitization has introduced digital content production, digital signals, digital distribution and finally digital reception of television program-carrying signals. Therefore, in today's broadcasting world digital contents constitute video, news, music and user generated services. This digital format production is the result of the shift to new media platforms, new media consumption and finally to new business models in multimedia applications. However, while the traditional broadcasting platforms have dominated most of the world media consumption; the emergence and popularity of new platforms has shifted the ways in which, content producers produce contents; broadcasters broadcast their signal and the user consumes content and media production. Consequently, users have shown an increasingly strong demand for digital content and to watch such content with new digital platforms and with greater choice. Indeed, this technological revolution has facilitated an explosion in the global traffic of culture, arts, information, news as well as cinematographic and musical works. As a result and due, to the new communication and information technologies, the existing phenomenon of broadcast piracy has been widened to encompass new models of broadcasting piracy, which represent a setback to the continuing broadcasting revolution. "This is despite the fact that anti-piracy software such as CSS (Content Scrambling System), used on DVDs, and AACS (Advanced Access Content System), used on BDs, have been revised and improved multiple times. Software enabling the copying of both DVDs (such as DeCSS, DVD Decrypter) and BDs (Blu Ray Disk Ripper 1.5), are freely available online from numerous websites." [171]

[171] WIPO Document SCCR/20/2 Rev, Study on the socio economic dimension of the unauthorized use of signals: Part II: Unauthorized access to broadcast content – cause and effects: A global overview prepared by Screen Digest Ltd, London of November 30, 2010, para 40.

In this chapter we considered the development in the broadcasting industry. We explored the diversification in the means and methods of broadcasting and the appearance of the new signal distribution platforms that have changed the landscape of the industry. Today in many parts of the world there is no one prevailing broadcasting technology, the platforms of origin and exploitation for broadcasting activities have become numerous and widespread. Due to many reasons broadcasters have been forced to make use of these new technologies and platforms to broadcast to the public for example, satellite broadcasting, webcasting or net casting, mobile casting etc. Besides, new broadcasting technologies and platforms have posed new challenges for the broadcasting industry due to the fact that methods and models of broadcast piracy continue to change and adapt. Broadcast pirates have equipped themselves appropriately to the changing landscape and to the requirements of digital technology. Therefore, the industry has found that they are facing increasing negative and detrimental effects of the convergence and new platforms against their interests. Alongside the aforementioned facts, there are other reasons that have led to the opinion amongst many stakeholders in the broadcasting industry that the time is right to update the existing minimum level of protection for broadcasting organizations and new norm setting in international intellectual property law to stop cross-border broadcast piracy particularly in the virtual world and over new platforms of content delivery.

To this end, in the following sub-sections we will cover the most important reasons and challenges which have led to the call for the updating of protection of broadcasters in international intellectual property law and establishing new basic rules of fairness in both a national and international context will be discussed. In the next sub-sections the following issues will be discussed:

1. Inefficiency of the technological solutions
2. Legal challenges
3. Economic impacts of the broadcast piracy

1. Inefficiency of the technological solutions

Broadcasting organizations carry out a number of anti-piracy activities as part of their broadcasts. These activities can be carried out before, during or after the broadcast takes place. Before or during actual broadcast, these tasks include several techniques including the usage of different hardware and software to prevent or dissuade broadcast piracy. These measures are also known as technological protection measures. Currently major technological protection measures and devices encrypt and encode a broadcast signal and place on it a conditional access system, for example by Common Scrambling Algorithm (CSA) that encrypt or scramble the channels. They establish barriers in front of unauthorized access and unauthorized watching of or listening to the radio and television broadcast out of intended broadcast area or out of authorized subscribers.

As part of their anti-piracy strategy, broadcasting organizations will use different technologies to monitor piracy of their broadcasts and identify unauthorized exploitation of their broadcasts over all types of information and communications platforms. Before or during a broadcast, some of these technological protection measures may assist broadcasting organizations in recognizing whether or not their broadcast signal has been pirated, who has pirated it and from which source. These anti-piracy activities include the use of content identification technologies, for example digital watermarking of the broadcast, tracing the

Internet protocol address of suspected pirates, the identification of download URL and other methods of detection of source that assisted by specialist hardware and software. This anti-piracy software monitors video and live streaming websites, collects information about suspected illegal websites and streams whilst also identifying the sources of the illicit sites and streams, and perpetrators in real and non-real time. These technologies assist a broadcaster in detecting suspected live and video streams, as well as checking the broadcast content and gathering proof of infringement and legal evidence about the suspected broadcast piracy. An example of this, content identification technologies are now being used for the automatic filtering of infringing materials on YouTube and Facebook, and watermarking technology is being used to assist broadcasters in tracking infringing materials from the source.

Nevertheless, not all anti-piracy techniques are as effective and many are financially out of reach for many broadcasters, who simply cannot afford to make use of them. Besides, even given that such technological solutions are available to all broadcasters, the usage of these solutions requires the existence of minimum information and communication infrastructures within the country were the suspected piracy is taking place. Finally, the technological solutions are not always an efficient way to prevent broadcast piracy. There exists a technological 'arms race' between broadcasting organizations and pirates, and although anti-piracy measures can be introduced, pirates can often circumvent the technological protection measures with a relatively minor delay, leaving no trace for them to be easily identified or removing any trace before being identified.

In regard to the conditional access system, however, the majority of broadcasting organizations do make use of it, with the question being does deployment of the conditional access system succeed to eliminate the piracy of program-carrying signals? The answer is that the technological solutions continue to assist broadcasters in their efforts to minimize or disrupt the piracy of program-carrying signals; but are not able to solve or eliminate completely this kind of piracy.

The types and models of broadcast piracy have largely developed by virtue of technological circumvention measures. Notably, while digitization of signal has brought advanced conditional access system and better signal encryption for broadcasting organization; professional and commercial pirates employed new technologies to hack conditional access system and encryption of program-carrying signals to access the content with better quality. Consequently, although broadcasting organizations are using the most sophisticated conditional access system to combat broadcast piracy and invest considerable resources to buy it, or they are forced by the content producers and sport organizations to develop these systems the commercial pirates remain ahead or after a short time the latest conditional access system is being circumvented. In addition to this it should be noted that there are many types and models of piracy, particularly infringement of broadcasters post-fixation rights, for which there are still no technological solutions to reduce the levels of broadcast piracy.

There are other instances that show a level of certain inefficiency in the current technological methods with which broadcasters seek to fight piracy across all major existing platforms. Another technological method used to identify the source of broadcast piracy is tracing the Internet protocol address. In this regard, however it is alleged that for example "the Internet key sharing (IKS) might be traced through the IP addresses and accordingly, the details of the

users could be found"[172]; but the fact is that, technically IP addresses indicate only the identity of Internet service providers (ISP) and machines (for example computers, printers or any other devices) which pirates use; but they do not necessarily indicate the identity of the pirates. Therefore IP addresses alone are not capable of affording any concrete protection to broadcasting organization or any other owners of copyright and related rights. Again, there is a question that whether IP address is like a personal details for instance name, address, phone number, social security number and fingerprints? According to Alma, the technical answer is that an Internet Protocol (IP) address is an address for a computer on the Internet, which exists to allow data to be delivered to that computer. A user enters a website's name – like http://www.google.com - that is actually a shortcut for the website's IP address - right now one of Google's is http://72.14.207.99/. So when a website needs to send user's computer something (for instance, his Google search results), it needs his IP address to send it to the correct computer.[173] The situation gets a bit more complex, though, because the IP addresses that people use can change frequently. For instance, an Internet service provider (ISP) may have a block of 20,000 IP addresses and 40,000 customers. Since not everyone is connected at the same time, the ISP assigns a different IP address to each computer that connects, and reassigns it when they disconnect (the actual system is a bit more complex, but this representative of how it works). Most ISPs and businesses use a variation of this dynamic type of assigning IP addresses for the simple reason that it allows them to optimize resources. Because of this, the IP address assigned to any computer one day may get assigned to several other computers within any given week. If a user has a laptop that he uses at work, at home, and at his corner café, he is changing IP addresses constantly. And if he shares his computer or even just his connection to his ISP with his family, then multiple people are sharing one IP address.[174] This issue also was raised when the European data protection authorities were considering a plan in 2008 to make IP addresses as personal information. At a hearing of the European Parliament's Civil Liberties Committee, European data protection authorities put forward the idea of adding IP addresses to the list of personal information, but Google's Global Privacy Counsel Peter Fleischer objected in words that might sound familiar. "There is no black or white answer," Fleischer said. "Sometimes an IP address can be considered as personal data and sometimes not; it depends on the context, and which personal information it reveals." Many IP addresses assigned to consumers don't reliably map to a single machine and even when they do, it's only the machine and not the person who is identified.[175] Furthermore, even if the pirate's IP address correctly being verified there are multiple back-up content sources and mirror sites that would replace with blocked sites and with the multiple back-up servers in all over the world the sources are barely traceable. Meanwhile pirate sites may change their ISPs to resume operation quickly whenever their websites are taken down or use VPN and proxy to hide their real location.

The same situation applies in relation to the technology of identification of download URL. For example, if an Internet file sharing or e virtual storage services (e.g. RapidShare,

[172] *What is Internet Key Sharing or Card sharing?* . (2012, October 26). Retrieved September 21, 2014 from www.cardsharingguide.blogpot.ch: cardsharingguide.blogspot.ch/2012/10/how-to-watch-pay-tv-channels-for-free.html.

[173] Whitten, A. (2008, February 22). *Are IP addresses personal?* Retrieved September 15, 2014 from www.googlepublicpolicy.blogspot.com: googlepublicpolicy.blogspot.com/2008/02/are-ip-addresses-personal.html.

[174] Ibid.

[175] Anderson, N. (2008, February 22). *Google argues against calling IP addresses "personal data*. Retrieved October 5, 2014 from www.arstechnica.com: Anderson, Nate, Google argues against calling IP addresses "personal data" See: http://arstechnica.com/tech-policy/news/2008/02/google-no-black-and-white-regulation-of-ip-addresses.ars.

Megaupload) is being used for illegal file sharing alongside their legitimate uses (e.g., online back-up, or legal file sharing) having access to the content hosted on such servers requires the user to know the exact download URL[176] or if URLs are encrypted, it's tracing by broadcasting organization or content owners is very difficult.

In regard to content identification technologies, it has been established that such technologies are not able to prevent or detect all kinds of broadcast piracy. Content identification technologies are technological solutions that combat broadcast piracy in new distribution platforms. These technologies, for example the watermarking of digital content play a very important role in tracing pirated content and broadcasts in new platforms like user-generated video services. If pirated content/broadcast are identified in user-generated video services, for example YouTube, the administrator of such services has an obligation to take them down. Such technological solutions can be very effective but depend on the content owner /broadcaster actually making use of them. Content identification technologies do encounter certain restrictions such as their usage is not possible or practicable for all types of content owners or broadcasters. In addition to this, the application of these technologies and the enforcing of user generated video services to take down the pirated contents or broadcasts is applicable only in a few countries which have a strong copyright and related rights laws. We may also add that it is impossible to use these technologies for the millions of the videos that are uploaded weekly to new platforms, particularly those in user generated video services and social networks. The final drawback is that, it is technically possible to remove watermarks on the broadcasted content, which means this technological solution is also a limited one in the fight against piracy.

Other technology used for detection of the source broadcast piracy is also of limited effectiveness. Detection of source, which means recognition of the origin of pirated content/broadcast through technological means, is a useful method, but, imagine that one or more broadcaster in the same or in a different market broadcasts a movie, which is distributed by its copyright owner to be shown in cinemas. The question is that, if illegally reproduced copies of that movie are stored in any recordable medium are found in the market, how is the source of this illegal reproductions to be detected? Whether they are illegally reproduced from the legal copies of that movie distributed to cinemas, or they are recorded/fixed during its broadcast by a broadcasting organization? The answer, to this question is of the utmost importance to this area. If illegal reproduction has been made from legal/physical copies of the work; then it is only the copyright owner that could claim against infringement of his copyrights, as it is they who have the exclusive right of reproduction. But if the illegal reproduction has been made from illegal fixation/recording of the work during its broadcast to the public, in addition to the owner of copyright, the originating broadcasting organization would also be able to claim for piracy of its broadcast signal or infringement of its related rights. The detection or recognition of source by technological solutions can be very difficult or in some instances impossible. In some exceptional cases for example "in unauthorized live (online) transmission of sporting events via peer to peer software, it is possible to determine the source of pirating the content or program-carrying signals." [177] Recently, the technology of the digital marking has started to be used by broadcasting organizations. This technology may help broadcasting organizations to ascertain whether their broadcasted content pirated or not. Professional pirates will no doubt continue to find it and remove digital marking made in

[176] WIPO Document SCCR/20/2 Rev, Study on the socio economic dimension of the unauthorized use of signals: Part II: Unauthorized access to broadcast content – cause and effects: A global overview prepared by Screen Digest Ltd, London of November 30, 2010, para 77.
[177] Ibid, para 84.

an unauthorized fixation of broadcast, and then redistribute it illegally. Therefore, the reality is that the detection of sources of pirated content should not be considered to be the most efficient way to recognize and fight against broadcast piracy.
On the other hand, only a small number of websites allow broadcasters to utilize live takedown tools to remove pirated broadcast signal. According to reports, during the 2010 FIFA World Cup from South Africa, 15,000 live user-generated content streams were found on 17 sites, which pirated the entire competition.[178] In addition, due to lack of an effective international binding instrument the pirates residing in other countries fail to comply takedown notices.

2. Legal challenges

Broadcast piracy also faces numerous legal challenges. Although many countries have updated their legislation on broadcasters rights, this has been met with limited success due to the existence of different national anti-piracy policies and enforcement strategies that limited their effectiveness out of their jurisdiction. Piracy of broadcast signal after all being a cross-border problem and coverage of a broadcast signal will not be limited to one national territory or jurisdiction. Multiplex signal distribution has resulted in the availability of broadcast signal to be sent over at least one distribution platform to all over the world. In such circumstances, anti-piracy tasks face with legal complexity as in each instance of broadcast piracy many individuals and entities may be involved from numerous different countries. Retailer and manufacturer of software and hardware (for example illegal set top boxes and smart cards), Internet service providers, providers of payment gateway services, domain name registrars, hosting service providers, content owners, broadcasters, satellite and cable operators, administrators of promotional platforms that advertise illegal websites may all reside in different jurisdictions. The broadcasting industry is therefore surrounded by numerous legal uncertainties with numerous different jurisdictions and numerous different law enforcement agencies. As an example of this we can refer to the cloud-recording service that has been approached differently in different jurisdictions. The main question to be considered here is does a cloud-recording service infringe broadcaster's related rights? There are different arguments on this issue even within a single jurisdiction. Cloud service providers claim to national courts that their cloud service is used for home personal video recorders thus the private copying exception in copyright and neighboring rights cover it. The same can be said for personal hard drive-based set-top boxes, cloud service provides private recording and individual time shifting services for audiences to later viewing of their selected television programs. On the other hand, broadcasters and content owners claim that cloud service providers infringe the copyright of, for example content owners' exclusive right of reproduction and communication to the public as it also involves unauthorized acts of fixation, reproduction and retransmission of their broadcast signal.

Other challenges include the legal uncertainty on method of unauthorized transmission or transfer of broadcast signal. Broadcast pirates provide video streams rather than copies, which is not unlawful in many jurisdictions. Furthermore, the sale of illegal set top boxes and acts that facilitate communication of and access to pirated contents or broadcast e.g. through pre-installation of infringing application on handheld devices is not clear in many jurisdictions. There are jurisdictions e.g. in the United Kingdom that allow site blocking via

[178] Wood C. (2014). The threat of signal piracy to broadcasters serving minority community, *WIPO Magazine (No. 6)*, World Intellectual Property Organization, p. 20.

judicial orders.[179] In Singapore broadcasters may request judicial injunction to prevent access to pirate websites, which deliberately engage in unauthorized retransmission of live broadcast and make available or put fixed broadcast in on-demand services through worldwide distribution and breaking the territorial boundaries of TV licensing. [180] The legal uncertainty caused by the multi-jurisdictional nature of broadcast piracy and the resulting loopholes in the national copyright and broadcast laws continue to be major challenge in the fight against the online broadcast piracy. This is in addition to the fact that an act considered piracy in one country might not be in a neighboring country. Thus, a large number of countries are yet to amend existing regulations (copyright and broadcast) to account for online piracy. [181] There are many cases that display current loopholes in national laws in regards to online broadcast piracy and exemplify the complexities involved in litigating against online piracy. In Spain, the court case against the operator of P2P site Rojadirecta.com, which provided links to sports events broadcast online was dismissed based on the argument that the site did not host the content itself.[182] Similarly, a case brought against MyP2P.eu by pay TV operator C More Entertainment AB in Scandinavia was dismissed by the courts in 2009 based on the fact that MyP2P.eu did not infringe any rights directly as they only provided links to streams already available on P2P software like SopCast. [183]

3. Economic impact of broadcast piracy

In practice, broadcasters normally aim to broadcast to audiences in a single country or within a region includes specific countries. Broadcast rights always assigned to broadcasters based on the territoriality. If during the original broadcast, pirates focus on a parallel or close-in-time exploitation through competitive audiovisual media outlets, it would adversely affect potential audiences of the original broadcaster. For, broadcasters will normally finance, exclusively or at least predominantly, through advertising and sponsorship revenue calculated on the basis of the actual audience of the program.[184]

The economic impact of piracy on broadcasting organizations is large. There is not a precise evaluation on the losses of online broadcast piracy. According to research carried out by different broadcast unions, sport organizations and reflected in the report of the WIPO,[185] the broadcasting industry loses economically to all kinds of broadcast piracy. The extent of these losses increases every day due to the constant improvement in the methods of digital piracy and reproduction of pre-broadcast and post-broadcast signals in all distribution platforms. In addition to this, the increasing commercial deployment of circumvention measures has aggravated the extent of the losses too. As a clear example, the cost of piracy in the Asia-Pacific region yearly increased. The studies show the cost of piracy in this region was U.S.$

[179] For example in Twentieth Century Fox Film Corporation, Universal City Studios Productions LLLP, Warner Bros. Entertainment Inc., Paramount Pictures Corporation, Disney Enterprises, Inc., Columbia Pictures Industries, Inc. v Newzbin Limited [2010] EWHC 608 (Ch) (1-3, 8, 10 February, 2, 3 March 2010), High Court (England and Wales).

[180] Based on amendments in Singapore Copyright Act introduced in April 2014.

[181] WIPO Document SCCR/20/2 Rev, Study on the socio economic dimension of the unauthorized use of signals: Part II: Unauthorized access to broadcast content – cause and effects: A global overview prepared by Screen Digest Ltd, London of November 30, 2010, para 84.

[182] Ibid, para 84.

[183] Ibid, para 84.

[184] See: European Audiovisual Observatory. (2007). *European Audiovisual Observatory, Yearbook"Trends in European television"* (Vol. 2). Strasbourg, France: European Audiovisual Observatory.

[185] See: WIPO Document SCCR/20/2 Rev, Study on the socio economic dimension of the unauthorized use of signals: Part II: Unauthorized access to broadcast content – cause and effects: A global overview prepared by Screen Digest Ltd, London of November 30, 2010.

1.538 million (in 2007), U.S.$ 1.754 million (in 2008) and U.S.$ 1.942 million (in 2009).[186] According to WIPO "in Asia, industry-wide losses from grey market or extra territorial access in 2008 (resulting from satellite overspill) were estimated to be in the region of $17m – less than 10 per cent of the total estimated losses from unauthorized access/piracy."[187] The Canadian figures from 2003 indicate that approximately 600,000 households used grey market direct to home (DTH) services.[188] Previously permitted in Canada – a court ruling banned extra territorial access in 2002, with estimating losses at $400m per annum at the time.[189] Other research, which was carried out in 2008 indicated that the total cable piracy market value in 2008 was $8.5 billion. Cable operators in Asia were said to have lost $1.75 billion to piracy, satellite piracy in Canada cost $278 million and cable and satellite piracy in the United States cost $6.5 billion in 2008.[190]

Another economic impact of the broadcast piracy particularly in regard to the online broadcast piracy is that unauthorized pirate websites usually use software and applications that enable users to skip or remove the original advertisements placed by the original broadcaster and also to place their own advertisements for example pornographic advertisements that decrease the value of broadcast programs and its underlying content by potentially affecting the viewership. Since the audiences would rather watch programs online without paying subscription fees, in the case of pay television this has had a direct impact on the number of subscribers as increased numbers make use of unauthorized online retransmissions.

In regard to the economic impact of post broadcast piracy, whereas although almost all, broadcasters welcomed making their broadcasted programs via their online services, pirate websites have also benefitted by placing the fixed or recorded broadcast of television dramas, series and shows in their websites. This kind of post-broadcast piracy unfairly attracts potential customers of the original broadcasters through unauthorized making available fixed broadcast or placing fixed broadcast in the unauthorized on-demand services and negatively affects licensing revenues of the broadcasting organizations.

---

[186] (CASBA), C. &. (2009). *CASBA Cost of Piracy, Digital Deployment, Asia- Pacific Pay-TV Industry Study, November 2009.* Cabel & Satellite Broadcasting Association of Asia.

[187] Beasley, L. (2008). *CASBA Cost of Piracy, Digital Deployment, Asia- Pacific Pay-TV Industry Study, October 2008.* Cabel & Satellite Broadcasting Association of Asia.CASBAA, October 2008: CASBA Cost of Piracy 'Digital Deployment, Asia-Pacific Pay-TV industry study'.

Also see: European Broadcast Union . (n.d.). *Some Recent Examples of Broadcast Piracy* . Retrieved February 17, 2015 from www.ebu.ch: www.ebu.ch/CMSimages/en/leg_p_pressreports_piracy_120905_tcm6-42762.pdf

[188] Taylor, G. (2006). Grey to Black- Satellite Piracy in Canada . *Canadian Journal of Media Studies , 4* (1), 89-108.

[189] All detailed information on losses in all regions of the world is mentioned in WIPO Document SCCR/20/2 Rev, Study on the socio economic dimension of the unauthorized use of signals: Part II: Unauthorized access to broadcast content – cause and effects: A global overview prepared by Screen Digest Ltd, London of November 30, 2010.

[190] Havocscope LLC. (n.d.). *Cable Piracy Market Value: $8.5 Billion in COUNTERFEIT GOODS*. Retrieved October 8, 2014 from www.havocscope.com: http://www.havocscope.com/cable-piracy-market-value/.

CHAPTER TWO

JUSTIFICATION FOR PROTECTION OF BROADCASTING ORGANIZATIONS

Chapter Two

Justification for protection of broadcasting organizations

The traditional realms of creativity and innovation have been forever changed by the onset of digitization as has the thinking surrounding copyright and related rights. The information society, which we have found ourselves living in, has resulted in a reconfiguration and reconstruction of international intellectual property law.
These changes have appeared in the form of new enactments in national legislations on copyright and related rights and the adoption of new international binding instruments including the WCT, WPPT and the Beijing Treaty. Such expansions in this area will continue in the future. On the other hand, the utilization of new information and communication technologies have not only greatly affected the creation of creative works but also have greatly influenced and changed dissemination of intellectual creations to the public and in particular how they are broadcasted to the public. All these developments and changes have caused intellectual property law to be "as a discrete and separate area of the law" [191] and to be continuously updated and /or expanded as technology dictates. In this chapter we intend to consider the origin and nature of protection of the broadcasters in related or neighboring rights theory and to discuss the traditional justifications that have led to the granting of intellectual property rights. The purpose of this chapter, meanwhile is the discussion of the classical rationales or justifications for the protection of broadcasting organizations in the sphere of intellectual property law, and to answer whether new rationales have appeared that can assist in the argument to give new effective rights and protections to broadcasting organizations or to strengthen their existing neighboring or related rights. We will finally judge how national legislators and the international community have to face the new forms of innovation, creativity and intellectual productivity of the broadcasting organizations.

To this end *firstly*, we will review the origin and appearance of the related rights including the protection of broadcasting organizations in the law of intellectual property rights. *Secondly*, in light of various existing theories, which have put forward regarding the nature of copyright we will analyse the nature of the broadcaster's related rights. *Thirdly,* we will consider the main arguments regarding the rationale of granting intellectual property rights to broadcasting organizations. In this regard we will look to find out whether there is any place to present new justificatory arguments or rationales to update the existing related rights and protections of broadcasting organizations. To this end and due to the relationship that traditionally exists between copyright and related rights, we will see whether and how the justification for copyright can be used as justification of broadcaster's related rights. What are the classical justifications for broadcaster's rights and protections in intellectual property law? Do broadcasting industry may benefit from these new arguments? And how much it affects the existing regime of legal protection of broadcasting organizations to be reconfigured or reconstructed?

[191] Bently, L., & Sherman, B. (1999). *The Making of Modern Intellectual Property Law: The British experience 1760- 1911* . Cambridge University Press, p.6.

I. Origin of the related rights

In principal, in the context of the international law of intellectual property rights neighboring or related rights are the rights of performers, producers of phonograms and those of broadcasting organizations. It is a concept that has been adopted from the civil law tradition. Indeed the accurate form of expressing these rights is 'rights neighboring with copyright' or 'rights related to copyright'. However, a commentator has defined related rights as "those rights granted for the protection of performers, producers of phonograms, broadcasters, etc."[192]; but basically, related rights are not any rights of performers, phonogram producers and broadcasting organizations; rather, they are only those rights, which are granted to performers in respect of their performances, to producers of phonograms in respect of their phonograms, and to broadcasting organizations in respect of their broadcasts. From this, it is clear that the subjects of the related rights are different from the subjects of the copyright, which are original literary and artistic works. In addition, they are named related rights or rights related to copyright; because while they are independent from the rights of authors of literary and artistic works, they do have kinship genuine relationship with copyright. The matter of how they are in truth neighbors or related to the author's right will be discussed later on in this chapter.

In considering the historical approaches regarding the origin of related rights, the following question should be considered why, how and when did related rights come into existence within intellectual property law? It is also necessary to consider the reasons and circumstances, which have led to the international recognition of a number of rights usually called neighboring or related rights.

Neighboring rights owe their existence to technical innovation. For much of the 19th century, an artist' offerings had an ephemeral and short-lived character. Meaning that what they performed disappeared at the very moment their work was seen or heard. Indeed, after the play or the concert was over, nothing was left of their performance except the impression created in the memory of the audience. A person had to be present at where the performance took place in order to see or hear the performances.[193] But with the invention of the gramophone[194], cinematography[195] and radio,[196] and their ability to communicate to the public on a great scale revolutionized the ways in which authors were able to publicize their work. These means of communication also affected performing artists in that they were able to claim neighboring rights.[197] Accordingly, as Sterling describes, by the end of the nineteenth century, the sound recording and film industries were flourishing in many countries; singers of the golden age of opera were heard on records all over the world and silent movies were being shown. Both of these forms of recording used authors' works: literary texts, and music in sound recordings and literary, dramatic, musical, and artistic works in films. Very soon after invention of phonograms and film industries, the advent of

[192] Sterling, J. (2003). *World Copyright law: protection of authors' works, performances, phonograms, films, video, broadcasts, and published editions in national, international and regional law* (2nd Edition ed.). London: Sweet and Maxwell. p. 4.
[193] World Intellectual Property Organization (WIPO). (1981). *WIPO, Guide to the Rome Convention and to the Phonograms convention,* . Geneva: WIPO Publication, No. 617 (E), p. 9.
[194] Tomas Edison's invented the sound recording process in the 1870s.
[195] Lumiere brothers' presented the cinematograph in 1895.
[196] The advent of wireless broadcasting to the public occurred in the 1920s.
[197] World Intellectual Property Organization (WIPO). (1981). *WIPO, Guide to the Rome Convention and to the Phonograms convention,* . Geneva: WIPO Publication, No. 617 (E). p. 9.

wireless broadcasting to the public brought a further dimension to the ways of exploiting authors' works and broadcasters used copyright materials extensively in their programs.[198] Therefore, the question arose as to what rights authors had in respect of the use of their works in the new devices. Within a short time, international law recognized[199] that authors should have the exclusive right to authorize to use their works in sound recordings, films and broadcasting. But the question also arose as to whether performers, phonogram producers and accordingly broadcasting organizations should be protected as such, quite separately from the protection of authors' works?[200]

Protection of performing artists in intellectual property law owes its recognition to the emergence of recording and the broadcasting industry. Prior to the development of the recording industry, a singer's song, for example, had a life span of the live performance of the song. Through the invention of the gramophone and birth of the recording industry, such performances could become everlasting by recording or being stored on mediums like discs, cassettes and other storage devices. In addition to this, they could be used repeatedly, listened to, reproduced, distributed and sold like any other piece of physical property. Such a possibility caused a decrease in the willingness of people to attend live performances and subsequently had an affect on the employment and incomes of performing artists. To take a cinematographic example of, when the piano came to the screen, the many musicians who accompanied silent films found their livelihood disappear. Later on, the invention and commercialization of radio, allowed the public to stay at homes to hear live or recorded performances of all kinds of literary and artistic production.[201] Therefore, the performers that stood in a mid-way position between the authors and the person who records the performance or presents it to the public through film, broadcasting etc.[202] felt they needed to be protected.

In the beginning, performing artists, like their audience, were happy that their performances would never 'die' and the public will never forget them by preservation and recording their songs and any other performances; but from the moment that performances were recorded on phonograms and sold or broadcasted without performer's consent many problems were revealed; because third parties exploited recorded performances in ways that performers had never allowed for and had no control over. A more serious problem was that, unlike the position of authors that they could control uses of their works (according national copyright law and the Bern Convention) there was no legal link between performers and their performances (as their labors), which others were exploiting.[203] Accordingly, many people reproduced recorded performances without consent of performing artists, or listen or watch them repeatedly through radio or television. Consequently, it was felt, by a large section of the public, that there was no need to attend public places like city halls or concert halls to

[198] Sterling, J. (2003). *World Copyright law: protection of authors' works, performances, phonograms, films, video, broadcasts, and published editions in national, international and regional law* (2nd Edition ed.). London: Sweet and Maxwell. p. 17-18.
[199] Berlin Act of the Berne Convention 1908, Arts 13 and 14 recognized exclusive right of authors in connection with recording and film industries. Accordingly, Art. 11bis of the Rome Act of the Berne Convention, 1928 recognized author's exclusive right in connection with the broadcasting of their works.
[200] Sterling, J. (2003). *World Copyright law: protection of authors' works, performances, phonograms, films, video, broadcasts, and published editions in national, international and regional law* (2nd Edition ed.). London: Sweet and Maxwell. p. 17-18.
[201] Ibid, p. 10.
[202] Ibid, p. 63.
[203] World Intellectual Property Organization (WIPO). (1981). *WIPO, Guide to the Rome Convention and to the Phonograms convention,* . Geneva: WIPO Publication, No. 617 (E). p. 10.

listen or see live performances. Very soon, the disc had become the enemy of the performer. Performers therefore demanded author's intellectual property type rights to exercise control over uses of their performances. [204]

The great success of the phonogram and record industry resulted in huge investments, financing and use of skilled manpower to produce higher quality and bigger storage phonograms. Thus, "phonograms became part of the ways of life, offering the public almost inexhaustible source of entertainment and culture."[205] The radio and television companies also welcomed phonograms. They broadcasted phonograms to the public as a part of their almost free public broadcast services. Without recognition of their rights, phonogram producers were not able to ban usage of their phonograms by these broadcasting organizations. To exaggerate these problems, mass manufacturing and distribution of recording machines to the people resulted in home-based unauthorized recording and commercial unauthorized reproduction of the original phonograms. Accordingly, soon, this industry was faced with the risk of illegal reproduction and unauthorized copying of phonograms. All this had led to the producers of phonograms to "demand the right to say yes or no to the copying of their phonograms and to receive payment if these are used for broadcasting or for communication to the public."[206] Therefore, similarly to the performer artists, phonogram producers also felt they needed to be protected by granting author's intellectual property type rights to control uses of their phonograms.

The third group to benefit from an author's intellectual property type rights is broadcasting organizations. After invention of the radio, it was first national governments that began to finance and make investment in public broadcasting services via the conventional wireless broadcasting as a public media. At first beginning, it was public radio and television stations were established. They broadcasted news and copyrighted works e.g. films and music, live performances and recorded phonograms against payment of royalties or a fair remuneration to right holders i.e. the authors of works and/or to performer artists and phonogram producers. Later on, broadcasting organizations were faced with unauthorized rebroadcast and use of their own broadcasts a sort of primitive form of broadcast piracy by other broadcasting organizations. They realized that if that situation were to continue they would stand to lose both their investment and audiences, the former of which they required to buy broadcast rights, install transmitters and other technical equipment to transmit broadcast signals to the general public and employing of technical personnel. As a consequence, broadcasters felt that they also needed an author's intellectual property type right and associated themselves with performer artists and phonogram producers in their calls be protected against unauthorized rebroadcasting of their broadcasts or illegal recordings of what they broadcast and showing these illegal recordings in public places to which the public had access without paying an entrance fee! Remarkably, when the radio first became popular to a mass audience, members of the general public had to pay an entrance fee to attend public places like restaurants to listen to the radio or watch television programs. Protection of broadcasters against illegal rebroadcasting, illegal recording of their broadcasts and showing to the public against entrance fee, received support of authors, performing artists and phonogram producers. Since without broadcasting organization being protected "they could not guarantee to the authors, performers and phonogram producers that the programs would not reach a wider audience than was envisaged when permission to broadcast was given." [207]

[204] Ibid, p. 10.
[205] Ibid, p. 11.
[206] Ibid, p. 11.
[207] Ibid, p. 12.

National legislations protect broadcasting organizations differently. In the civil law system for example in the law of Switzerland, France, Germany and Iran they are protected by means of related rights. Whereas in the United Kingdom and countries whose laws derive from British law broadcasting organizations are granted a copyright, with the distinction that also in this case the creation, respectively the programme that their broadcast does not have to be an original one in order to enjoy protection. In the United States the broadcasting organizations are granted protection by means of a *sui generis* right and by acknowledging a copyright for the programmes that have as subject original creations.[208]

II. Nature of the related rights

While discussing the origin of the related rights, we mentioned how performing artists, phonogram producers and broadcasting organizations were originally claimants to be protected author's intellectual property type rights. The term intellectual property "refers to a loose cluster of legal doctrines that regulate the uses of different sorts of ideas and insignia."[209] The related rights or the neighboring rights are actually known as 'rights related to copyrights'; this includes performing artists, phonogram producers and broadcasters. Although it is said that the related rights are neighbors or related to copyright, but that being said, the nature of copyright and related rights remains distinct. Copyright is rights given to authors or creators of the literary and artistic works. It refers to the rights that are granted to protect authors of literary, dramatic, musical and artistic works, and other works for their own original intellectual creation.[210] There are a number of different theories, however, to the nature of copyright. According to the 'property rights theory', property rights, as Giovanni believes, was a powerful device for promoting trade development, market existence and efficiency throughout human history; therefore what is not owned cannot be traded.[211] Though what is understood historically from property in property law of different legal systems of the world is corporal or tangible item or object and what is the common feature of intellectual properties is that they are concerned with intangible or in-corporal object; it is accepted that property means having ownership in something and the item owned could be material or immaterial. Nevertheless, according to 'property rights theory', copyright/author's right is a property right derived from natural law and it is from this approach the concept of intellectual property originates.[212] The property theory in relation to copyright is perceptible and originated from the propositions of John Locke in his book

[208] Speriusi-Vlad, A. (2009). Basic Rules of Protection in the Copyright and Intellectual Property Law: The Nature of the Granted Rights in the Field of Intellectual Property. *Dny práva – 2009 – Days of Law* (pp. 1-27). Brno : Masaryk University, p. 16.

[209] Fisher, W. (2001). Theories of Intellectual Property. In S. R. Munzer, *New essays in the legal and political theory of property* (pp. 168-200). Cambridge University Press, p. 1.

[210] Sterling, J. (2003). *World Copyright law: protection of authors' works, performances, phonograms, films, video, broadcasts, and published editions in national, international and regional law* (2nd Edition ed.). London: Sweet and Maxwell, p. 4.

[211] Ramello, G. B. (2010). Intellectual property, social justice and economic efficiency: insights from law and economics . In A. a. Flanagan, *Intellectual property law, Economic and Social Justice Perspective* (pp. 1-23). Cheltenham: Edward Elgar publication, p.1.

[212] Sterling, J. (2003). *World Copyright law: protection of authors' works, performances, phonograms, films, video, broadcasts, and published editions in national, international and regional law* (2nd Edition ed.). London: Sweet and Maxwell, p. 39.

'Second Treatise on Government'.[213] Locke's theory had great influence on the development of other theories of copyright and intellectual creation of an author as the fruit of his personal labor (his education, research and thoughts) were considered as his own. It was developed in France and Germany in the nineteenth century and adapted accordingly by many countries with civil law system like Iran.
The second theory regarding the nature of copyright is 'monopoly rights theory'. On the basis of this theory, intellectual creation like a book provides its author a kind of legal monopoly to exploit economic privileges of his intellectual creation exclusively. According to this approach, monopoly right grants the author a chain of economic rights that are guaranteed by law.

The 'personality rights theory' is the third theory on the nature of copyright. According to this theory, an author's right is related to his personality. It became a reliable basis for the proposition of the right of personality in copyright theories and ended in the recognition of the property in production of genius known as personal rights theory. This approach is attributed to Immanuel Kant when considering illegal printing of a book as infringement of author's personal right. Kant, in his book 'The philosophy of Law' says a book is an appearance of its author's mind and personality.[214] In other words, each work is the outcome of an individual's mind and rose from its author's personality. It is impossible to make any separation between author of the work and his personality. This relation is up to the extent that any work is reflecting the personality of its creator and therefore should be respected by others as with other personal rights of mankind. The impacts of this theory could be seen very clearly in countries which have a civil law system, and after Kant's publication, the theory was adopted as law in France and Germany. The fact that each work is associated with the personality of its creator also resulted in the recognition of moral rights for authors in almost all of those national laws with civil law system.[215]

---

[213] According to Locke theory "God gave the world to man in common and individuals are given the means of appropriating to themselves individually the produce of nature. Every man has a property in his own person and is owner of the labor of his body and the work of his hand". See: Locke, J. (1980). *The Second Treatise on Government.* Indianapolis: Hackett publishing. No. 25-26.
John Lock's theory of property "is opposed to intellectual property. Nonetheless, scholars have utilized his theory to justify the existence of intellectual property, arguably because of its rhetorical force and because his arguments translate effectively".
See: Aplin, T., & Davis, J. (2009). *Intellectual Property Law, Text and Materials* . Oxford: Oxford University Press, p.7.

[214] Kant, E. (2005). *Philosophy of Law (Persian Translation translated by Sanei Darre Bidi, Manochehr)* . Tehran: Entesharate naghsho negar Publication, pp. 141-2.

[215] "In French Law, the test for subsistence of the right is (at least as a general rule) based on the inquiry whether the works shows the marks of the author's personality, and even the extended definition referring to intellectual's mind.
See: Article L.111-1 of the French Law on Copyright and Industrial Property (IP Code), as consolidated 2006 states that: The author of a work of the mind shall enjoy in that work, by the mere fact of its creation, an exclusive incorporeal property right which shall be enforcea2.ble against all persons. (Translation from: www.wipo.int/wipolex/en/text.jsp?file_id=180336 , last visited January, 2011
Similarly, the German 1965 law enshrines the 'creation principle', again relating subsistence of the author's right to the personal act of creation. "
See: Article 7 of the German Law on copyright and related rights (Copyright Law) of September 9, 1965, as last amended by the Law of July 16, 1998 states that "the person who creates the works shall be deemed the author". (Translation from: www.wipo.int/wipolex/en/details.jsp?id=1034, last visited January, 2011; Also See: Sterling, J. (2003). *World Copyright law: protection of authors' works, performances, phonograms, films, video, broadcasts, and published editions in national, international and regional law* (2nd Edition ed.). London: Sweet and Maxwell, p. 43.
It may be said that the personal right theory is well enshrined in the report of Isaac- Rene- Guy Le Chapelier when as the Reporter of the 1791 Decree stated that the work, which is the fruit of a writer's thought, is his

The final theory we will consider on the nature of copyright is the *sui generis* theory. According to this theory, there is no need to insist that copyright is a kind of 'real' property right (either tangible or intangible property) or that it is deemed a kind of personal rights related to author's personality. Rather, it is a *sui generis* right that might be partly similar to property rights and partly similar to personal rights. Namely, copyright or author's right is right of its own independent nature which has some similar aspects with the other categories of classic rights i.e. property rights, natural right and personal right.

By considering the above-mentioned theories regarding the nature of copyright it seems that the nature of a performance made by a performing artist is closer to the nature of a copyrighted work should we follow the 'personality right theory', because a performing artist may perform an existing copyrighted work but attributes his own personality and creativity in the way he expresses the work and this plays an important role in the works performance. Besides, the nature of phonograms and broadcasts is nearby to other theories on the nature of copyright. Since phonogram producers and broadcasters are protected and granted author's intellectual property type rights under the related rights without requiring existence of originality and creativity in phonograms and broadcasts.
Phonogram producers are protected under related rights in respect of their phonogram and not its underlying content. With this in mind, the subject matter of protection is not content, but rather it is the phonograms themselves as the physical carrier in the form in which they materialize as an end product from their activity be it CD, tape and phonogram. The content of a phonogram and whether it is protected work under copyright law or not is irrelevant to protection of phonogram and phonogram producers. The originality and creativity placed on the phonogram is not a condition for protection of physical phonogram itself. What is relevant is the investment and entrepreneurial work done by the phonogram producer, for which he is deserving of protection under related rights. The phonogram producer is owner of its phonogram and he can control exploitation of its phonogram particularly reproduction and performance in public of its phonogram. The broadcasters' neighboring right in the broadcast signal is thus comparable to the phonogram producers' neighboring right in phonograms. Protection exists even when the content is no longer protected. Broadcasters are also protected for their entrepreneurial efforts and investment in the form in which they materialize as an end product of their activity, namely the broadcasts. Broadcasts are the electronic signals, which carry radio or television programs and are transmitted over the air by or on behalf of broadcasters for reception by the public. Only these signals are protected under the neighboring right, and not the programme content, which is carried by the signals. [216]

III. Justifications for protection of the related rights

The interest of academics in the theories of intellectual property has dramatically increased in recent years and articles reviewing and critiquing theories of intellectual property have

---

personal property. Since he cultivate the domain of thought should draw some fruits from its work during the whole life and for some years after their death.
See: Sterling, J. (2003). *World Copyright law: protection of authors' works, performances, phonograms, films, video, broadcasts, and published editions in national, international and regional law* (2nd Edition ed.). London: Sweet and Maxwell. Sterling, J. (2003). *World Copyright law: protection of authors' works, performances, phonograms, films, video, broadcasts, and published editions in national, international and regional law* (2nd Edition ed.). London: Sweet and Maxwell, p. 46.

[216] European Broadcasting Union. (2007). The broadcaster's neighbouring right: Impossible to understand? In W. Rumphorst, *2007, A selection of Articles and Speeches by Werner Rumphorst*, Geneva.

proliferated in law reviews and in journals of economics and philosophy.[217] Theories on rationales and justifications of granting intellectual property rights to the owners of copyrights and related rights clarify why the law should protect copyright and related rights? Or what are the philosophies and rationales, which are behind the author's rights legal protections and protection of related rights? In this regard, not only do different scholars of philosophy, law and economy present various justificatory theories and arguments; but also different national legal systems of the world and in particular two major legal traditions (the copyright system and the authors' right system) have been affected by these arguments and have moved in different ways to protect authors of literary and artistic works and the owners of related rights. The common outcome that lies in all justificatory arguments is the recognition of the necessity in granting legal protections to the authors and owners of the related rights. Although, it cannot be ignored that the various justificatory arguments has brought some differences on the subject matter, object, scope and duration of protection of the such subject matter of copyright and related right. The purpose of this section is to answer three questions; firstly, why the rights of performers in respect of their performances, rights of phonogram producers in respect of their phonograms and finally rights of broadcasters in respect of their broadcasts are named as rights related to copyright (related rights) or rights neighboring with copyrights (neighboring rights)? The second question is what are general justifications or rationales for granting intellectual property rights to the holders of related rights? And the third question is what are particular justifications for granting IP rights to performers and phonogram producers?'

Regarding the first question different reasons have been expressed. The rights are named 'related rights' or 'neighboring rights' because they are usually closely linked to copyright, namely neighbors of copyright but only present creative works of authors to the public rather than be the creative work itself. In the civil law system only natural persons can be the authors of their intellectual creations. Related rights are mainly legal or corporate persons that do not possess an independent, intellectual mind and thus are not deemed to be authors. They are therefore named related rights because " the rights accorded to persons who present creative works (belong to authors) to the public, but are not regarded as creators in their own right." [218] The second reason is that they are auxiliaries to authors. They are "linked to the authors, because authors depend on the recipients of such rights to make their works known to the public; therefore they are auxiliaries to the authors"[219] and thus deserve to be protected in an independent but similar regime of protection. The derivative nature of related rights is also been said as one of the reason that they are named related or neighboring rights. In this regard, they are known as related rights because they are mainly of a derivative nature taken from the author's works; and they (except minimal degree of creativity by performers) lack the creativity or intellectual creation of the mind, which serves as the prerequisite for being protected in copyright. However, since they are serving copyright owners and facilitating dissemination of author's works to the public, they are worthy and deserve to be protected alongside copyright with a minimal but similar regime of protection. Bently and Sherman also viewed a historical reason that related rights were not included as protected works in copyright because "the various authors' societies opposed the inclusion of such works within

[217] Fisher, W. (2001). Theories of Intellectual Property. In S. R. Munzer, *New essays in the legal and political theory of property* (pp. 168-200). Cambridge University Press, p. 1.
[218] Sterling, J. (2003). *World Copyright law: protection of authors' works, performances, phonograms, films, video, broadcasts, and published editions in national, international and regional law* (2nd Edition ed.). London: Sweet and Maxwell, p. 62.
[219] World Intellectual Property Organization (WIPO). (1981). *WIPO, Guide to the Rome Convention and to the Phonograms convention,* . Geneva: WIPO Publication, No. 617 (E), p.12.

the Berne Convention on the grounds that they are non-creative and derivative in character, and that recognition of performers' rights might reduce the royalties available for authors."[220] Finally, it is the industrial or mechanical nature so often attributed to related rights, which can be a reason they are regarded as such. All related rights except 'performers' have an entrepreneurial character or an industrial or mechanical nature that contribute to the flourishing of the copyright industries; and by disseminating valuable copyrighted works to the public, encouraging authors to create new valuable creative works. Thus, since "the fact that 'what are performed are frequently works', 'what are included in phonograms are frequently performances of works', and 'what are broadcasts are frequently audiovisual works and performances of other works;"[221] these rights were thought to be related or neighboring to copyright.

To answer the second question raised above as 'what are the general justifications that led to the recognition of intellectual property rights of related rights' different arguments have been presented. Generally speaking, the purpose of related rights is to protect the legal interests of certain natural and legal persons who either contribute in the making of 'copyrighted works' available to the public or produce subject matter which, will not qualify as works under the copyright systems of all countries; but express creativity or technical or organizational skills sufficient to justify a spate recognition of a copyright-like property right.[222] "The law of related rights deems that the productions that result from the activities of such persons and entities are deserving of legal protection in themselves, as they are 'related' to the protection of works of authorship under copyright."[223] Although, it should be acknowledged that exercise of related rights leaves intact and in no way affect the protection of copyright of the creative work in question.

However, almost all justificatory arguments (except the 'personality right' theory of copyright) which were discussed in order to justify the granting of intellectual property rights to authors of literary and artistic works, can also be applied to neighboring rights and can be extended to recognize intellectual property rights for related rights.
Through studying the history of how the major international binding instruments on neighboring rights e.g. the Rome Convention (1961), Satellite Convention (1974), Phonogram Convention (1971), WTO TRIPS Agreement (1994), WIPO Performances and Phonograms Treaty (WPPT)(1996) came into existence, will reveal that the recognition of the protection of *related rights* under national and international intellectual property law follows the same rationales and justifications, which *copyright* has.

In addition, there are common features that substantively connect the rationales of related rights to the rationales of copyright:
i) The subjects of both categories of rights are human beings or their corporate bodies.
ii) Creativity, innovation, utilization of skills, investment, labors and efforts are present in both of copyright and related rights.
iii) The subject of related rights is composed of the same elements as literary and artistic works, namely, of words, symbols, sounds and images, or the representation thereof.

---

[220] Bently, Lionel & Sherman Brad, Intellectual Property Law, (Oxford, Oxford University Press, 2001) p. 36.
[221] WIPO, Guide to the Copyright and Related rights Treaties Administered by WIPO and Glossary of Copyright and Related Rights Terms, WIPO Publication No. 891(E), (Geneva, WIPO, 2003) 133.
[222] World Intellectual Property Organization (WIPO). (2010). *Basic notion of copyright and related rights*. Retrieved March 2, 2013 from www.wipo.int: www.wipo.int/export/sites/www/copyright/en/activities/pdf/basic_notions.pdf para 52
[223] Ibid, para 52.

iv) Similar logical reasons to justify granting of rights in subjects of related rights as in literary and artistic works (i.e. copying, making available to the public, and communication to the public must be subject to exclusive rights or, in a certain cases, at least to a right to remuneration). Since, without these exclusive rights, there would be no appropriate incentives for the creation of new works and producing new subjects of the related rights).
v) Existence of the same or similar kinds of rights, which are granted to the related rights.[224]

In addition to the general justifications for existence of related rights, there are also particular justifications for each member of related right. Regarding the performing artists, as the first beneficiaries of the related rights there are some particular justifications. The rights of performers are recognized because their creative intervention and/or interpretation are necessary to give life, for example, to musical works, dramatic and choreographic works, and to motion pictures. Thus they have a justifiable interest in legal protection of their individual interpretations.[225]
From the beginning of recognition of copyright for authors, the creative or cultural contributions made by performers to give an original interpretation and life to creative works has been valued. The term 'performing artists' has always covered a wide range of persons including those that played musical compositions, performed dramatic or dramatic- musical works, read poetry and performed plays. The difficulty was always the live and transitory nature of their performances without the capability to be fixed or stored in any material form, which led to the fact that such performances could not be protected in copyright and under the Berne Convention. As to deserve protection under copyright law, it was necessary to be proved in any material mode or forms, in addition to this it could be argued that " in part it was because the fleeting and transitory nature of performances meant that they could not satisfy the requirement of material form that is a prerequisite for the subsistence of copyright."[226]

Therefore, we may say the main particular justifications of recognition of intellectual property rights for performers is that they have intellectual contributions or have a certain level of desirable creativity in their performances. If such performers could not claim a level of protection in their performances, then they risked losing an incentive to perform both protected and non-protected works. In addition, they are protected not only because they perform an existing protected work of copyright, but also for their own independent performances. They have a justifiable interest in legal protection of their individual interpretations. It is worth noting that according to Article 9 of the Rome Convention (1961) "any Contracting State may extend by its domestic laws and regulations, the protection provided for in this convention to artists who do not perform literary or artistic works." The WIPO performances and Phonogram Treaty (WPPT) (1996) also identifies an important category of performances, which do not relate to literary and artistic works, namely the

[224] World Intellectual Property Organization (WIPO) (2003). *Guide to the Copyright and Related rights Treaties Administered by WIPO and Glossary of Copyright and Related Rights Terms* (Vol. 891(E)). Geneva: World Intellectual Property Organization (WIPO), p. 134.
[225] World Intellectual Property Organization (WIPO). (2010). *Basic notion of copyright and related rights*. Retrieved March 2, 2013 from www.wipo.int: www.wipo.int/export/sites/www/copyright/en/activities/pdf/basic_notions.pdf para 53.
[226] Bently, L. &. (2001). *Intellectual Property Law.* Oxford: Oxford University Press, p.294.

"performances of expressions of folklore." [227] According to Article 2 (a) of WPPT "Performers are actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, interpret, or otherwise perform literary or artistic works or 'expressions of folklore'. It seems that WPPT has indirectly defined performance by defining the term "performers." [228] Finally, some scholars are of the view that "it is not generally contested that where the performer goes beyond performing and creates a new work, he will be regarded as an author, for instance, where an imaginative passage of improvisation is inserted by the performer in the score as set down by the composer." [229]

For the phonogram producers as the second member of related rights, there are also particular justifications. A phonogram is the product of investment and entrepreneurial works in the recording industry. [230] Despite the argument that "sound recording are properly seen as industrial, not literary or artistic works; and that there are difficulties in identifying author of a sound recording;" [231] in the existing international instruments i.e. the Rome Convention (1961), Phonograms Convention (1971) and WIPO Performances and Phonograms Treaty (1996), phonograms are protected as an object of related or neighboring rights. In addition, protection of the phonogram is "irrespective of whether or not the author exerted his mental skill, labor or effort in the creation of the work. This means that if a video recorder or tape recorder is turned on and left on a table, the resulting film or sound recording would be protected." [232] Nevertheless, though existence of 'originality' in phonograms is not as a prerequisite for phonograms to be protected in international intellectual property law, it does not mean that the phonogram producers exert no creativity or innovative effort in their activity. Despite this, it should also be acknowledged that the level of creativity in the phonogram industry is different from the nature and degree of creativity in 'performances' of performing artists. Therefore, the particular justifications to grant intellectual property rights to phonogram producers include the fact that they take the 'initiative' and have the 'responsibility' for the first fixation of the sounds of a performance or other sounds, or the representation of sounds.[233] Furthermore, fixation of sounds has been deemed to be an industrial or mechanical action done by technical means; but despite this there are also many aspects of creativity involved during the processes of embodiment or fixation of sounds that require creativity and innovation in how to use the technology of embodying and the quality of the corresponding fixation or embodiment. This is the key element of a phonogram, which makes it distinct from others. WIPO has stated that the rights of producers of phonograms are recognized because of the creative, financial and organizational resources that are necessary

---

[227] World Intellectual Property Organization (WIPO). (2003). *Guide to the Copyright and Related rights Treaties Administered by WIPO and Glossary of Copyright and Related Rights Terms* (Vol. 891(E)). Geneva: World Intellectual Property Organization (WIPO), p.113.

[228] There are other scholars that are on this view that Article 3 (a) of the Rome Convention extends the protection of Convention to the performances of those works, which are "non-protected literary and artistic works". In this regard " it is immaterial whether the work performed is or is not protected by copyright." See: World Intellectual Property Organization (WIPO). (1981). *WIPO, Guide to the Rome Convention and to the Phonograms convention,* . Geneva: WIPO Publication, No. 617 (E). p. 21.

[229] Sterling, J. (2003). *World Copyright law: protection of authors' works, performances, phonograms, films, video, broadcasts, and published editions in national, international and regional law* (2nd ed.). London: Sweet and Maxwell, p. 63, para 2.44.

[230] Rikeston, S., & Ginsburg, J. C. (2006). *International Copyright and Neighbouring Rights* (Second ed.). Oxford University Press, P. 1206.
See also: Stewart, S. M. (1989). *International Copyright and Neighbouring Rights* (Second ed.). Butterworths, pp. 190-191.

[231] Bently, L. &. (2001). *Intellectual Property Law.* Oxford: Oxford University Press, p. 36.

[232] Ibid, p. 98.

[233] Definition of producer of phonogram in Article 1 (a) WPPT.

in order to make recorded sounds available to the public. Thus, they have legitimate interests to be protected and to take action against unauthorized uses, for example unauthorized reproduction and distribution of their phonograms or their unauthorized broadcasting or communication to the public. [234]

IV. Justifications for protection of broadcasting organizations

To engage in broadcasting activities, broadcasting organizations need to have extensive knowledge and experience of media and broadcast law, and must also be governed by national and possibly regional content regulations.[235] In a national context, broadcasters come under the supervision of a content regulation body, for example; the Office of Communication (Ofcom) in Switzerland and United Kingdom and Media Development Authority (MDA) in Singapore. In addition, broadcasters must have an in-depth understanding and vast experience of content standards and policies, regulatory bodies, content selection and content compliance system and compliance enforcement. Recently, they also need to know ever-changing Internet content regulations as a new media or new content distribution platform, which they may provide non-linear or broadcast-like services along with their linear or traditional broadcasting services. Almost all national laws have granted protections to broadcasting organizations either under copyright law or under related rights. Moreover, although national laws protect broadcaster's rights in different ways there exists universal recognition of the objectives of their protection under intellectual property law. Similarly to the national justifications, the same rationales exist in the regional and international instruments, which are applicable on their protection under intellectual property law e.g. the Rome Convention (1961) and WTO TRIPS Agreement. Broadcasts are either protected as subject matter of the neighbouring or related rights; or is regarded an independent subject matter of copyright, e.g. in US and UK copyright law and does not cover the underlying work or content of the broadcasts. The status of the underlying works or content, i.e. copyrighted, fallen into public domain etc., is irrelevant to the protection of broadcasting organizations.

Though there are differences in the national regulatory license regulations, the general trend is that an individual person who is transmitting audio, video or audiovisual content to the public, a considerable part of the public, or a group of persons is not considered to be a broadcaster. Since it is accepted in almost national regulations that broadcaster cannot be a real person and that rather, a broadcaster should be organized as entity, association, company or an organization. Only then can broadcasters receive their broadcast license from national technical[236] and content regulatory body. Telecommunication companies, postal organizations, Internet and/or web service providers or any other persons, which by technical equipment and/or facilities merely provide transmitting services either simultaneous or deferred transmission to the broadcasting organizations, are not deemed to be a broadcasting or 'originating organization'. An 'originating organization' is a legal entity that has the

[234] World Intellectual Property Organization (WIPO). (2010). *Basic notion of copyright and related rights*. Retrieved March 2, 2013 from www.wipo.int: www.wipo.int/export/sites/www/copyright/en/activities/pdf/basic_notions.pdf para 53.

[235] In EU broadcasting organizations are subject to implementation of Audiovisual Media Directive in the law of EU Member States (DIRECTIVE 2007/65/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities.

[236] In some countries for example Iran there is a separate national technical or telecommunication regulatory body, which permits and allows a broadcasting organization in which radio spectrum they can broadcast.

authority to decide and exercise control over what broadcast (program) be carried by the broadcast; and has initiatives, responsibilities in relation to programming, editorial tasks and scheduling of the broadcasts. Editorial responsibility means the exercise of effective control over both the selection of the programs either in a chronological schedule (in the case of television broadcasts), or in a catalogue (in the case of on-demand audiovisual media services). Editorial responsibility does not necessarily imply any legal liability under national law for the content or the services provided,[237] in each country, it is the content regulation body that sets criteria for editorial responsibility of broadcasting organizations and other media service providers. These criteria will refer to the responsibility of broadcaster with regard to the control and choice of selection of what the broadcaster decides to broadcast; even when what is broadcasted is not produced by the broadcaster but by a third party. The aforementioned arguments provide the main rationales for the protection of broadcasting organizations in national and international regulation.

Leading academics in IP Law have classified the theories of rationales for copyright. For example Sam Ricketson has classified the justificatory arguments into two categories; justifications which are economic or more broadly instrumentalist in character; and justifications which are non-economic in character.[238] Lionel Bently and Brad Sherman classified justifications into three categories; 'natural rights theories'; 'reward arguments'; and 'incentive based theories'[239]. Tanya Aplin and Jenifer Davis classified their justifications into four approaches; 'unjust enrichment argument'; 'natural rights argument'; 'utilitarian justification; and the, 'law and economics approach'.[240] Finally, J.A.L Sterling believes most of these arguments with legal, philosophical and economic approaches to intellectual property law can be classified in five major classifications. He says, arguments justifying the granting of copyright/author's right may be classed as:

i) Natural justice arguments;
ii) Creative incentive arguments;
iii) General public interest arguments;
iv) Moral arguments

He adds to this that "various propositions may be advanced under these headings and the arguments justifying the granting of IP rights may be deployed in relation to each of the principal classifications of the right, or other classifications, depending on the standpoint of the proposer."[241]

Like performing artists and phonogram producers, broadcasting organizations are also subject to the general justifications and rationales of related rights. Due to the unique characteristics, functions and missions of these organizations there are particular justifications for granting

[237] Article 1 (c), Audiovisual Media Services Directive (Directive 2007/65/EC OF the European Parliament and of the Council of 11 December 2007 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities.

[238] Ricketson, S., & Creswell, C. (1989). *The Law of Intellectual Property: Copyright, Designs& confidential Information* (2nd Edition ed.). London: Butterworths. para 1.02 and 1.05.

[239] Bently, L., & Sherman, B. (2001). *Intellectual Property Law.* Oxford: Oxford University Press, p. 32

[240] Aplin, T., & Davis, J. (2009). *Intellectual Property Law, Text and Materials* . Oxford: Oxford University Press, 4- 14.

[241] Sterling, J. (2003). *World Copyright law: protection of authors' works, performances, phonograms, films, video, broadcasts, and published editions in national, international and regional law* (2nd Edition ed.). London: Sweet and Maxwell, p. 4.

related rights to them. In this section, we intend to consider the particular justifications that exist in respect of the protection of broadcasting organizations. We will also discuss whether the initial justificatory arguments or rationales for granting intellectual property type rights to broadcasters have changed since the signing of the Rome Convention in 1961. We will also try to reassess the existing justifications in order to compare each justification with the previously stated justificatory arguments on the rationales of copyright. Finally, we will answer the question of whether there is space to provide new justifications for the protection of broadcasting organizations in intellectual property law.

To address the first point raised namely the particular justifications for extending related rights protection to broadcasting organizations, it must be said that there are a number of different opinions[242] on the matter and that the issue has always been surrounded by controversy. [243] With a view to sorting through these differing arguments, we will look at the justifications through the following categories economic, socio-cultural and legal.

1. Economic justification

The first category of the justifications and rationales we will analyse is that of economic justification. To set the scene here we can first highlight the difference between copyright and related or neighboring rights; copyright can be considered to be a 'reward' for authors for their creative efforts and protection of their personality rights but for the protection of broadcast signals through the granting of neighboring rights to broadcasting organizations is based on the organizational, technical, and economic efforts invested in a program and its broadcast.[244] The international IP community has, of course, previously granted neighbouring rights based on economic justifications, namely to performing artists and to phonogram producers, rights that could also apply to broadcasting organizations. The main rationale behind the granting of neighboring rights to phonogram producers in the Rome Convention and WPPT are the investments, financing, and use of skilled manpower used in order to achieve the best recording quality and the utilization of technology to increase the storage capacity of phonograms and other mediums. Notably, the existence of originality or any degree of creativity (of the kind comparable to, for example, a piece of literature or a painting) in the production of the phonogram is not a prerequisite in order for the producer to benefit from the related rights afforded by the Rome Convention and WPPT. In addition to this, such a rationale for the granting of related rights is supported by academics when it

[242] See for example:
Françon, A. (1991). Should the Rome Convention on neighboring rights be revised? *Copyright Bulletin, XXV (*No. 4), 1991, p. 21; Kerever, A. (1994), Should the Rome Convention be revised and if so, is this the right moment? *Copyright Bulletin , XXV* (No. 4), p. 13 ; Ian D., T. (1991). Revision of the Rome Convention: is it necessary and timely? *Copyright Bulletin , XXV* (No. 4), p. 32; Rickeston, S. (1987), *The Berne Convention for the protection of literary and artistic works: 1886-1986.* Lodon, UK: University of London, p. 3; Rumphorst, W. (1993), Protection of broadcasting organizations under the Rome Convention, *Copyright Bulletin , 27*, p. 11; Guibault, L., & Melzer, R. (2004 November). The legal protection of broadcast signals. *IRIS Plus, Legal observations of the European Audiovisual Observatory* (10), p. 2; Helberger, N. (1999), *Neighboring rights protection of broadcasting organization: Current problems and possible lines of action.* Strasbourg: Council of Europe, Doc. No. MM-S- PR (1999) def. p. 3.
[243] Guibault, L., & Melzer, R. (2004 йил November). The legal protection of broadcast signals. *IRIS Plus, Legal observations of the European Audiovisual Observatory* (10), pp. 2-8.
[244] Helberger, N. (1999). *Neighboring rights protection of broadcasting organization: Current problems and possible lines of action.* Strasbourg: Council of Europe, Doc. No. MM-S- PR (1999) def. p. 3.

comes to protection of the financial investment involved in making of a recording or broadcast. [245]

For this reason, it is necessary to consider the protection of broadcasting organizations in respect of economic justifications. Broadcasting organizations invest heavily in innovative, high quality, culturally diverse content, news, documentaries, entertainment and fiction from all around the world. They serve not only as program producers, but also as a major investor content production itself. They also produce programs or other subject matter, which do not qualify as works that can be protected under copyright law. As has been discussed in Chapter one, broadcasting organizations create direct and indirect jobs in every country and at every level of economic development. They also contribute to major investments in global signal transmission infrastructure and other global logistics operations. Broadcasting organizations are therefore key players in the new digital economy, and contributors of both expertise and capital to further development of digitization in production, dissemination and satellite broadcasting. Recently, the move towards digitization has resulted in broadcasting organizations having to make huge investments in their promotional activities, as they had to change from an analogue environment to the digital. This migration to digital meant that the entire production and dissemination model of broadcasting organizations has had to change; from the production of audiovisual works, to the dissemination and transmission of broadcasts, and even to the reception of program-carrying signals. Thus, the economic rationale of granting related rights to broadcasters is twofold: i) to protect the substantial investment made by broadcasting organizations for the provision of program content and the transmission of that content to the public; and ii) the ease at which third parties can exploit the products of this investment in the new digital environment. [246]

The broadcast, or program-carrying signal, being the end result or final output of broadcasting also has an economic value of its own. It is the result of the transformation or conversion of the content into an electronic pulse then putting that pulse on the signal as its carrier. Therefore, for this pulse to be produced and transmitted for public reception, it requires technical equipment, skilled personnel, in addition to acquiring the broadcast rights from the content owners or event organizer. Furthermore, the transmission of that signal also has the economic significance and value. Broadcasters require transmitters (owned or hired) as well as other facilities to transmit the broadcast signals from the location where the signal originated to the location where the reception is intended. The use of terrestrial, satellite and broadband connection and transmission facilities represent a significant cost for broadcasters. Therefore, "the broadcast signal may be more costly than the rights (authors' rights and neighboring rights) to be acquired for the making program." [247] An example of this would be if a program consisted of a sporting event, such as the FIFA World Cup then no copyright is involved but that program may be more expensive than if there were copyright. Hence, the broadcast signal could be transferred or sold. It should therefore be protected against unauthorized distribution accordingly.[248]
It is for these reasons the economic justification is one of the strongest for why it is essential that broadcasters be conferred relevant and necessary protection for their broadcasts. Failure

[245] Rikeston, S., & Ginsburg, J. C. (2006). *International Copyright and Neighbouring Rights* (Second ed.). Oxford University Press. Pp. 1206. See also: Stewart, S. M. (1989). *International Copyright and Neighbouring Rights* (Second ed.). Butterworths. Pp. 190-191.
[246] WIPO Document SCCR/23/9, Report on the Informal Consultations on the protection of broadcasting organizations prepared by the Chair of the informal consultations of January 27, 2012
[247] Stewart, S. M. (1989). *International Copyright and Neighbouring Rights* (Second ed.). Butterworths p. 282.
[248] Ibid.

to do so would risk many broadcasters gaining no return on their substantial investments, resulting from the piracy of broadcast signals and the availability of those signals in unauthorized online or offline services. Their audiences and viewing shares are already affected by the increase in piracy and the advertising revenues of broadcasters, one of their primary sources of income, have been adversely affected.

The financial and organizational resources of broadcasting organizations are greater than those of the phonogram industry, which is protected under the WPPT, and therefore they have more to lose from the ongoing piracy of their signals.
The effective and updated protection for broadcasting organizations would guarantee continuity of their broadcast services and constant access of the public to broadcasts of high quality and varied content. This is also the reason that adoption of the Rome Convention and granting neighbouring rights to broadcasting organizations became the main source of royalty payments to performing artists and phonogram producers.[249]

2. Socio-cultural justification

In the vast majority of countries, the domestic broadcasting industry has the primary mission to disseminate the cultural heritage of the nation through its broadcasts. They disseminate national cultural expressions, traditions, customs (within the country and to foreign markets), and are a major driving force for national economic, social and cultural development. Some broadcasting organizations also represent the public media and are therefore manifestations of freedom of expression and free flow of information. Through this important role, broadcasters assist in preserving and enriching the culture of their home country and provide a means for the commercial presence of a domestic culture in international audiovisual markets. If such broadcasting organizations are not protected in an efficient and effective manner both in national and cross border jurisdictions, in line with the ongoing developments in communication and information technology, then these primary missions would discontinue. As a leading national media outlet, broadcasting organizations have obligations to provide public services to the citizens of their home country and to contribute in making news, events, and other content available to them. These obligations are accepted as being one of the primary missions of these organizations. Accordingly, to perform these obligations, broadcasting organizations invest a considerable budget in the production (and co-production) of programs aimed at improving public awareness, as well as buying royalties or broadcast rights of programs produced by other parties and the scheduling and transmitting of these programs. For example, they are effectively involved in production, co-production and buying broadcast rights of environment protection programs, charity programs, public awareness and disease prevention policies, how the public face with natural disasters and catastrophic events and finally mobilizing the society to help the victims of natural disasters e.g. in the Asian tsunami or typhoon ketsana by fast-breaking news.

Broadcasting organizations also serve the social and democratic interests of citizens. In a liberal and secular society, within which broadcasting organizations generally enjoy very little government censorship, these broadcasters allow for the dissemination of discussion and critiquing of government policies, which is the cornerstones of an open society. This mission of broadcasting organizations in this sense is to facilitate the public supervision over the activities of governmental officials and political parties. Therefore, many broadcasters devote

[249] Rickeston, S. (1987). *The Berne Convention for the protection of literary and artistic work: 1886-1986*. Kluwer Queen Mary College, University London, p. 3.

much of their prime-time hours to current affairs programs or television interviews, which aim to serve the social and democratic interests of citizens.

In addition, broadcasting organizations are essential in the widespread dissemination of valuable national works of copyright and related rights. Except in cases of international news broadcasts, often-main users of broadcasting organizations are the citizens of the country. National, or local broadcasting organizations rely on their local audiences figures for commissioning and scheduling of works, using their trends and favourites. In many cases the broadcasting regulatory body in a country will recommend to local broadcasters a determined amount of foreign-produced programs, which can be disseminated to their local audiences. This inevitably means that national broadcasters will look for local works and locally made programs for their broadcasts, promoting healthy competition amongst local audiovisual content makers, encouraging them to produce works of a higher standard, compatible with their national traditions, history, cultural values and public orders.

The socio-cultural justification for the call for broadcasters to be protected by related rights complies with the 'general public interest argument' for the protection of author's rights under copyright. According to this argument [250] that it is called by some scholars as a 'utilitarian approach'[251], 'utilitarian guidelines', ' incentive based theories'[252] as well as a 'social- oriented theory' [253] the granting of copyright is justified by the submission that the public is receiving ongoing benefit through the granting of such rights by (i) the encouragement of learning; (ii) the promotion of the economy by providing economic incentives and benefits not only to authors but also to industry, commerce and to society as a whole; (iii) the promoting of cultural development, and (iv) the promotion of international understanding.[254] In this regard, William Fisher says according to utilitarian guideline, a lawmaker's ideal, when shaping property rights, should be the maximization of net social welfare. Pursuit of that end in the context of intellectual property, it is generally thought, requires lawmakers to strike an optimal balance between, on one hand, the power of exclusive rights to stimulate the creation of inventions and works of art and, on the other, the partially offsetting tendency of such rights to curtail widespread public enjoyment of those creations.[255] He adds this argument is derived in substantial part from the writings of Jeremy Bentham, John Stuart Mill and A. C. Pigou.

According to Hettinger, the 'general public interest' argument focuses on the users of intellectual products, rather than on the producers. The strongest and most widely applied justification for intellectual property is this utilitarian argument based on the provision of incentives. The constitutional justification for patents and copy right- to promote the progress

---

[250] Sterling, J. (2003). *World Copyright law: protection of authors' works, performances, phonograms, films, video, broadcasts, and published editions in national, international and regional law* (2nd Edition ed.). London: Sweet and Maxwell. p. 58.

[251] Aplin, T., & Davis, J. (2009). *Intellectual Property Law, Text and Materials* . Oxford: Oxford University Press. p.8-12.

[252] Bently, L., & Sherman, B. (2001). *Intellectual Property Law*. Oxford: Oxford University Press, p. 32

[253] Rickeston, S., & Creswell, C. (2001). *The Law of Intellectual property: Copyright, Designs & Confidential information* (2nd Edition ed.). Sydney: Law book Co. 1.30.

[253] Sterling, J. (2003). *World Copyright law: protection of authors' works, performances, phonograms, films, video, broadcasts, and published editions in national, international and regional law* (2nd Edition ed.). London: Sweet and Maxwell. p. 58.

[254] Ibid, p. 58.

[255] Fisher, W. (2001). Theories of Intellectual Property. In S. R. Munzer, *New essays in the legal and political theory of property* (pp. 168-200). Cambridge University Press, p. 1.

of science and useful arts- is itself utilitarian. Given the shortcomings of the other arguments for intellectual property, the justifiability of copyright and other types of intellectual property depends, in the final analysis, on the utilitarian defense. According to this argument, promoting the creation of valuable intellectual works requires that those intellectual creators be granted property rights in those works. Without intellectual property protection, adequate incentives for the creation of a socially optimal output of intellectual products would not exist. If competitors could simply copy books, movies and records, and take one another's inventions and business techniques, there would be no incentive to spend the vast amounts of time, energy, and money necessary to develop these products. No one would engage in original development, and consequently no new writings, inventions, or business techniques would be developed. To avoid this disastrous result, the argument claims, we must continue to grant intellectual property rights.[256] This approach to law making, and in particular to intellectual property protection, has traditionally found favor in the US. Perhaps the most prominent example of the influence of utilitarian ideas on intellectual property law is to be found in the copyright and patent clause of the US Constitution itself, [257] which gives Congress power to "promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." [258]

It seems that 'the general public interest arguments' for author's rights also correspond with the socio-cultural justification of broadcaster's related rights, for it is society as a whole, which benefits the broadcasting activities. Broadcasting to the public is the outcome of the broadcaster's investment of time, skills, creative endeavor and money. Thus, their protection is an incentive to continue to serve society through their broadcasting services. Through their programs, broadcasters encourage learning, promote the economy by providing economic incentives and provide benefits not only to content creators but also to industry, commerce and society as a whole as well as stimulating cultural development and international understanding.

3. Legal justification

In almost all legal traditions there exist general legal principles that are used to justify the granting of intellectual property rights. These legal principles and theories, though different, cover the general legal concepts respected in any given jurisdiction or legal system. Generally, the main rational of granting neighbouring rights to broadcasting organizations is to protect them against broadcast piracy, unfair competition and all other unauthorized acts by a third party, which unfairly deprive these organizations of the benefit of their investment.[259] Therefore, justification of granting broadcasters related rights can be found in existing legal justifications or theories, which exist as rationales of copyright and other subject matter protected under intellectual property law.

Broadcasting organizations are owner of their broadcast signals. They convert the underlying broadcast content or program to the signal and transmit the program-carrying signals to be listened to or viewed by the public. To broadcast, they can either produce the broadcast program themselves or acquire the broadcast rights from other content owners or creators.

---

[256] Hettinger, E. C. (1989). Justifying intellectual property. *Philosophy & Public Affairs* , p.31. To see another interpretation of incentive based theories See: Bently, L., & Sherman, B. (2001). *Intellectual Property Law.* Oxford: Oxford University Press, p. 32.

[257] Aplin, T., & Davis, J. (2009). *Intellectual Property Law, Text and Materials* . Oxford: Oxford University Press, p.8-12.

[258] US Constitution, Article. 1 s.8.

[259] Kerever, A. (1994). Should the Rome Convention be revised and if so, is this the right moment? *Copyright Bulletin , XXV* (No. 4), p. 13.

They then require extensive infrastructure and skilful human resources as well as the need to obtain frequency spectrum from a relevant national regulatory authority or rent satellite transmission capacity in order to make. Preparation of all above mentioned matters need investment and resources. If the ownership of a broadcasting organization over their broadcast signal as the final output of the broadcasting is accepted then that signal should be safeguarded from any unauthorized appropriations and exploitation. In this section, we will deal with the existing legal justifications and theories for different types of intellectual property, particularly copyrighted works, and will consider the possibility of application of these arguments or theories to justify broadcasters related rights. Then we will seek to answer whether there is any room to produce new justification theories for the protection of broadcasting organizations in intellectual property law.

3.1 Justification by natural justice argument

This argument initially is based on the proposition that a person who uses his own resource in order to create an original work has a natural property right to the fruits of his or her efforts – and the state has a duty to respect and enforce that natural right. These ideas, originating in the writings of John Locke, are widely thought to be particularly applicable in the field of intellectual property.[260] Debates on this argument usually stem from Locke's theory as he had first emphasized the conceptualization of property by saying that "a person's labor belongs to him." [261] From this point, according to the natural justice argument, the rationale for granting IP rights is based on what is called as the creator- oriented approach (or rationale).[262]

Lionel Bently and Brad Sherman describe natural justice arguments in summary as the reason why copyright protection is granted is not because we think that the public will benefit from copyright. [263] Rather, copyright protection is granted because it is 'right' to do so. It is right to recognize a property right in intellectual productions because such productions which emanate from the mind of an individual author is an expression of the author's personality, and product of author's mind, his intellectual effort and inspiration.[264] Therefore the resulting creation is recognized as the exclusive property of its creator.[265]

If Locke's theory of property applies to intangible or intellectual property, then it stands to reason that every person has property in his or her intellectual labor. Property rights in intangible creations operate as a reward for the author's intellectual labor; alternatively, they can be considered a reward for the contribution that the intangible creation makes to society. In both cases, the argument is that a person's labor or contribution should be rewarded *per se*. The natural justice argument is not that a reward is given in order to encourage labor or

---

[260] Fisher, W. (2001). Theories of Intellectual Property. In S. R. Munzer, *New essays in the legal and political theory of property* (pp. 168-200). Cambridge University Press, p. 1; Hughes, J. (1988), The Philosophy of Intellectual Property . *Georgetown Law Journal* (77), pp. 299-330.

[261] In the words of an ancient aphorism, " to every cow its calf". Quoted by: Bently, L., & Sherman, B. (2001). *Intellectual Property Law.* Oxford: Oxford University Press, p. 32

[262] Or as Sterling describes " the laborer is entitled to payment for his labor". Sterling, J. (2003). *World Copyright law: protection of authors' works, performances, phonograms, films, video, broadcasts, and published editions in national, international and regional law* (2nd Edition ed.). London: Sweet and Maxwell, p. 56.

[263] Bently, L., & Sherman, B. (2001). *Intellectual Property Law.* Oxford: Oxford University Press. p. 32.

[264] From this point, intellectual property rights connected to and counted as human rights. For further discussions see: Panel discussion, organized by the World Intellectual Property Organization with the office of the United Nations High Commissioner for Human Rights on 9, 1998 published in, Intellectual Property and Human Rights, (WIPO Publication No.762 (E) Geneva, 2006).

[265] Bently, L., & Sherman, B. (2001). *Intellectual Property Law.* Oxford: Oxford University Press, p. 32.

contributions to society.[266] The justification based on reward for the labor might be said to lead to the 'participation principle' that is the fundamental concept (as it is viewed in a number of jurisdictions) that the author should participate in all economic benefits realized from the use of his work.[267] It seems that the proposed broadcaster's related rights over their broadcast signals may be justified by the natural justice argument in a similar manner that the argument is employed to justify copyright for authors. Broadcast signal has physical existence and can be produced, transmitted, appropriated and reproduced. Broadcasters take initiatives for their broadcasting activities and the broadcast signal is the outcome of broadcasters' labor and investment. Therefore they deserve to be conferred a full property type protection in respect of their broadcast signal.

3.2 Justification by private property rights argument

The 'private property rights argument' is the second legal argument that helps to justify the need for broadcasters to be granted related rights over their broadcast signal. This argument was originally derived from the writings of Kant and Hegel was used initially to justify copyright in literary and artistic properties. According to this argument, private property rights are crucial to the satisfaction of certain fundamental human needs; and policymakers should thus strive to create and allocate entitlements to resources that enable people to fulfill those needs. From this standpoint, intellectual property rights may be justified.[268] Justin Hughes is a commentator, who derives from Hegel's 'Philosophy of Right' guidelines concerning the proper shape of an intellectual-property system. He states that legal protection should be accorded to the fruits of highly expressive intellectual activities. [269] Authors and inventors should be permitted to earn respect, honor, admiration, and money from the public by selling or giving away copies of their works.[270] Accordingly, a broadcast signal transmitted by a broadcasting organization is the private property of that broadcasting organization and according to private property rights argument, the owner (broadcaster) can decide and control the uses of its property (broadcast) by others. The broadcast signal should, therefore be protected against unauthorized exploitation and methods and forms of broadcast piracy.

3.3 Justification by reason and equity argument

The third legal justification used for recognition and protection of intellectual property rights is the 'reason and equity argument'. 'Reason' in a number of legal traditions, for example in

---

[266] Aplin, T., & Davis, J. (2009). *Intellectual Property Law, Text and Materials* . Oxford: Oxford University Press, p.8.

[267] Sterling, J. (2003). *World Copyright law: protection of authors' works, performances, phonograms, films, video, broadcasts, and published editions in national, international and regional law* (2nd Edition ed.). London: Sweet and Maxwell. p. 56.

Sterling presents examples in a number of jurisdictions. He refers to the 'participation principle' as a basic premise in the application of German Law (the statement of the Federal Court of Germany in the Berlin Wall Pictures case (BGH, Feb. 23,1995; (1997) 28 I.I.C. 282). In common law jurisdiction, he refers to " the primacy of the owner's entitlement to any economic return from his proprietary rights" as a guide in interpreting the Australian copyright Act as mentioned in the decision of Federal Court of Australia in APRA v. Telstra (1995) 31 I.P.R. 289 at 326.

[268] Fisher, W. (2001). Theories of Intellectual Property. In S. R. Munzer, *New essays in the legal and political theory of property* (pp. 168-200). Cambridge University Press, p. 1.

[269] Hughes, J. (1988). The Philosophy of Intellectual Property . *Georgetown Law Journal* (77).(Hughes, pp. 330-350.

[270] Quoted by Fisher, W. (2001). Theories of Intellectual Property. In S. R. Munzer, *New essays in the legal and political theory of property* (pp. 168-200). Cambridge University Press. p. 1.

Islamic law, is a basis for conceptualization, recognition and protection of legitimate rights and interests. This argument also finds a place amongst justifications for copyright and related rights. On the meaning of 'reason' we can say it is the approval or recognition of a judgment on a given subject made by 'common sense' or 'reasonable men' of society. In other words, what 'reasonable man' or the 'common sense' of a society deems correct or wrong could, potentially, be the basis for individual rights and obligations even though such rights and obligations are not stipulated in legislation or the legislation is silent in that particular area.
It seems that there is a common understanding and similar elements between 'reason', what is named as the judgment of 'custom' and what is deemed as 'basis of equity'. The key point of reasoning in this argument is that, before having any law (as approved by some parliaments of modern societies) on an issue in a given society, there exists a logical order of events. Firstly, what has previously been considered to be 'good' or 'bad' would be judged in the light of the 'reason' of reasonable men of those societies and becomes common sense. Such sense then comes to be accepted by the people of that society as the dominant norms of the society. Finally, a government, through its legislative arm, approves that dominant norm as a law to guarantee its enforcement and determine sanctions in case of its infringement.

Regarding the reason and equity argument, many scholars in Islamic countries have tried to justify rationales of granting intellectual property rights to authors, and owners of related rights. According to this argument, assuming that intellectual properties are not as real properties '*jus in rem*' or right in a thing; or the same as a personal rights or right to a thing *'jura ad rem'*; intellectual products are accepted and recognized by 'reason' i.e. judgment of reasonable men, common sense or 'custom' of the society as respected and legitimate like real properties *'quaosi propriette'* and any misappropriation of these intellectual products would be like usurpation, theft, and unjustified enrichment and is against equity as the 'common principles of fairness'.
Recently, some legal scholars derived other theories from the reason and equity argument to justify the granting of intellectual property rights, namely 'equity argument' and 'unjustified enrichment argument'. According to the 'equity argument', even without classifying an author's work as property, or as part of the author's personality, common principles of fairness may be invoked to support the concept that unauthorized use of something produced by another person is to be condemned in modern society, or other words; "one man must not be permitted to appropriate the result of another's labor." [271]

There is another sub- argument named as 'misappropriation argument' that conceptually is based on the condemnation of theft. According to this approach, once the author's work is recognized as a form of property, the concept of misappropriation is applied.

Some national laws, for example Iran, are influenced by the 'natural rights' and the 'reason and equity arguments' to justify intellectual property rights (for copyright and related rights), and makes clear references to condemnation of theft by criminal sanctioning of literal and artistic theft in the existing Law on the Protection of Authors, Compositors and Artists (1968). Nevertheless, some recent intellectual property law scholars believes that the 'misappropriation argument' may also be considered as justified by equity approach' as a sub- argument of the 'natural justice arguments'. [272]

[271] Sterling, J. (2003). *World Copyright law: protection of authors' works, performances, phonograms, films, video, broadcasts, and published editions in national, international and regional law* (2nd Edition ed.). London: Sweet and Maxwell, p. 56.
[272] Ibid, p. 55-57.

Protection of intellectual property rights is also justified by the 'unjustified enrichment theory'. According to this theory, an unauthorized user of a work receives a benefit from its use and thereby "reaps she has not sown",[273] which is a phrase originally taken from the Bible. In the Quran there is an equivalent phrase [274] that "everyone shall have in his account only that which he worked for" [275] Such statements from religious scripture has led to extensive debates in the Islamic Jurisprudence and in European Law.

M. Spence believes that it is clear that the principle against reaping without sowing is not absolute and is not an independent principle that can be used to justify entitlements to the exclusive use of a work. Therefore, in the context of copyright, whether a particular unauthorized use constitutes an unjust enrichment depends upon whether, and how strongly a creator's claim to exclude others from its use can be justified. So, it could be argued that the principle against reaping without sowing is only referring to the ability to exclude others from the use of her work.[276] In the same manner, unjustified enrichment theory may be used to justify broadcaster's related rights and give them power to stop unconsented exploitation of their broadcast signal except for those uses permitted by the law e.g. under the limitation and exception clauses. In light of 'reason and equity argument' and 'unjustified enrichment theory' broadcasters related rights could potentially be accepted in almost all legal traditions. The pirates that to commercially benefit from different method of the broadcast piracy and not only enriched unjustifiably but also deprive the broadcasters from their legitimate interests.

4. Creativity and innovations

At its most basic level, one of the main goals of granting copyright to the authors is protection of their creative efforts. On the basis of the 'creative incentive argument', which is one of the common-used arguments made for the recognition of copyright in literary and artistic creation, authors are given copyright over their work as an incentive to continue to create and as a reward for their works and/or creations. When broadcasting organizations began to broadcast to the public, back in the nineteenth century, they merely transmitted or disseminated works of authors, live performances or phonograms to the public, without a tangible creative contribution on the part of the broadcasters themselves. Authors, therefore "argued that broadcasters are not truly creative and that they should not therefore benefit from the same kind of protection as authors." [277] In contrast to the author's rights, initially the broadcaster's neighboring rights were recognized only for their investment and entrepreneurial works, not for any creativity and originality in the broadcasting activities or broadcast services. Nevertheless, we will examine here whether existing activities and

[273] M. Spence, (2002). *Justifying copyright in McClean and Schobert (eds), Dear Images: Art, copyright and culture*, Manchester: Riding house, pp. 389- 403, at pp. 395-6 quoted by Aplin, T., & Davis, J. (2009). *Intellectual Property Law, Text and Materials* . Oxford: Oxford University Press, p.5.

[274] Quran, H. (610 AD). *Chapter 53: AN-NAJM (THE STAR) - Juz' 27*. Section 39, Retrieved October 8, 2014 from www.parsquran.com: http://www.parsquran.com/data/show.php?quantity=&lang=eng&sura=53&ayat=31&user=eng&tran=1

[275] Ibid.

[276] M. Spence (2002). *Justifying copyright in McClean and Schobert (eds), Dear Images: Art, copyright and culture*. Manchester: Riding house, pp. 389- 403, at pp. 395-6 quoted by Aplin, T., & Davis, J. (2009). *Intellectual Property Law, Text and Materials* . Oxford: Oxford University Press, p. 5.

[277] Davies, G. (1979). The Rome Convention 1961: a brief summary of its development and prospects. *European Intellectual Property Review ,* 1, p. 157.

services carried out by broadcasting organizations corresponds to the intentions of those who adopted the Rome Convention.
Interestingly, 40 years ago it was claimed "the beneficiaries of the Rome Convention make original and creative contributions to cultural life and are fully deserving of protection in the realm of intellectual property." [278] Similarly, it was also argued that "the Rome Convention protects the contribution to the presentation of the work and not their mere dissemination"[279] and the broadcaster "is not just a relayer of programme-carrying signals." [280] These arguments were raised but were not deemed convincing enough by international and national law policy makers to update at an international level the existing rights and protection already granted to broadcasting organizations. As such, currently in the national legislation for example in the legislation of Switzerland and Iran and according to the Rome Convention, the presence of 'originality' or 'creativity' is not pre-requisite for the protection of broadcasting organizations under intellectual property law. Indeed, broadcasters are protected regardless of whether 'originality' and 'creativity' is present in the activities. There are similarities in this situation with the protection attributed to phonogram producers under the Rome Convention and WPPT.
Despite this, the protection of broadcasters under related rights also faces criticism. Opponents say that the granting of an unconditional intellectual property type right to broadcasters is in contrast with every other type of intellectual property because it grants a list of exclusive rights to the other claimants of intellectual property rights is conditional to the fulfillment of a condition of creativity, novelty, originality and/or substantial investment.[281]Some commentators also refer to the reasons of ambiguity that might exist in granting related rights to broadcasters; for example, the existing regime of intellectual property protection for broadcasters sets no condition or investment threshold on the broadcasting organizations in order to benefit from the protection.

Though creativity and originality are not necessary for broadcasters to benefit from related rights, over the decades, and particularly since the digital migration, creativity, innovation and originality are becoming more and more important in the performance of broadcasters roles.

In general, the broadcast industry has three major sectors, which contribute to the overall industry:
i) Distribution platforms and network designers, which are responsible for providing telecommunication, satellite and mobile communication and broadband services for broadcasting organizations through, for example, Hertz waves, broadband, 3G, DVB-H etc.
ii) Transmitter and receiving manufactures that manufacture television, radios and other receiving devices, for example, mobile phone, IPods, PCs etc.
iii) The broadcasting organizations.

All three sectors are in a period of continuous technological innovation, but for the purposes of this study we intend to consider only broadcasting organizations and the role and contribution of creativity and innovation in their activities and broadcast services. The act of broadcasting is a combined effort of a broadcasting organization to plan, produce and/ or acquire, schedule and transmit programmes that deserve protections against unauthorized

[278] Ibid, p. 158.
[279] Costa, J. F. (1976). Some reflexions on the Rome Convention. *Copyright , 89* (3), p. 82.
[280] Blanco Labra, V. (1978). The three subjects protected by the Rome Convention. *Copyright , 91* (1), p. 28.
[281] Ian D., T. (1991). *Revision of the Rome Convention: is it necessary and timely?* Copyright Bulletin , XXV (No. 4), p.32.

appropriation by third parties.[282] Innovations are employed throughout the broadcast in areas such as up-to-the minute news, analysis, commentary and critical data. The effects if these innovations are clear to the viewer, for example, on demand services, interactive TV, podcasts, catch up, breaking news etc.

In addition, broadcasting organizations can use innovation and creativity in other areas such as planning, selecting and testing programming, producing or acquiring programs, and then the arranging, scheduling, promoting of programming and subsequent transmission to the public. Broadcasting organizations offer a unique combination of news, entertainment, sports and other types of programming which represents the collective efforts of many individuals, all exercising significant creative, organizational and technical skills.[283] Broadcasters usually employ people with more creativities, skillfulness and expertise experiences in so far the main category of jobs in broadcasting organizations, which is relevant to the issue of creativity and innovation, is program production for example sport programs, news related programs, live television shows and other live programs. To show the existence of creativity and innovation in broadcasting activities and services, we now intend to provide examples to consider whether such creativity and innovation might be used to justify recognition of related rights to broadcasting organizations. In other words, if the criterion of intellectual property protection is existence of a relative level of creativity and originality, does such level of creativity or originality exist in broadcast activities and broadcast services? If the answer is in the affirmative, may it then be justifiable for national and international law makers to grant new intellectual property rights and protections to broadcasting organizations; and whether 'creative incentive argument' could equally be applied for granting new related rights and protections to the broadcasting organizations. The following sections will, therefore, discuss some of the creative contributions that broadcasters make in order to justify the granting of intellectual property rights.

i. Creativity in the programming

It is the programming that distinguishes one broadcaster from another, and what separates broadcasters in the eyes of audiences. In the broadcasting industry, programming is considered to be the art of determining the works and their sequence, whether performed live or in pre-recorded form that are to be broadcasted at a later date, in other words it refers to the art, technique and style of selecting programs, newsgathering, classification and methods of their presentation to the public. It is this programming which attracts audiences to certain broadcasting stations.[284] The success of a broadcasting organization undoubtedly owes to the success in the popularity of its programming and using innovation and creativity in its programming techniques. Programming can be tailored towards trends or a section of the public, which is, considers being its primary audience, reflecting political persuasion, or a desire for drama or documentaries, or a certain age group. Thus, broadcasting organizations owe their reputations and brands to the programs they broadcast.

---

[282] Rumphorst, W. (1993). *Protection of broadcasting organizations under the Rome Convention*. Copyright Bulletin , 27, p. 11.

[283] World Intellectual Property Organization (WIPO). (1998). *WIPO world symposium on broadcasting, new communication technologies and intellectual property.* Geneva: World Intellectual Property Organization, p.17 (Intervention made by Erica Redler).

[284] Blanco Labra, V. (1978). The three subjects protected by the Rome Convention. *Copyright , 91* (1), 27-33. p. 29.

ii. Creativity in the production and editing process

According to the Berne Convention "collections of literary or artistic works such as encyclopedias and anthologies, which by reason of the selection and arrangement of their contents constitute intellectual creations, shall be protected as such, without prejudice to the copyright in each of the works forming part of such collections." [285] The WIPO Copyright Treaty also provided that "compilations of data or other material, in any form, which by reason of the selection or arrangement of their contents constitute intellectual creations, are protected as such. This protection does not extend to the data or the material itself and is without prejudice to any copyright subsisting in the data or material contained in the compilation." [286] Both instruments have based the criterion of protection on the existence of intellectual creation. They do not specify a pre-determined level of creativity to be attained and, leaving this matter for Contracting Parties to decide. The existence of intellectual creation is attributed to the relevant subject matter or content in the work itself.
A key part of broadcasting activities is the production and editing of the programs or the content, which are not necessarily protected as works of copyright but involve creative selection and arrangement. In technical language 'editing' is defined as being "the process of selecting and preparing written, visual, audible and film media used to convey information through the processes of correction, condensation, organization, and other modifications performed with an intention of producing a correct, consistent, accurate, and complete work."[287] Following the above definition editing in broadcasting organizations and/or in audiovisual works production is entails the process of the selection of particular scenes from any number of scenes, and the arrangement and correction of these different scenes of visual and audio files, as well as any modifications and editing of the final outputs.[288] Therefore, the broadcasting industry is heavily reliant on creativity in the selection and arrangement of its final output, namely the broadcast itself.

Sports programs, not protected by copyright, provide a useful example of this editorial process, and closely resemble the 'compilation' or 'database' that are recognized as protected works under copyright law. Taking the example of a professional football match at which there can be up to 36 cameras, all these cameras transmit pictures to the match's television director (or editor) and require constant editing by him and his team.

It is this editor who decides which scene from which camera to select, prepare and arrange so that an audience can enjoy the final audiovisual output. It is a common practice in such a sporting event that two or three broadcasting organizations broadcast to their respective audiences different pictures of the event as each broadcaster will use their own editor and editorial team.
One scholar has described the underlying broadcast content as raw material; an author's work, performed by artists in front of cameras represents the raw material, which is then edited and processed by the broadcaster before it is broadcast to the public. In this production process the author and performer usually have no or very little intervention, and will include the manipulating or deleting of images, the addition of scenography or background effects

[285] Berne Convention, Article 2, para 5.
[286] WIPO Copyright Treaty (WCT), Article 5.
[287] Mamishev, A., & Williams, S. (2009). *Technical Writing for Teams: The STREAM Tools Handbook,* Hoboken: John Wiley & Sons. Inc. p. 128.
[288] See examples of creativity in the television production in Smith, F. L., Wright (II.), J. W., & Ostroff, D. H. (1998). *Perspectives on Radio and Television: Telecommunication in the United States.* Lawrence Erlbaum Associates, pp. 176-178.

not included in the original broadcast, all of which can be considered to be the broadcaster's creative contributions.[289]

The significance of the creativity in program production is that it can play an important role in audience satisfaction. As an example, in December 2013, the Swiss regulator, OFCOM published the results of a study carried out on public satisfaction with television channels available in Switzerland. The SSR TV programmes appealed to 60% of those questioned, while just 50% of the public gave regional TV channels a positive rating. The viewers' criticism mainly concerned the quality of programme production and its poor entertainment value.[290]

The final product of the program production process resembles a 'compilation' or 'database' and involves significant creative contribution on the part of broadcasters during this process, though whether or not this is considered enough for the program production to be equated to, for example, a compilation for the purposes of the Berne Convention remains a controversial topic.

iii. Creativity in the broadcast services

The creativity in the broadcasting activity is not limited to the production and editing process of the program. It also extends to the provisioning of the broadcasting services. In the 21st century and its information society, broadcasting organizations have used considerable innovation in creating new, diverse ways to share audiovisual content and information services to the public. To provide the public with the ability to access content at any time, any location and over any devices, broadcasting organizations have developed a number of innovative services including podcast, vodcast, time shifting, video on demand, VOD streaming, tele-text, catch up services, and start-over services. In depth technical analysis of these innovations might assist us in justifying new rationales to confer or create new intellectual property rights to these organizations without necessity to shift the protection from the related rights to copyrights.[291] Giving effective protection to broadcasting organizations would meet the requirements of the digital environment, respond adequately to economic realities such as news broadcasting activities and services; and will foster innovations and creativities in the industry.

iv. Creativity in production of the program-carrying signal

The broadcast or program carrying signal, as the proposed subject matter of protection is the final output of broadcasting and can also be an indication of the broadcaster's creativity and innovation. Apart from the broadcasted contents, which might (or might not) be works protected under copyright, or the subject matter of related rights i.e. performance or phonogram or even contents that exist in the public domain, the 'broadcast signal' or 'program-carrying signal' therefore looks to be a derivative work in the copyright. The reason for this is that the 'program-carrying signal' is the result of transforming or converting

[289] Blanco Labra, V. (1978). The three subjects protected by the Rome Convention. *Copyright , 91* (1), p . 29.
[290] European Audiovisual Observatory. (2013). *2013 Year Book, Television, cinema, video and on-demand audiovisual services in 39 European States* (Vol. 1). Strasbourg: European Audiovisual Observatory, p. 42.
[291] To see examples of creation new IP rights for broadcasting organizations in the European Union due to innovation in their audiovisual and information services see:
Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society, Official Journal L 167, 22 June 2001, p. 10 Text available at: www.wipo.int/wipolex/en/text.jsp?file_id=126977

the content into the electronic pulse or signal. In addition to this, while broadcasters transform or convert the content into a signal they use a further technical process for additional adaptation example by adding their commentary, graphic, artistic effects, shadowing and lightening.

In the context of copyright of the derivative works, which are protected under the Berne Convention,[292] derivatives can refer to the translations, adaptations, arrangements and similar alterations of preexisting works without prejudice to the copyright in the preexisting works. In its broader sense, derivative works also extend to the compilations/collections of works protected under Article 2(5) of the Berne Convention (as well as under Article 10.2 of the TRIPS Agreement and Article 5 of the WCT). [293] Therefore, although we are not arguing that the 'broadcast signal' or 'program-carrying signal' should be considered a work that should be protected by copyright, it does have present a creative and innovative contribution on the part of broadcasters. It seems that these creative contributions may assist in the justification of updating their existing rights and protection or creating new rights and protection for broadcasters. Broadcasting is more than a mere technical transmission of the pre-existing content to the public by telecommunication facilities. Precise analysis of the broadcast signal proves that it is too much extent a derivative creation that justify granting intellectual property-type rights to the broadcasters on the basis of the creative incentive argument in intellectual property law.

At the end of this chapter we can conclude that like as with the international copyright protection regime, the existing international regimes of protection of neighboring or related rights (including those of broadcasting organizations) are mainly based on justifications that provide for classic intellectual property solutions. These solutions are based on a type of monopoly pricing in order to keep intact the incentive to invest. As we have seen in this chapter, almost all justificatory arguments (except the 'personality right' theory of copyright) which were discussed in order to justify the granting of intellectual property rights to copyright, can also be applied to beneficiaries of related rights and therefore broadcasting organizations. In the past, these justifications were used to recognize intellectual property type rights for related rights including broadcasting organizations. The Rome Convention (1961), the Phonogram Convention (1971), the WTO TRIPS Agreement (1994), the WIPO Performances and Phonograms Treaty (WPPT)(1996) are clear examples that have rightly adopted classic IP-based solutions to protect related rights and followed the same rationales and justifications, which copyright has. We should add that the protection of broadcasting organizations against broadcast piracy through classic IP solution does not necessarily require any inventiveness in their broadcasting. Indeed, broadcasters are protected by the law of intellectual property rights regardless of whether 'originality' and 'creativity' is present in their activities. Thus, in this regard, there are many similarities between producers of phonograms and broadcasting organizations. Nevertheless, over the decades, and particularly since the digital migration, creativity, innovation and originality are seen more and more in broadcasting. As a conclusion the broadcaster's ownership over their broadcast signals justify their monopoly and classic IP-type rights and protections.

[292] Berne Convention, Article 2(3).
[293] World Intellectual Property Organization (WIPO). (2003). *Guide to the Copyright and Related rights Treaties Administered by WIPO and Glossary of Copyright and Related Rights Terms* (Vol. 891(E)). Geneva: World Intellectual Property Organization (WIPO). p. 281.

CHAPTER THREE

ANALYSIS OF THE RELEVANT INTERNATIONAL AND REGIONAL INSTRUMENTS

Chapter Three

International and regional instruments

The international regime of the protection of broadcasting organization has been shaped gradually. There are several international instruments and regional agreements that protect broadcasting organizations differently. Some of them adopted a legal regime of protection through granting intellectual property-type rights while others protect them without the granting of intellectual property rights but through other protective measures beyond the context of intellectual property law. There are also instruments that bind its Member States into giving protections without specifying a particular regime of protection. The latter, leave the matter to the national legislation of Member States to determine the most effective way and extent of protections. In this Chapter we will analyze the existing legal regime of the protection of broadcasting organizations in current international intellectual property law. To this end, we will first examine the relevant provisions of the five international instruments; WIPO Rome Convention, WIPO Brussels Satellite Convention (1971), WTO Trips Agreement (1994), The European Agreement on the Protection of Television Broadcasts (1961) and the European Satellite Convention (1994). Then we will review the relevant regional agreements and arrangements regarding the protection of broadcasting organizations including the Cartagena Decision No. 351 (1993), the North American Free-Trade Agreement or NAFTA (1993) and European Union Directives regarding copyright and related rights. The purpose of this Chapter is to provide a comparative and realistic efficiency assessment of the existing regime to see whether it meets the considerable changes, developments and challenges the broadcasting industry faces and whether those regimes are able to effectively protect broadcasters' legitimate interests in their broadcast against broadcast piracy. Such analysis may help us to purpose which model of protection is suitable to be adopted for updating the existing rights and protections of the broadcasting organizations within the framework of international intellectual property law. Accordingly, to what extent broadcasters need new rights or additional protection.

Part One. International instruments

1. The International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (1961)

I. The origin and history

The Rome Convention was the first international instrument that recognizes broadcaster's neighboring rights. After the invention of the sound recording and possibility of the radio

communication to the public but before the adoption of the Rome Convention, there had been several efforts to accomplish international protection for performers, phonogram producers, and broadcasting organizations. [294] During the Rome revision conference of the Berne Convention in 1928 the problem of the protection of neighboring rights came into the international arena and finding solutions in this regard was considered desirable.[295] First it was intended to protect this new category of intellectual property rights holders by revising the Berne Convention and in the form of annexes to this convention. Due to many legal and technical reasons all attempts to protect this new category of intellectual property rights in the frame of the Berne Convention failed. The revision conference has objected to inclusion of sound recording as being one of the beneficiaries of the Berne Convention on the basis that they were productions with an industrial character and thus did not constitute a literary or artistic creation. Regarding the broadcasting organizations it has been reasoned that, the broadcasts were produced by large public organizations and it was therefore difficult to identify their 'author' or 'authors'. Finally, regarding the performers the question was unanswered whether the performance or interpretation of another's work was in itself a work and whether a performer could consequently be regarded as an author.[296]

Accordingly, the outcome of the Rome Revision Conference had failed in its attempts to draft a new independent treaty for the international recognition of neighboring or related rights. The Rome Convention was the first and crucial international agreement in this area and as such sought to provide intellectual property type rights to a new category of rights owners whose productions were seen as being closely related to or 'neighboring' the authors' own rights. The convention covers the specific categories of subject matter including live performances, sound recording and broadcasts. "Each differs in character, and the reasons for being excluded from the umbrella of the Berne Convention have also differed."[297] It is argued "in a general sense, each of the above categories is a derivative kind of subject matter that is generally dependent, for its creation, on the use of a pre-existing literary or artistic work." [298]

Before the adoption of the Rome Convention, there were three streams of discussions that would eventually become the sources of the Rome Convention.[299] The first stream consisted of discussions by various performers associations that began at the Congress of the International Literary and Artistic Association (ALAI) in 1903.[300] Since after recording or broadcasting appeared, performers found that they were losing their work opportunities

---

[294] These attempts were explained by several commentators, See:
Rikeston, S., & Ginsburg, J. C. (2006). *International Copyright and Neighbouring Rights* (2nd Edition ed., Vol. II). Oxford: Oxford University Press. No. 19.05 P. 1210; Ogawa, M. (2006). *Protection of broadcaster's rights.* Leiden: Martinus Nijhoff Publishers. P. 32- 43; Stewart, S. M.(1989). *International Copyright and Neighbouring Rights* (Second ed.). Butterworths. P.222; and World Intellectual Property Organization (WIPO). (1981). *Guide to the Rome Convention and to the Phonograms convention.* Geneva: WIPO Publication, No. 617 (E), p. 7-15.

[295] World Intellectual Property Organization (WIPO). (1981). *Guide to the Rome Convention and to the Phonograms convention, .* Geneva: WIPO Publication, No. 617 (E). P. 3 (Preface written by Arpad Bogsch)

[296] Rikeston, S., & Ginsburg, J. C. (2006). *International Copyright and Neighbouring Rights* (2nd Edition ed., Vol. II). Oxford: Oxford University Press. No. 19.02.

[297] Ibid, No. 19.01.

[298] Rikeston, S., & Ginsburg, J. C. (2006). *International Copyright and Neighbouring Rights* (2nd Edition ed., Vol. II). Oxford: Oxford University Press, p. 1206.

[299] Ogawa, M. (2006). *Protection of broadcaster's rights.* Leiden: Martinus Nijhoff Publishers, pp.32- 33.

[300] World Intellectual Property Organization (WIPO). (1981). *Guide to the Rome Convention and to the Phonograms convention,.* Geneva: WIPO Publication, No. 617 (E). P. 7.

unless their rights were recognized.[301] The International Labur Organization (ILO) took the initiative to open discussion on this problem.[302] The second stream was the discussions initiated by the Berne Union in 1928 at the Berne Convention Revision Conference in Rome.[303] The question of whether performers' rights should be protected by copyright or not, discussed at the Conference.[304] Though regarding the broadcasting organizations, the right to broadcast as being one of the authors' rights was discussed but the proposed rights of these organizations were not adopted.[305] The third stream was the discussions led by the United Nations Educational, Scientific and Cultural Organization (UNESCO).[306] After establishing the Universal Copyright Convention in 1952,[307] UNESCO proposed a project for protecting neighboring rights at the second session of the Interim Copyright Committee in 1955. The Executive Board of UNESCO resolved that the project should be pursued because neighboring rights were closely related to copyright and presented similar problems to copyright. Thus, the first Draft Convention on neighboring right prepared by the Joint Committee of Experts in 1951 in Rome. After prolonged debates between ILO, UNESCO and the Berne Union, the parties agreed to work jointly on preparation of a single draft on neighboring rights by establishing a joint committee. Unfortunately, they could not then agree on the composition of the committee. Consequently, ILO published its draft in 1956 and the Berne Union and UNESCO published their own draft in 1957.[308] As a result, before adoption of the Rome Convention there were several draft conventions on related rights that had been published:

- The Rome Draft prepared by the Joint Committee of Experts of the Berne Union and ILO (1951)

- The Draft Convention prepared by the Committee of Experts of ILO (1956)

- The Draft Agreement on the Protection of Certain Rights called Neighboring on Copyrights (Monaco Draft)', prepared by the Committee of Experts convened by UNESCO and the Berne Union in 1957

The Draft International Convention Protecting Performers, Phonogram Producers and Broadcasters (The Hague Draft) was prepared by the Committee of Experts on Neighboring Rights the Hague in 1960 by the ILO, UNESCO, and the Berne Union. It became the basis for the Diplomatic Conference or the Rome Convention and ILO, UNESCO and the Berne Union jointly convened the Diplomatic Conference. During the discussions on the Hague Draft, three major concerns were raised and addressed. The first concern was that the three

[301] International Labour Organization, United Nations Educational, scientific and Cultural Organization, and the United International Bureau for the Protection of Intellectual Property. (1968). *Records of the Diplomatic Conference on the International Protection of Performers, Producers of Phonograms and Broadcasting Organizations* . Ceuterick: Louvain , p. 65.
[302] World Intellectual Property Organization (WIPO). (1981). *Guide to the Rome Convention and to the Phonograms convention.* Geneva: WIPO Publication, No. 617 (E), p. 7.
[303] International Labour Organization, United Nations Educational, scientific and Cultural Organization, and the United International Bureau for the Protection of Intellectual Property. (1968). *Records of the Diplomatic Conference on the International Protection of Performers, Producers of Phonograms and Broadcasting Organizations* . Ceuterick: Louvain, p. 65.
[304] World Intellectual Property Organization (WIPO). (1981). *Guide to the Rome Convention and to the Phonograms convention.* Geneva: WIPO Publication, No. 617 (E), p. 8.
[305] Ogawa, M. (2006). *Protection of broadcaster's rights.* Leiden: Martinus Nijhoff Publishers p.33.
[306] World Intellectual Property Organization (WIPO). (1981). *Guide to the Rome Convention and to the Phonograms convention.* Geneva: WIPO Publication, No. 617 (E), p. 9.
[307] Sterling, J. (2003). *World Copyright law: protection of authors' works, performances, phonograms, films, video, broadcasts, and published editions in national, international and regional law* (2nd Edition ed.). London: Sweet and Maxwell. No. 19.01.
[308] Ogawa, M. (2006). *Protection of broadcaster's rights.* Leiden: Martinus Nijhoff Publishers, p. 32- 33.

proposed members of neighboring rights are different in nature. That is, Performers are closer to authors' then phonogram producers and broadcasting organizations. Therefore, there was a concern that how these three different subjects with three different natures were to be regulated in a single instrument. This concern was not resolved with any finality. The second concern was the issue of the general extent of protection or the number of rights and the scope of protections. In this regard an agreement was reached that the number and the scope of rights would not be greater than the author's right. Finally, the third concern was maintaining a clear demarcation between copyrights and neighboring rights. To remove this concern it was agreed that it should be stipulated in the new convention that the neighboring rights would not prejudice copyrights.[309] The Diplomatic Conference adopted the Convention, which provides for the protection at the international level of the three principal categories of neighboring rights. "As the adjective 'neighboring' indicates, each is closely connected to the creation and exploitation of literary and artistic works, as well as being concerned with the prevention of particular kinds of unfair appropriation of the efforts of others."[310]

The Rome convention serves a different purpose to that of the Berne Convention. The latter was largely the result of consensus between the existing national laws of its contracting parties as to what should be protected and how this should be done.[311] By contrast, the Rome Convention set out the rights that contracting parties should incorporate into their laws.[312] The Rome Convention states the minimum rights protection for three traditional categories of related rights and reflects on the nature of broadcasting activities and levels of communication technology and record industry that existed at that time (1961).

The Rome Convention is based on the technological reality of the beginning of the 1960s. Only four years after the adoption of the Rome Convention, the first communication satellite of the International Telecommunications Satellite Organization (INTELSAT) of the United States of America started broadcasting.[313] Though commercial cable television broadcasting started in 1950 in the United States,[314] it was not until 1966 when the USA Federal Communications Commission (FCC) prepared regulations for cable television.[315] Ten years

[309] Article 1 of the Rome Convention is a copyright safeguard clause to respond several concerns, which were raised on any potential or possible conflict of interests between author's rights and neighboring rights. This Article provides "protection granted under this convention shall leave intact and shall in no way affect the protection of copyright in literary and artistic works. Consequently, no provision of this Convention may be interpreted as prejudicing such protection". In addition, the following statement was inserted in the general report of the Diplomatic Conference "when by virtue of this convention, the consent of the performer, recorder, or broadcaster is necessary, the need for his consent does not disappear because authorization by the author is also necessary." See: International Labour Organization, United Nations Educational, scientific and Cultural Organization, and the United International Bureau for the Protection of Intellectual Property. (1968). *Records of the Diplomatic Conference on the International Protection of Performers, Producers of Phonograms and Broadcasting Organizations* . Ceuterick: Louvain, p. 38.

[310] Rikeston, S., & Ginsburg, J. C. (2006). *International Copyright and Neighbouring Rights* (2nd Edition ed., Vol. II). Oxford: Oxford University Press. No. 19.07.

[311] World intellectual property organization (WIPO). (1978). *Guide to the Berne convention for the protection of literary and artistic works (paris Act, 1971)*. Geneva: World intellectual property organization (WIPO). P. 7-13

[312] Rikeston, S., & Ginsburg, J. C. (2006). *International Copyright and Neighbouring Rights* (2nd Edition ed., Vol. II). Oxford: Oxford University Press. No. 19.07.

[313] Head, S. (1985). *World Broadcasting System: A Comparative Analysis.* California: Wadsworth Publishing Company. p. 41.

[314] Schaumann, N. B. (1983). Copyright Protection in the Cable Television Industry: Satellite Retransmission and the Passive Carrier Exemption . *Fordham law Review* (51), p. 637.

[315] Dizard, W. (2000). *Old Media New media: Mass Communication in the Information Age,* ((3rd Edition ed.). New York: Longman, p. 109.

later, the British Broadcasting Corporation (BBC) started Teletext in 1976. Broadcasting on mobile platform or mobile TV (meaning television watched on a small handheld device) was made available to the public in January 1977 and the first broadcasting satellite, the Yuri of Japan started direct broadcasting in 1978. The simultaneous transmission of traditional radio and TV broadcasts over the World Web was invented in 1989.[316] Finally, Web TV or Internet Television Protocols (IPTV) started in 2007 and Internet TV that is a television service distributed via the Internet, started in 2007. These milestones in the development of the broadcasting industry indicate that it is an industry that has continued to develop in both its means and methods since 1961.

II. Analysis of the broadcaster's rights and protections

The Rome Convention does not define a broadcast or the object of protection of the Convention nor does it define a broadcasting organization that is the beneficiary of the rights and protection. Rather it defines the act of broadcasting. Article 3 (f) of the convention broadcasting very narrowly defines 'broadcasting' as the transmission by wireless means for public reception of sounds or of images and sounds. According to this definition, to be deemed broadcasting for the purposes of this convention, two cumulative conditions must be met i) the method of transmission must be 'wireless' and ii) the aim of the transmission should be for 'public reception'. The above definition legally 'narrows the field'[317] and technically confines the concept of 'broadcasting' in subsequent international neighboring rights discussions. Regarding the first condition, according to the General Report of the Diplomatic Conference, there was a consensus that only transmission by Hertz waves or other wireless means (traditional or conventional platforms) should constitute 'broadcasting'.[318] Therefore, transmission of sounds, or of images and sounds, to the general public by cable or any other wired means is not considered as broadcasting for the purposes of the Rome Convention. The second condition is that the transmission should be only for 'public reception'. This condition makes clear that transmission to a single person or a defined group is not broadcasting for the purposes of the Rome Convention.[319] The public is not interpreted but it seems that a particular group of people, like students of a university or a particular complex, group of families/relatives, passengers travelling by a bus, train, ship, aircraft or fleet of taxis, and a hotel are not interpreted as public for the purposes of the Convention. Therefore, transmission of sounds, or of images and sounds to a particular person or group are not deemed as broadcasting.

In addition to the above two conditions, which are mentioned in Article 3 (f) of the Rome convention, it should be noted that a 'real person' could not be deemed as broadcaster under the Rome Convention. The Rome Convention protects broadcasting organization that are officially organized or registered as a legal person in the form of a public or private organization, entity, association or company. Yet, the convention does not define a

[316] Webcasting was first publicly described and presented by Brian Raila of GTE Laboratories at Entertainment '89, 1989, held in New York City, USA. See: Kumaraswami, N. (2007, February 9). *All about webcasts*. Retrieved October 9, 2014 from www.worldstart.com: http://www.worldstart.com/all-about-webcasts/.

[317] World Intellectual Property Organization (WIPO). (1981). *Guide to the Rome Convention and to the Phonograms convention.* Geneva: WIPO Publication, No. 617 (E). P. 24.

[318] International Labour Organization, United Nations Educational, scientific and Cultural Organization, and the United International Bureau for the Protection of Intellectual Property. (1968). *Records of the Diplomatic Conference on the International Protection of Performers, Producers of Phonograms and Broadcasting Organizations* . Ceuterick: Louvain, p. 40.

[319] World Intellectual Property Organization (WIPO). (1981). *Guide to the Rome Convention and to the Phonograms convention.* Geneva: WIPO Publication, No. 617 (E). p. 24.

broadcasting organization itself, but the General Report of the Conference makes it clear that the telecommunication organizations or postal administrations of the Contracting States which own the technical or telecommunication systems and/or equipment and merely presenting the transmission services to broadcasting organizations are not broadcasting organizations for the purposes of the Convention. These two former administrations/ organizations are excluded from the Rome Convention.[320] The reason being, that according to the Rome Convention those broadcasting organizations which - as the owner of neighboring rights- are protected in the Convention, are just those legal entities (licensed by the competent authority of a member State) have initiatives and responsibilities (i.e. legal, editing and programming etc.). A Broadcaster is an organization which prepares or presents the material to be fed into the transmitter." [321] Furthermore, if a program has a sponsor or advertiser and it is transmitted by such organizations, the latter, other than the sponsor, advertiser or even an independent producer of the program, is to be considered the broadcasting organization within the meaning of the convention.[322] Finally, the transmission to the public of sounds or of images and sounds should be a one-way transmission and without any interactivity between broadcaster and receiver/s. Therefore, any transmission of sounds or of images and sounds based on the interactivities, both 'send and receive' system, 'push and pull' system of content transmission like email transmissions are therefore excluded from the Rome Convention.

Although the Rome Convention was the first international instrument that granted intellectual property type rights to broadcasting organizations there was not a great deal of existing national law granting such rights and protections to broadcasters. In order to attract increased participation of countries, it was intended for the convention to set a minimum standard of protection through conferring minimum rights with the minimum scope of application. However, the minimum rights and protections are specifically guaranteed. The protections granted to the three beneficiaries of neighboring rights are set out in Article 7 (performers rights), Article 10 (phonogram producers right) and Article 13 (broadcasters right) respectively, of the Rome Convention are deemed as minimum rights and protections.[323] Articles 7, 10 and 13 provide the minimum protections, which are specifically guaranteed by the Convention. This means even if a Contracting State does not grant these minima to its own nationals, it must do so to nationals of other Contracting States. [324] Broadcasters have the right to authorize or prohibit the 'simultaneous rebroadcasting of their broadcasts', the 'fixation of their broadcasts', the 'reproduction of unauthorized fixations of their broadcasts or reproduction of lawful fixations for illicit purposes' and the 'communication to the public of their television broadcasts' by means of receivers in places accessible to the public against payment. [325] The term of protection of neighboring

[320] International Labour Organization, United Nations Educational, scientific and Cultural Organization, and the United International Bureau for the Protection of Intellectual Property. (1968). *Records of the Diplomatic Conference on the International Protection of Performers, Producers of Phonograms and Broadcasting Organizations* . Ceuterick: Louvain. p. 41.
[321] (Lewinski, 2008) No. 6.24.
[322] World Intellectual Property Organization (WIPO). (1981). *Guide to the Rome Convention and to the Phonograms convention.* Geneva: WIPO Publication, No. 617 (E). P. 25.
[323] International Labour Organization, United Nations Educational, scientific and Cultural Organization, and the United International Bureau for the Protection of Intellectual Property. (1968). *Records of the Diplomatic Conference on the International Protection of Performers, Producers of Phonograms and Broadcasting Organizations* . Ceuterick: Louvain . p. 136-138.
[324] World Intellectual Property Organization (WIPO). (1981). *Guide to the Rome Convention and to the Phonograms convention.* Geneva: WIPO Publication, No. 617 (E). p. 317.
[325] The Article 13 of the WIPO Rome Convention provides:

rights in the Rome Convention is also based on the minimum guaranteed term of protection. Article 14 of the Convention states that the term of protection shall last at least until the end of a period of twenty years dated from the end of the year in which the broadcast took place.[326] If a Contracting Party grants its nationals less than 20 years, it cannot apply such a rule for nationals of other Contracting Parties to the Rome Convention based on the principle of national treatment provided by Article 2 of the Convention. The term of protection for the broadcasting organizations is a challenging issue. Whereas the subject of protection is broadcast signal or program output and the content of the broadcast is irrelevant the term of protection must be calculated with regard to each broadcast individually. It means that if for example a program broadcasted in 1990; and the program rebroadcasted in 2014; then that second broadcast would also enjoy a separate period of protection of twenty years, as the protection applies to the transmission not the program.[327]
To assess the applicability and appropriateness of the existing broadcaster's right under the Rome Convention, we will consider the aforementioned broadcaster's rights in the following subsections. This will assist us in creating a clearer judgment on the relationship between the provisions of the Rome Convention and the current state of affairs of the broadcasting industry.

1. The right to rebroadcast

In principle, rebroadcasting is the act of repeated simultaneous and non-simultaneous (deferred rebroadcasting) broadcasting of a program. Rebroadcasting may be carried out either by the original broadcaster or another broadcasting organization. Article 13 (a) of the Rome Convention grants broadcasters the right to authorize or prohibit rebroadcasting of their broadcasts, but the Convention viewed rebroadcasting with a limited concept. The limitation set out in Article 3 (g) confined the instances of rebroadcasting only to the simultaneous broadcast by another broadcasting organization.[328] According to this definition, the two broadcasts (original and rebroadcasts) must be simultaneous; consequently all non-simultaneous rebroadcast or 'deferred rebroadcasts' are excluded from the scope of the protection under the Convention. This means that broadcasters are not protected against all unconsented non-simultaneous rebroadcast of their program by other broadcasting organizations. This right as it is formulated allows broadcasting organizations to control only 'simultaneous rebroadcasting of their broadcasts' by another broadcasting organization.

Broadcasting organizations shall enjoy the right to authorize or prohibit: (a) the rebroadcasting of their broadcasts; (b) the fixation of their broadcasts; (C) the reproduction: (i) of fixations, made without their consent, of their broadcasts; (ii) of fixations, made in accordance with the provisions of Article 15, of their broadcasts, if the reproduction is made for purposes different from those referred to in those provisions;(d) 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; it shall be a matter for the domestic law of the State where protection of this right is claimed to determine the conditions under which it may be exercised.

[326] The term of protection to be granted under this Convention shall last at least until the end of a period of twenty years computed from the end of the year in which:
(a) the fixation was made–for phonograms and for performances incorporated therein;
(b) the performance took place–for performances not incorporated in phonograms;
(c) the broadcast took place–for broadcasts.

[327] Guibault, L., & Melzer, R. (2004 November). The legal protection of broadcast signals. *IRIS Plus, Legal observations of the European Audiovisual Observatory* (10), pp. 2-8. P.3.

[328] Article 3 (g) of the WIPO Rome Convention:
Rebroadcasting means the simultaneous broadcasting by one broadcasting organization of the broadcast of another broadcasting organization.

There are other important points on the scope of the 'right to rebroadcast' in the Rome Convention. The Convention protects broadcasting organizations against simultaneous rebroadcasts only when another broadcasting organization rebroadcasts the broadcast of the original broadcasting organization. Therefore, any other person that is not a broadcasting organization may freely conduct any kind of retransmission of the broadcast signal. Besides, the scope of application of the right of rebroadcast provided by the Rome Convention only covers rebroadcast via a traditional distribution platform or wireless rebroadcast via hertz wave. Therefore, if a broadcasting organization rebroadcast a program of the original broadcaster through non-traditional platforms for example by wire, cable, mobile, broadband and computer networks they are not infringing the 'rebroadcast right' as recognized by the Rome Convention. Nevertheless the question whether the satellite transmission of a program to the public constitutes broadcasting within the definition of Article 3 (f) is a matter of controversy.[329] A final point to consider here is that unauthorized rebroadcast occurs only when it was intended for public reception. So, if a broadcasting organization retransmits another broadcaster's program, but does not do so to the public, such a retransmission does not constitute breach of rebroadcast right conferred by the Rome Convention.

2. The right of fixation

The Rome Convention does not define 'fixation' itself. The right to fixation of broadcasts grants the broadcasting organization the right to authorize or forbid any other persons including other broadcasting organizations to fix its broadcasts. In the current literature of intellectual property law, fixation of a work or object of related rights means "capturing a work or object of related rights in some material form (including storage in an electronic (computer) memory in a sufficiently stable form, in a way that it may be perceived, reproduced or communicated to the public." [330] The WPPT in its Article 2(c) define it as "the embodiment of sounds [that is, not also image] or of the representations thereof, from which they can be perceived, reproduced or communicated through a device".[331] The importance of the right of fixation is that this right "enables broadcasters to control deferred rebroadcasting which necessitates the previous fixation."[332] Before the Rome Convention it was agreed that the right to cover fixation of a part of broadcast but at the Diplomatic Conference, no position was taken on the matter of whether fixation of only one still photograph of the screen is capable of being or can be deemed as fixation of a part of broadcast? As Masouye pointed out in the General Report of the Diplomatic Conference, this matter is left for national legislation to decide. He stated that an omission of the right to control (authorize or prohibit) the taking of (fixation) of a still photograph from the screen could be damaging to the broadcasters, particularly for news broadcast. This loophole allows for the a unauthorized person or entity to take or fix a still photograph from the TV screen and publish that photograph of a news events or, for example the winning goal in the World Cup final.[333]

[329] World Intellectual Property Organization (WIPO). (1981). *Guide to the Rome Convention and to the Phonograms convention.* Geneva: WIPO Publication, No. 617 (E), p. 54.
[330] World Intellectual Property Organization (WIPO). (2003). *Guide to the Copyright and Related rights Treaties Administered by WIPO and Glossary of Copyright and Related Rights Terms* (Vol. 891(E)). Geneva: World Intellectual Property Organization (WIPO), p. 290.
[331] Ibid.
[332] Lewinski, S. v. (2008). *International Copyright Law and Policy.* Oxford: Oxford University Press. P. 246.
[333] World Intellectual Property Organization (WIPO). (1981). *Guide to the Rome Convention and to the Phonograms convention.* Geneva: WIPO Publication, No. 617 (E). p. 53.

3. The right to reproduction of the fixation

Generally, the reproduction is a [new] fixation of the work or object of related rights sufficiently stable in a way that the work or object of related rights may be perceived, [further] reproduced and communicated on the basis thereof. The storage of works in an electronic (computer) memory is also reproduction, since it fully corresponds to this concept.[334] The definition of reproduction right in the Rome Convention is different from the definitions, which are presented in Article 9 (1) of the Berne Convention, Articles 7 and 11 of the WPPT and Article 1 (4) of WCT. According to the other (non-Rome) instruments, reproduction right means reproduction of works in any manner or forms, but the Rome Convention defines reproduction in Article 3 (e) as only making a copy or copies of a fixation. This description has proven to be controversial as it is ambiguous as to whether that includes new forms of storage in the digital environment. Article 10 of the Convention adds a certain clarity describing direct or indirect reproduction,[335] according to the right, broadcasting organizations have the right to authorize or prohibit the reproduction of their broadcasts. It is necessary to clear that the application of the right is confined only to two cases; first, if the subject of reproduction is a fixation of broadcast that the fixation itself have been made without the consent of broadcasting organization. Second, the subject of reproduction is a fixation that made for the purpose of Article 15 (exceptions and limitations)[336] of the Convention and the purpose of reproduction is also different from the purpose of that Article. Therefore, the right of reproduction dose not cover the reproduction of those fixations that the fixations itself are made by the consent of broadcasting organization. Accordingly, the right of reproduction dose not covers those reproductions of the fixation that was made in accordance with the Article 15 of the Convention and the purpose of reproduction is also the same purpose mentioned in that Article. The convention gives the broadcasting organizations the right to authorize or prohibit 'reproduction of unauthorized fixations' and 'reproduction of lawful fixations for unlawful purposes.

4. The right of communication to the public

Historically, the right of communication to the public was granted to the authors of literary and artistic work after broadcasting (namely radio and TV) came into existence. The importance of this right was justified by the fact that originally the radio and television devices manufactured were not sufficient for all households and so therefore the majority of audiences had to go to public places, such as restaurants, to hear or watch their favorite radio and television programs. These very public airings resulted in the increase of customers and therefore incomes for the owners of restaurants and other hosting establishments. Conversely,

---

[334] World Intellectual Property Organization (WIPO). (2003). *Guide to the Copyright and Related rights Treaties Administered by WIPO and Glossary of Copyright and Related Rights Terms* (Vol. 891(E)). Geneva: World Intellectual Property Organization (WIPO), p.307-8.

[335] Ibid. p. 308.

[336] Article 15 of the WIPO Rome Convention: 1. Any Contracting State may, in its domestic laws and regulations, provide for exceptions to the protection guaranteed by this Convention as regards: *(a)* private use; *(b)* use of short excerpts in connection with the reporting of current events; *(c)* ephemeral fixation by a broadcasting organization by means of its own facilities and for its own broadcasts; *(d)* use solely for the purposes of teaching or scientific research.

2. Irrespective of paragraph 1 of this Article, any Contracting State may, in its domestic laws and regulations, provide for the same kinds of limitations with regard to the protection of performers, producers of phonograms and broadcasting organizations, as it provides for, in its domestic laws and regulations, in connection with the protection of copyright in literary and artistic works. However, compulsory licenses may be provided for only to the extent to which they are compatible with this Convention.

the size of audiences attending live performances of the very same acts shrank as a result. Thus, the right of communication to the public was identified in almost all international instruments for the protection of copyright and related rights (though the Berne and the Rome Convention differ in regards to the scope of this right).

Prior to the Rome Convention in 1961, the Bern Convention granted the right of communication to the public to authors in respect of public performances of dramatic, dramatic-musical and musical works, [337] public recitations of literary works, [338] and audiovisual works.[339] In the Berne Convention, communication to the public covers broadcasting to the public and any other communication to the public by wire or wireless means[340] regardless of the distance between where that transmission originated from and where it was received. The Rome Convention however grants to broadcasting organizations the right of communication to the public with a narrow sense covering only the 'television' broadcast and the application of that right is limited to those communications, which are made in places accessible to the public against 'payment of an entrance fee'.[341] These kinds of television broadcasts were common in 1960s in restaurants, cafes, and hotels, as owners would seek to attract customers by showing television programmes and charging for entry. Nevertheless, the right of communication to the public in the Rome Convention is subject to a reservation in the Article 16 (b) of the Convention. This Article allows a Contracting Party to reserve application of this right regarding broadcasting organizations. A Member State can through a notification deposited to the General Secretary of the United Nations declares that it will not apply item (d) of Article 13. However, the other Contracting State shall not be obliged to grant the right referred to in Article 13 (d) to broadcasting organizations whose headquarters are in that State.

III. New broadcasting platforms and the Rome Convention

New distribution platforms have emerged since the Rome Convention, which has given rise to questions about whether the rights and protections provided by the Convention extend to these new platforms.

---

[337] Article 11 (1) ii of the Berne Convention: Authors of dramatic, dramatic-musical and musical works shall enjoy the exclusive right of authorizing:
(ii) Any *communication to the public* of the performance of their works.

[338] Article 11ter (1) (ii) of the Berne Convention:
Authors of literary works shall enjoy the exclusive right of authorizing:
(ii) Any *communication to the public* of the recitation of their works.

[339] Article 14(1) (ii) of the Berne Convention:
Authors of literary or artistic works shall have the exclusive right of authorizing:
(ii) The public performance and *communication to the public* by wire of the works thus adapted or reproduced.
Also Article 14bis (1) of the Berne Convention requires that:
(1) Without prejudice to the copyright in any work, which may have been adapted or reproduced, a cinematographic work shall be protected as an original work. The owner of copyright in a cinematographic work shall enjoy the same rights as the author of an original work, including the rights referred to in the preceding Article. (i.e. Article 14).

[340] Article 11bis of the Berne Convention:
(1) Authors of literary and artistic works shall enjoy the exclusive right of authorizing:
(i)The *broadcasting* of their works or the *communication thereof to the public* by any other means of wireless diffusion of signs, sounds or images;
(ii) Any *communication to the public* by wire …

[341] Article 13 (d) of the Rome Convention: Broadcasting organizations shall enjoy the right to authorize or prohibit 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; it shall be a matter for the domestic law of the State where protection of this right is claimed to determine the conditions under which it may be exercised.

The significance of this question is that certain modes of exploitation or transmission made possible by new distribution platforms, whether lawful or unlawful, are capable of directly or indirectly influencing the protection afforded by the Rome Convention.[342] The identification of these modes of exploitation would require the revision of the Convention in order to adopt it to the contemporary technical environment of communication or would necessitate a completely new international treaty.
In regards to satellite broadcasting and the Rome Convention it should first be stated that there are two satellite distribution services, which are both based on wireless signal transmission. The fixed satellite service (FSS) is used for point-to-point communication or signal transmissions and direct-broadcasting satellites services (DBS) is a point to multipoint transmission and allows for the direct reception of broadcast signals by the general public.

In the beginning, members of the public were not able to receive signals transmitted by the fixed satellite service (FSS) and only the direct broadcasting satellites services (DBS) enabled the public to receive a broadcast signal. There are scholars that believe transmission by fixed satellite services or "point to point transmissions without further transmission to the public are, however, not protected."[343] Nevertheless, it has also been said that "due to employment of the powerful receiving equipment, signals transmitted from fixed satellite services can also be received directly by public hence they are capable to be treated like signals transmitted by direct broadcasting satellites. The distinction, which was originally made between fixed service satellites and direct broadcasting satellites is thus not generally applied anymore." [344] The Rome Convention fails to define 'broadcast' but it does define broadcasting as "the transmission by wireless means for public reception of sounds, or of images and sounds." [345] Thus, it would appear that satellite broadcasting could be considered as being wireless over the air broadcasting and the Rome Convention can therefore be extended to the satellite broadcasting.[346] In addition to this "the majority of the members of the Intergovernmental Committee of the Rome Convention took the view that the definition of the Convention does include satellite transmission." [347] Later on, in 1996 the WIPO Performances and Phonograms Treaty (WPPT) updated the concept of broadcasting, in particular, regarding satellite broadcasting. It took into account the technological developments that have taken place since the Rome Convention. By combining the notion presented by the Rome and the 1974 Brussels Satellite Convention the WPPT defined broadcasting to include satellite broadcasting.[348]

Though being technically different, cable casting and Internet Protocol Television (IPTV) are both fundamentally based on wired transmission and therefore are not protected under the Rome Convention. Also with mobile and web casting, the latter now being one of the most popular forms of broadcasting, with many broadcasting organizations using live or deferred

[342] Masouye, P. (1985). the Rome Convention: Realities and prospects. *Copyright , 21* (9), p. 309.
[343] Lewinski, S. v. (2008). *International Copyright Law and Policy.* Oxford: Oxford University Press. No. 6.24
[344] WIPO Document SCCR/7/8, Protection of broadcasting organizations, technical background paper prepared by the WIPO Secretariat of April 4, 2002, p.7; and Stewart, S. M. (1989). *International Copyright and Neighbouring Rights* (Second ed.). Butterworths, p. 248.
[345] The WIPO Rome Convention, Article 3(f).
[346] Costa, J. F. (1976). Some reflexions on the Rome Convention. *Copyright , 89* (3), p. 83.
[347] Davies, G. (1979). The Rome Convention 1961: a brief summary of its development and prospects. *European Intellectual Property Review , 1*, p. 154.
[348] The WPPT, Article 2(f): Broadcasting means the transmission by wireless means for public reception of sounds or of images and sounds or of the representations thereof; such transmission by satellite is also broadcasting; transmission of encrypted signals is broadcasting where the means for decrypting are provided to the public by the broadcasting organization or with its consent.

webcasting, both are still considered wired transmission and thus excluded from the Rome Convention. The Rome Convention therefore can no longer be considered to adequately protect the rights of broadcasting organizations in new broadcasting platforms.[349] Due to the technology-dependent wording of its provisions, the Rome Convention proved unsatisfactory to all three categories of related rights, and as a result the Convention has lost significance as technology has evolved. [350] Although we can not deny accuracy of this allegation that "the success of the Rome Convention seen in the national legislation that has been introduced since 1961, even in countries which have not yet announced their intention of joining the Convention." [351]

2. The Convention Relating to Distribution of Program-Carrying Signals Transmitted by Satellite (1974) [352]

The Brussels Satellite Convention is the second international instrument on the protection of broadcasting organizations. Whereas the Rome Convention only covers broadcasts to the public, which is based on the point or points to multi point transmission, the Satellite Convention was adopted to protect only point-to-point transmission of program-carrying signals via satellite. Only satellite broadcasters are beneficiaries of this Convention as it protects only that particular kind of signal transmission.[353] Thus it is supplementary to the Rome Convention in its protection of broadcasting organizations.[354] In addition, when the Rome Convention was adopted, there was no direct reception of the satellite broadcast signal by the public as direct broadcast signal via satellite only became available after adoption of the Brussels Convention. Although due to the definition of broadcasting in the Rome Convention and its emphasis on the 'wireless broadcast to the public' the Rome Convention currently is capable of extending the protection of the broadcast signal transmitted by direct broadcasting satellite to the public.

One of the innovations of the Brussels Convention is that it defined clearly and separately 'signal'[355] and 'program' [356], which in turned assisted the definition of 'program-carrying signal' as being subject matter of the protection of the Convention. Conveniently, the notion of the 'program-carrying signal' corresponds to the notion of 'broadcast' as the subject matter of the Rome Convention. The Brussels Convention has aimed to establish a worldwide system to prevent the unauthorized distribution of program-carrying signals transmitted by satellites that lack of this kind of protection was likely to hamper the use of satellite communications.[357] It intends to protect broadcasting organizations against illegal

[349] Ogawa, M. (2006). *Protection of broadcaster's rights.* Leiden: Martinus Nijhoff Publishers, p.2.
[350] Guibault, L., & Melzer, R. (2004 November). The legal protection of broadcast signals. *IRIS Plus, Legal observations of the European Audiovisual Observatory* (10), p. 2.
[351] Thompson, E. (1981). Twenty years of the Rome Convention: some personal reflections. *Copyright , 94* (10), 211-216, p. 271.
[352] Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite, 21 May 1974, 1144 UNTS 3 (entered into force 25 August 1979) [WIPO Brussels Convention]

[353] Ogawa, M. (2006). *Protection of broadcaster's rights.* Leiden: Martinus Nijhoff Publishers, p.52
[354] Guibault, L., & Melzer, R. (2004 November). The legal protection of broadcast signals. *IRIS Plus, Legal observations of the European Audiovisual Observatory* (10), p. 3.
[355] Article 1(i): signal is an electronically generated carrier capable of transmitting programs.
[356] Article 1(ii): Program is a body of live or recorded material consisting of images, sounds or both, embodied in signals emitted for the purpose of ultimate distribution.
[357] The Satellite Convention, Preamble.

appropriation and distribution of their program-carrying signals by third parties.[358] Technically such signals are communicated or transmitted between different broadcasting organizations or between a broadcasting organization and a cable distributor.[359]
The Brussels Convention is rather a public law convention [360] than a copyright and related right convention. The main difference between the Satellite Convention and the Rome Convention in terms of policy is that, it grants no specific intellectual property or any other rights to broadcasting organizations. While it provides no protection in respect of the program content[361] it has followed a flexible way in respect the nature and means of protection. The Convention requires the Contracting Parties to take 'adequate measures' to prevent the distribution on or from its territory of any program-carrying signal, by any distributor for whom the signal emitted[362] or passing through a satellite that is not intended. It has given full freedom to the national legislation of Contracting Parties to determine how it will give effect to this obligation.[363] The Brussels Diplomatic Conference did not discuss at any great length the meaning of 'adequate measures' used in the Article 2(1) of the convention. According to the general report of the Conference, "While the obligation of the convention might well be undertaken within the legal framework of intellectual property laws through granting protection to signals under theories of copyright or neighboring rights, a contracting party could adopt administrative measures, penal sanctions, or telecommunications laws or regulations on the subject." [364] Thus, the broadcasting organizations cannot enforce the convention unless the Contracting Party grants them a specific right.[365]

Nevertheless, the Satellite Convention is not applicable where the emitted signal intends for direct reception (direct broadcast by satellite or DBS) by the general public.[366] In a direct broadcast by the satellite or DBS, a broadcasting organization, instead of using an aerial located on the earth's surface or located at intermediary terrestrial station, uses an aerial located on a satellite with a very powerful transmitter capable of sending images directly to home receivers without the need to first pick up signals from the satellite then to send it via terrestrial distribution to households.[367] Finally, Article 2(1) of the Convention used the words 'the signal emitted to or passing through the satellite' to indicate that the "convention

[358] Satellite Convention, Article 2.
[359] Guibault, L., & Melzer, R. (2004 November). The legal protection of broadcast signals. *IRIS Plus, Legal observations of the European Audiovisual Observatory* (10). p. 3.
[360] Ogawa, M. (2006). *Protection of broadcaster's rights.* Leiden: Martinus Nijhoff Publishers, p. 49.
[361] Sterling, J. (2003). *World Copyright law: protection of authors' works, performances, phonograms, films, video, broadcasts, and published editions in national, international and regional law* (2nd Edition ed.). London: Sweet and Maxwell. No. 17.11.
[362] The Satellite Convention, Article 1(iv) and (v):
'Emitted signal' or 'signal emitted' is any program-carrying signal that goes to or passes through a satellite.
'Derived signal' is a signal obtained by modifying the technical characteristics of the emitted signal, whether or not there have been one or more intervening fixations.
[363] Rikeston, S., & Ginsburg, J. C. (2006). *International Copyright and Neighbouring Rights* (2nd Edition ed., Vol. II). Oxford: Oxford University Press. No. 19.25.
[364] Ringer, B. (1974). Brussels Diplomatic Conference on the Distribution of Programme-Carrying Signals Transmitted by Satellite, Report. *Copyright* (11), 267-291, para 79.
[365] Stewart, S. M. (1989). *International Copyright and Neighbouring Rights* (Second ed.). Butterworths, para 10.07.
[366] The Satellite Convention, Article 3.
[367] World Intellectual Property Organization (WIPO). (2003). *Guide to the Copyright and Related rights Treaties Administered by WIPO and Glossary of Copyright and Related Rights Terms* (Vol. 891(E)). Geneva: World Intellectual Property Organization (WIPO), p. 179.

applies not only to poaching at the end of the down-leg of a transmission or thereafter, but at any point during the up-leg or down-leg or from the storage unit of the satellite itself." [368]

3. The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), (1994) [369]

The TRIPS Agreement is a part of the World Trade Organization (WTO) Agreement that was signed in April 1994 at the conclusion of the Uruguay Round of the General Agreement on Tariffs and Trade (GATT) and came into force in January 1995. The primary aim of TRIPS is to promote effective and adequate protection of intellectual property rights in the framework of the world trade system. To this end, the need was felt for new rules and disciplines concerning the applicability of the basic principles of GATT 1994 and of relevant international intellectual property agreements or conventions; and establishing adequate standards and principles concerning the availability, scope and use of trade-related intellectual property rights.

In order to simplify the process of international trade between WTO Member States, taking into account their different legal systems and certain inefficiencies of international law, it was necessary for TRIPs to set up provisions on:
(a) Effective and appropriate means for the enforcement of trade-related IP rights;
(b) Effective and expeditious procedures for the multilateral prevention and settlement of disputes between governments;
(c) Multilateral framework or principles, rules and disciplines dealing with international trade of counterfeit goods; and
(d) Resolving disputes on trade-related intellectual property issues through multilateral procedures. [370]

The TRIPS deals with copyright and related rights, and provides international standards for the protection of intellectual properties. TRIPs expands the protection of existing conventions by requiring all WTO Members to recognize the same level of protections and grant the same substantive rights to; authors, performers, phonogram producers and broadcasting organizations, even if they are not Contracting Parties to the Berne and Rome Conventions.[371] The protection of authors' right in TRIPS is based on imperative compliance[372] with Article 1 to 21 of the Berne Convention, excluding the provisions on moral rights.[373] One of the consequences of this is that the WTO dispute resolution procedure can now consider disputes over compliance with Berne Convention[374]. In addition, the TRIPS Agreement contains certain 'Berne-plus' features, in regard to various aspects of copyright responding to new technologies that have given rise to new sorts of works and new methods of distribution.[375]

[368] Ringer, B. (1974). Brussels Diplomatic Conference on the Distribution of Programme-Carrying Signals Transmitted by Satellite, Report. *Copyright* (11), 267-291. Para 83.
[369] Agreement on Trade-Related Aspects of Intellectual Property Rights, 15 April 1994, 1869 UNTS 299 (entered into force 1 January 1995) [TRIPS Agreement]
[370] Ibid, Preamble.
[371] Ibid, Articles 9 and 14.
[372] Akester, P. (2006, April and June). The Draft WIPO Broadcasting Treaty and its Impact on Freedom of Expression. *Copyright Bulletin*, p. 8.
[373] TRIPS Agreement, Articles 9 (1).
[374] Bently, L., & Sherman, B. (2001). *Intellectual Property Law.* Oxford: Oxford University Press, p. 37
[375] Ibid, pp. 37-38.

According to Article 10, computer programs and databases (Compilations of Data)[376] are protected by copyright. The TRIPS Agreement, introduces a 'rental right' for the first time in an international agreement, and though being limited to computer programs, phonograms and cinematographic works,[377]reflects the impact of new modes of distribution is having on international IP law.[378]

TRIPS also expands the three-step test of the Berne Convention from applying only to 'reproduction rights' granted to authors, to all rights granted to authors.
According to Article 14(1), performers have the possibility of preventing unauthorized fixation, reproduction, wireless broadcasting and communication to the public of their performances that it conforms to Article 7 of the Rome Convention; and according to Article 14 (2), the producers of phonograms have the right to prohibit the reproduction of their phonograms, which conforms to the Article 10 of the Rome Convention. As was stated by Gervais the TRIPS provisions on related rights is the result of compromise on all sides, and deals with the three traditional categories of beneficiaries of neighboring rights.[379]

According to Article 3 (1) of TRIPS, any Contracting Party is obliged to grant nationals of other Contracting Party the minimum rights set out in the TRIPS agreement. As with the Berne and the Rome Conventions, TRIPS adheres to the principle of National Treatment. Article 3 (1) provides that each Contracting Party shall accord to the nationals of other Contracting Party treatment no less favorable than that it accords to its own nationals with regard to the protection of intellectual property. Unlike the Berne and the Rome Convention, however, the TRIPS Agreement adopted the 'most favored nation treatment' and requires that "with regard to the protection of intellectual property, any advantage, favor, privilege or immunity granted by a Member to the nationals of any other country shall be accorded immediately and unconditionally to the nationals of all other Members." [380]
Before considering provisions of TRIPS Agreement with regard to broadcasting organizations, it is important to note three important points. Firstly, TRIPS obliges the Contracting Parties to implement the substantive provisions of the Berne Convention. Under the TRIPS Agreement Contracting Parties shall comply with Articles 1 through 21 of the Berne Convention and the Appendix thereto. However, Contracting Parties shall not have rights or obligations under this Agreement in respect of the rights conferred under Article 6bis of that Convention or of the rights derived there from.[381] But it does not follow the same reference to the substantive provision of the Rome Convention. Secondly, with regard to the rights of performers and phonogram producers, TRIPS reiterates most of the substantial regulations of the Rome Convention; as Guibault and Melzer pointed out, it even provides for some supplemental regulations[382] in respect to performers and producers of phonograms but does not provide the same to broadcasting organizations. Thirdly TRIPS extends the term of protection conferred to performers and phonogram producers by the Rome Convention, from

[376] Subject to the conditions that, by reason of the selection or arrangement of their contents, constitute intellectual creations. (Article 10 (2).
[377] Akester, P. (2006, April and June). The Draft WIPO Broadcasting Treaty and its Impact on Freedom of Expression. *Copyright Bulletin*, p. 8.
[378] Bently, L., & Sherman, B. (2001). *Intellectual Property Law*. Oxford: Oxford University Press, p. 38
[379] Geravis, D. J. (2003). *The TRIPS Agreement: Drafting, History and Analysis* (2nd Edition ed.). London: Sweet & Maxwel, p. 160.
[380] TRIPS Agreement, Articles 4.
[381] Ibid, Article 9 (1).
[382] Guibault, L., & Melzer, R. (2004 йил November). The legal protection of broadcast signals. *IRIS Plus, Legal observations of the European Audiovisual Observatory* (10), p. 3.

20 years to 50 years, though the term of protection to broadcasting organizations remains unchanged at 20 years.[383]

TRIPS therefore protect IP rights with comprehensive enforcement mechanisms, but imposing no obligations on Contracting Parties to confer neighboring rights to broadcasting organizations.
Additionally, except in the case of the right to prohibit (control) communication to the public, it does not provide any new intellectual property rights or even a higher level of protection to broadcasting organizations. [384] In other words, the TRIPS Agreement follows a similar line as the Rome Convention in that it grants minimum rights and protections to broadcasting organizations.[385] In relation to this protection of broadcasting organizations, the scope of protection still does not extend to cablecasting and any other wire based transmission of the broadcast signal. The scope of rights also does not cover distribution of fixations of the broadcast.[386]

TRIPS deals with the protection of the broadcasting organizations in two ways. It provides that broadcasting organizations shall have the right to prohibit unauthorized fixation, reproduction of fixations, and the rebroadcasting by wireless means of broadcasts, as well as the communication to the public of television broadcasts of the same. Where Contracting Parties do not grant such rights to broadcasting organizations, they shall provide owners of copyright in the subject matter of broadcasts with the possibility of preventing the above acts, subject to the provisions of the Berne Convention. [387]

Article 14(3) was criticized by some however, with claims that 'TRIPS only recognizes broadcasting rights for copyright owners',[388] allows member countries not to recognize the rights of broadcasting organizations',[389] and 'TRIPS effectively ignored broadcasters' rights.[390] In other words a Contracting Party has no obligation to grant special rights to broadcasters as long as it complies with the relevant provision of the Convention.[391]

Although TRIPS does not provide appropriate or updated protection to broadcasting organizations, it does not ignore broadcasters' rights as some would claim. Article 14(3) does, in fact, require 'where Members do not grant such rights to broadcasting organizations', they shall provide such rights (right to control or right to prevent certain acts) to copyright owners of the subject matter of the broadcasts. The reason behind this clause is that, this provision seems to imply that only those Contracting Parties may deny specific rights to broadcasting organizations in the copyright laws of which the concept of works is sufficiently broad to grant efficient protection to broadcasting organizations in respect of their broadcast

[383] TRIPS Agreement, Article 14 (5).
[384] Ogawa, M. (2006). *Protection of broadcaster's rights.* Leiden: Martinus Nijhoff Publishers, p.52.
[385] Munoz Tellez, V., & Waitara, A. C. (2007). A Development Analysis of the Proposed WIPO Treaty on the Protection of Broadcasting and Cablecasting Organizations. *Research Paper* (9), p. 21.
[386] Ganter, M., Matzneller, P., & Scheuer, A. (2010). Relevant International and European Law. In S. Nikoltchev, *IRIS plus, New Services and Protection of Broadcasters in Copyright Law* (pp. 38-45). Strasbourg, France: European Audiovisual Observatory, p. 43.
[387] TRIPS Agreement, Article 14 (3).
[388] Ogawa, M. (2006). *Protection of broadcaster's rights.* Leiden: Martinus Nijhoff Publishers, p.52.
[389] Ibid.
[390] Blakeney, M. (1996). *Trade Related Aspect of Intellectual Property rights: A Concise Guide to the TRIPS Agreement.* London: Sweet & Maxwell, p. 49.
[391] Guibault, L., & Melzer, R. (2004 November). The legal protection of broadcast signals. *IRIS Plus, Legal observations of the European Audiovisual Observatory* (10), p. 3. And Taubman, A., Wager, H., & Watal, J. (2012). *A handbook on the WTO TRIPS Agreement.* Cambridge: Cambridge University Press, p. 52.

programs.[392] Meanwhile, if a Contracting Party does not grant protection for broadcasting organizations it must at least recognize the minimum rights conferred by Article 13 of the Rome Convention. However this provision of the TRIPS Agreement is ambiguous because all broadcasts cannot be protected under the Berne Convention because same subject matter will inevitably be in the public domain.[393] Consequently, it is not clear how the Contracting Parties can fulfill their obligation to give protection in respect of such broadcasts to copyright owners. Hence, those broadcasts whose underlying content is not a copyrighted work fall outside the protection provided by the TRIPS Agreement in those Members that do not recognize neighboring or related rights for broadcasting organizations.

Some commentators viewed that on the basis of Article 22 of the Rome Convention, the TRIPS Agreement should be considered as a special agreement to the Rome Convention for the latter's Contracting Parties. Article 22 of the Rome Convention allows its Contracting Parties to enter into special agreement among them, provided that the provisions of that agreement grant greater protection or at a minimum are not contrary to the Rome Convention.[394]

Finally, despite the criticisms of TRIPS regarding protection of broadcasting organizations, it seems that the TRIPS represented a positive step in that it provides a complementary right to broadcasting organizations in relation to 'communication to the public'. This builds on the Rome Convention which limited the right of communication to the public' only 'if such communication is made in places accessible to the public against payment of an entrance fee',[395] TRIPS however, provides a right to control or prevent any kind of communication to the public in regards a broadcasters' broadcasts.

4. The European Agreement on the Protection of Television Broadcasts 1961 (EAT)[396]

The 'European Agreement on the Protection of Television Broadcasts' also known as the EAT is another international instrument, which was passed by the Council of Europe and intended to protect broadcasting organizations. The work on this agreement started at a similar time as the Committee of Experts was discussing the proposed text for the Rome Convention. The difference between the EAT and the Rome Convention is that EAT was the first international instrument which exclusively dealt with the protection of broadcasting organizations in the framework of intellectual property law and afforded them specific neighboring rights. The Olympic Games of 1960 in London and the need of broadcasters to have protection were mentioned in the course of the early discussions as the Council of

[392] World Intellectual Property Organization (WIPO) . (1996). *Implication of the TRIPS Agreement on the Treaties Administered by WIPO (No. 464 (E))* . WIPO publication, para 67; Also see: WIPO Document SCCR/1/3, Existing international, regional and national legislation concerning the protection of the rights of broadcasting organizations, Memorandum prepared by the International Bureau of September 7, 1998, p.3.
The same reasoning presented by Guibault and Melzer in: Guibault, L., & Melzer, R. (2004 November). The legal protection of broadcast signals. *IRIS Plus, Legal observations of the European Audiovisual Observatory* (10), p. 3.

[393] Rivers, T. (2007). *A broadcasters' treaty? published in Copyright Law, A hand book of Contemporary Research.* (P. Torremans, Ed.) Edward Elgar Publishing, p. 488.

[394] Lewinski, S. v. (2008). *International Copyright Law and Policy.* Oxford: Oxford University Press, para 6.78

[395] WIPO Rome Convention, Article 13 (d).

[396] European Agreement on the Protection of Television Broadcast, 22 June 1960, CETS No 034 (entered into force 1 July 1961) [European Agreement on the Protection of Television Broadcast].

Europe considered the adoption of this agreement.[397] The EAT, which has been amended by a Protocol and two Additional Protocols,[398] originally entered into force on July 1, 1961. Although the draft of the EAT was noted at the Committee of Experts responsible for preparation of the draft of the Rome Convention, but it seems that the Committee and the subsequent Convention were not affected by the work going on in the Council of Europe.[399]

In regard to the objectives and rationales of the Council of Europe in the adoption of the EAT, it was stated that the organizers of musical or dramatic performances and sports organizations give their consent to the broadcasting of their performances or events to other countries upon the condition that the relays will not be used for purposes other than private viewing. Despite this, the majority of broadcasting organizations were powerless at that time to fulfill their obligations to the organizers of sporting events and other public events and to prevent the unauthorized re-broadcasting, fixation or public performance of their broadcasts.[400] The rights granted to broadcasting organizations by the EAT, were more modern[401] and wider in scope[402] than the minimum rights which were conferred by the Rome Convention to broadcasting organizations. The EAT granted the right to authorize or prohibit the right to 'rebroadcast'; 'cablecasting or any other wired means of the broadcast to the public; a broad and unconditional right of communication of such broadcasts to the public by means of any instrument; making any fixation of such broadcasts and making still photographs thereof and any reproduction of such a fixation; re-broadcasting; wire diffusion or public performance with the aid of the fixations or reproductions referred[403] in the Agreement, except where the organization in which the right is vested has authorized the sale of the said fixations or reproductions to the public. Therefore, the neighboring rights granted by the EAT to broadcasting organizations extended the protection to the transmission of wired broadcasts',[404] to the unrestricted right to authorize or prohibit reproduction of fixations of their broadcast without limiting application of this right, only to the fixations made without the consent of the broadcasting organization as it is under the Rome Convention.[405] Finally the EAT granted rights of re-broadcasting, wire diffusion or public performance of fixations or reproductions except in cases where the organization in which the right holder, has authorized the sale of the said fixations or reproductions to the public.[406]
As Helberger has pointed out, due to technical reasons, only a very limited number of countries has joined to the ETA; and they had reservations with respect to the main

[397] Stewart, S. M. (1989). *International Copyright and Neighbouring Rights* (Second ed.). Butterworths, para 11.04.
[398] Text amended according to the provisions of Protocol (ETS No. 54), which entered into force on 24 March 1965; of Additional Protocol to the Protocol (ETS No. 81), which entered into force on 31 December 1965; and of Additional Protocol to the Protocol (ETS No. 113), which entered into force on 1 January 1985.
[399] Ogawa, M. (2006). *Protection of broadcaster's rights.* Leiden: Martinus Nijhoff Publishers, p.39.
[400] The European Agreement on the Protection of Television Broadcasts, Preamble.
[401] Guibault, L., & Melzer, R. (2004 November). The legal protection of broadcast signals. *IRIS Plus, Legal observations of the European Audiovisual Observatory* (10), p. 3.
[402] Rivers, T. (2007). *A broadcasters' treaty? published in Copyright Law, A hand book of Contemporary Research.* (P. Torremans, Ed.) Edward Elgar Publishing, p. 489.
[403] The European Agreement on the Protection of Television Broadcasts, Article 1(1)(d).
[404] Ibid, Article 1 (1) (b); Although Article 3 of the Agreement allows the Member States, to make certain reservations including Article 1(1)(b) to withhold the protection regarding wire diffusion provided for in that sub-paragraph regarding broadcasting organizations constituted in their territory or transmitting from such territory. Accordingly, the Member States can restrict the exercise of such protection, as regards broadcasts by broadcasting organizations constituted in the territory of another party, to the Agreement or transmitting from such territory, to a percentage of the transmissions by such organizations, which shall not be less than 50% of the average weekly duration of the broadcasts of each of these organizations.
[405] Ibid, Article 1 (1) (d).
[406] Ibid, Article 1 (1) (e).

provisions conferring wider neighboring rights to broadcasting organizations[407] and to the minimum term of protection under the agreement being 20 years from the end of the year in which the broadcast took place. Under the Additional Protocol to the Protocol to the EAT (ETS No. 113)[408] Contracting Parties to the Agreement also become Contracting Parties to the Rome Convention.[409] In all, only six counties became Contracting Parties to the EAT, but it retains its significance not because of its adherents, but because it was agreed upon prior to the Rome Convention and provided for a wider scope of protection than the Convention as well.[410]

5. The European Convention Relating to Questions on Copyright Law and Neighboring Rights in the Framework of Trans-frontier Broadcasting by Satellite (European Satellite Convention) (1994)[411]

The European Satellite Convention (ESC) was another initiative by the Council of Europe to regulate copyright and neighboring rights in respect of satellite broadcasting. It was the result of increasing exploitation of the Direct Broadcast by Satellite (DBS) and Fixed Satellite Services (FSS), and aimed to consider the different legal aspects of the technical differences between direct broadcasting satellites DBS and FSS from the viewpoint of copyright law and neighboring rights. In this manner it was designed to fill the gaps left by the Rome Convention in respect of DBS and FSS and to remove doubts regarding the scope of application of the Rome Convention to broadcasting by satellite.

It is of relevance however, because it contains innovations comparable to the Rome Convention, TRIPS Agreement and EAT. The ESC defines the notion of satellite broadcasting and the technical act of satellite broadcasting. For the first time, the transmission of works and other contributions by DBS was considered to be broadcasting by an international instrument. Also, the transmission of works and other contributions by FSS under conditions which, as far as individual direct reception by the general public is concerned, are comparable to those prevailing in the case of DBS, were considered as broadcasting. Finally, the transmission of program-carrying signals in encrypted form was considered to be broadcasting in cases where the means of decoding the broadcast is made available to the general public by the broadcasting organization, or by a third party with its consent.[412] These three innovations in defining the notion of broadcasting were later followed

[407] Helberger, N. (1999). *Neighboring rights protection of broadcasting organization: Current problems and possible lines of action.* Strasbourg: Council of Europe, Doc. No. MM-S- PR (1999) def.p. 4.
[408] It is open for signature by member States of the Council of Europe, which have signed or acceded to the Agreement, in Strasbourg, on 21 March 1983, and entered into force on 1 January 1985.
[409] Article 13(2) of the Agreement as amended by Additional Protocol (ETS No. 113) "...as from 1 January 1990, no State may remain or become a Party to this Agreement unless it is also a Party to the WIPO Rome Convention.
Available at: http://conventions.coe.int/Treaty/en/Summaries/Html/034.htm (last visited in April 2014)
[410] Rivers, T. (2007). *A broadcasters' treaty? published in Copyright Law, A hand book of Contemporary Research.* (P. Torremans, Ed.) Edward Elgar Publishing, p. 489
[411] European Convention relating to questions on Copyright Law and Neighbouring Rights in the Framework of Transfrontier Broadcasting by Satellite, 11 May 1994, ETS No 153 (entered into force 1 December 1999) [European Satellite Convention]
[412] Ibid, Article 1.

by WPPT (1996).[413] Regarding the definition of the act of broadcasting, the ESC clearly provides that an act of broadcasting by satellite shall be considered to comprise both the up-link to the satellite and the downlink to the receiver on Earth.[414] The ESC bases its model of protection and the scope of rights for the broadcasting organizations equally and in the same manner in accordance to the Rome Convention. By direct reference to the provision of the Rome Convention, it adds no additional neighboring rights to broadcasters exceeding the protections stipulated by the Rome Convention.[415]

Part Two. Regional instruments

1. The Cartagena Agreement Decision No. 351 (1993)

In 1969, Bolivia, Colombia, Ecuador, Peru and Venezuela entered into an agreement known as the Cartagena Agreement.[416] The Agreement was part of a general effort to advance towards the formation of an Andean sub-regional community,[417] through achieving harmonization of the economic and social policies and the approximation of their national laws.[418]

In the field of copyright and related rights, the Contracting Parties signed the Cartagena Decision No. 351 "Common Provisions on Copyright and Related Rights" on December 17, 1993. In its protection of broadcasting organizations the Decision followed the Rome Convention. It explicitly recognized a broadcaster's neighboring rights and granted them a series of intellectual property type rights. Based on the level of developments in the broadcasting industry in 1993 and by virtue of economic, social and technological developments and prevalent business model of the industry, the Cartagena Decision tried to update and develop the existing international protection of broadcasting organizations provided by the Rome Convention in four areas.

The significance of the Decision is that it sought to create and introduce new notions of the broadcasting industry into a regional arrangement that was unprecedented in international intellectual property law at that time. It proposed definitions for 'broadcasting organization',[419] 'fixation',[420] 'transmission',[421] 'retransmission'[422] and 'ephemeral

[413] WPPT, Article 2(f) 'broadcasting' means the transmission by wireless means for public reception of sounds or of images and sounds or of the representations thereof; such transmission by satellite is also 'broadcasting'; transmission of encrypted signals is 'broadcasting' where the means for decrypting are provided to the public by the broadcasting organization or with its consent.

[414] European Satellite Convention, Article 2.

[415] European Satellite Convention, Article 5(1): "As far as trans-frontier broadcasting by satellite is concerned, performers, producers of phonograms and broadcasting organizations from States parties to this Convention shall be protected, as a minimum, in accordance with the provisions of the Rome Convention (1961)."

[416] ANDEAN Decision No. 351 - Common Provisions on Copyright and Neighboring Rights, Gaceta Oficial del Acuerdo de Cartagena, 17 December 1993, X - No 145 (entered into force 21 December 1993) [ANDEAN Decision No. 351]

[417] Ibid, para 3.

[418] Ibid, para 4.

[419] Ibid, Article 3. "Broadcasting organization means the radio or television company that transmits programs to the public."

[420] Ibid, Article 3. "Fixation means the incorporation of signs, sounds or images in a physical material that enables them to be perceived, reproduced or communicated."

[421] Ibid, Article 3. "Transmission means the sending of sounds or images and sounds over a distance for reception by the public."

recording'.[423] Like the Rome Convention, the Decision limited broadcasters only to legal entity e.g. organization or companies, and therefore real persons could still not be considered broadcasters. Unlike the Rome Convention, instead of defining 'broadcasting' and 'rebroadcasting' it proposed 'transmission' and 'retransmission'. It seems that the idea behind this innovation was to extend the traditional wireless 'broadcasting' and 'rebroadcasting' recognized by the Rome Convention to include broadcasting by wired means, cable, fiber and also satellite broadcasting,[424] it therefore expanded the scope of application of the Rome Convention. In addition, through proposing a new exclusive right of retransmission, the Decision replaced the narrowly drafted 'right to communication to the public' of the Rome Convention.[425] However, by using 'relaying' of a signal or program in the definition of 'retransmission', the Decision intended only to cover simultaneous retransmission of a broadcast signal. Therefore, like the Rome Convention, deferred retransmission by wireless means or wire and cable is excluded. Finally, the Decision proposed for the first time the definition for 'ephemeral recording' in a regional agreement concerned with neighboring rights. This definition complies with the Bern Convention,[426] which the ephemeral recordings is defined as a kind of recording, which is made by a broadcasting organization by means of its own facilities and used for its own broadcasts.

The Decision confers to the broadcasting organizations three exclusive rights to (i) authorize or prohibit the retransmission of their broadcasts by any means or process; (ii) fixate their broadcasts on a physical medium; and (iii) reproduce a fixation of their broadcasts[427] for a term of protection that may not be less than 50 years, counted from January 1 of the year following that in which the broadcast occurred.[428] The Decision allowed Contracting Parties to set the same limits on the rights recognized for broadcasting organization in the cases allowed by the Rome Convention.

2. The North American Free- Trade Agreement (NAFTA) (1993)[429]

The North American Free Trade Agreement is another regional agreement concluded by Canada, Mexico and the USA in 1993, and which came into force in 1994. NAFTA protects broadcasting organizations through protecting television-programming content transmitted

---

[422] Ibid, Article 3. "Retransmission" means the relaying of a signal or program received from another source, affected by the distribution of signs, sounds or images by wireless means or by wire, cable, optic fiber or other comparable medium."

[423] Ibid, Article 3. "Ephemeral recording means the sound or audiovisual fixation of a performance or broadcast made for a finite period by a broadcasting organization by means of its own facilities and used for the transmission of its own broadcasts."

[424] Ibid, Article 40. "The broadcast referred to in the foregoing Article shall include the production of program-carrying signals intended for a broadcasting or telecommunication satellite, and also distribution to the public by a body that broadcasts or disseminates the transmissions of others received by means of such a satellite."

[425] WIPO Rome Convention, Article 13(d) "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; it shall be a matter for the domestic law of the State where protection of this right is claimed to determine the conditions under which it may be exercised."

[426] Berne Convention, Article 11bis (3).

[427] ANDEAN Decision No. 351, Article 39.

[428] Ibid, Article 41.

[429] The North American Free-Trade Agreement between the Government of Canada, the Government of the United Mexican States and the Government of the United States of America, 17 December 1992, CTS 2 (entered into force 1 January 1994) [NAFTA Agreement]

via encrypted satellite signals.[430] However, in contrast to the Decision No. 351 of the Cartagena Agreement and other former-discussed international instruments, NAFTA does not confer any neighboring rights to broadcasting organizations. Instead, in an innovative action, it imposes obligations on its Contracting Parties to include in their respective national law criminal and civil sanctions to protect the technological protection measures used by broadcasting organizations in regard their satellite broadcast signal. Chapter 17 of NAFTA included the relevant provisions on intellectual property. This Chapter makes it a distinctive regional agreement regarding protection of broadcasting organizations. Unlike the Rome Convention and any other international and regional instrument, for the first time in the international intellectual property law, NAFTA as a regional binding agreement recognized protection of technological protection measures (TPM) i.e. encryption of the satellite broadcast signal employed by the broadcasting organizations. It imposed obligations on its Contracting Parties to criminal and civil sanctioning of the unauthorized encryption of a satellite broadcast signal.

Today, TPM is recognized as indispensable and as a supplementary protective measure towards effective protection of other neighboring right (performing artists and phonogram producers) in WPPT and for copyright under WCT. It is indispensable because relying solely on copyright or related rights for the protection of broadcasters' rights, without giving protection to TPM under national and international law, would be inefficient and frustrating. Accordingly, under Article 1707 of the NAFTA; 'Protection of Encrypted Program Carrying Satellite Signals', it is provided that each Contracting Party shall consider it a criminal offense to manufacture, import, sell, lease or otherwise make available a device or system that's primary purpose is the decoding of encrypted program carrying satellite signal without the authorization of the lawful distributor of such signal. In addition, each Contracting Party would consider it a civil offense to receive, in connection with commercial activities, or further distribute, an encrypted program carrying a satellite signal that has been decoded without the authorization of the lawful distributor of the signal or to engage in any activity prohibited under subparagraph (a) of Article 1707.[431]

3. The European Union Directives

In the last two decades, the European Union (EU) has moved towards the harmonization of copyright and related rights laws of its Member States. The differences in these laws represented a potential barrier to trade within the EU's internal market. The EU Directives are aimed at ensuring the approximation of legal provisions where and to the extent that this appears necessary for the establishment and functioning of the internal market.[432] The Directives, which are the EU's tool of implementing policy has not only played a very important role in harmonizing specific areas of copyright and related rights laws but they have also updated the existing copyright and related rights and even created new intellectual property-type rights and other supplementary protections in EU law and thus the law of its Member States. The Directives have been an essential factor in the formulation of a coherent European copyright law and an approximation between two existing legal traditions within the Union; d*roit d'auteur* and copyright law.

[430] WIPO Document SCCR/1/3, Existing international, regional and national legislation concerning the protection of the rights of broadcasting organizations, Memorandum prepared by the International Bureau of September 7, 1998, para. 33.
[431] NAFTA Agreement, Chapter Seventeen, Article 1707.
[432] Kur, A., & Dreier, T. (2013). *European Intellectual Property Law, Text, Cases & Materials.* Cheltenham, UK: Edward Elgar, p. 58.

There have been four Directives that have had the greatest impact on the existing legal regime of rights and protection for broadcasting organizations. The Directives created new IP-type property rights and other protections for broadcasting organizations, which were sympathetic and responsive to the technological changes occurring in the industry.
The relevant Directives, which will be discussed in this section, are:
(i) The Rental and Lending Rights Directive (1992);
(ii) The Cable and Satellite Directive (1993);
(iii) The Term Directive (1993); and (iv) The Information Society Directive (2001).

The Directives are important within the EU because they are directly effective in its Member States, a fact that has two main consequences; "First a Member States cannot rely upon its failure to implement a Directive against an individual. Secondly, national courts are obliged to interpret national law in order to insure that the objectives of Directives are achieved."[433]

3.1. Rental and Lending Rights Directive (1992)[434]

The Council Directive 92/ 100/EEC of 19 November 1992 on 'Rental right and Lending right and on certain rights related to copyright in the field of intellectual property'[435] which is amended by the Council Directive 93/98/EEC[436] and the Directive 2001/29/EC of the European Parliament and of the Council[437] updated not only the protection of broadcasting organizations, but also presented a new notion of broadcast, a new concept of broadcasting and of a broadcasting organization. The Rental Directive is codified by the Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006.[438]
The Rental Directive added film producers as the forth category of beneficiaries of neighboring rights in EU law. This addition was a reaction to new forms of exploitation[439] through which piracy had become an increasing threat,[440] and the Directive aimed to give adequate protection to the copyright works and subject matter of related rights by rental and lending rights and as well as the protection of the subject matter of related rights by fixation right, reproduction right, distribution right, right to broadcast and communication to the public.[441] Furthermore, it emphasized that without adequate legal protection of the right holders concerned securing incomes and recouping investments in copyright and subject matter of related rights was impossible.[442] This Directive harmonized the economic rights prescribed by the Rome Convention and generally follows the structure of this Convention though with the exception of granting a new right of distribution of fixation.[443] Broadcasting organizations were given the exclusive right to authorize or prohibit fixation of their

[433] Tritton, G., Davis, R., Graham, J., Malynicz, S., & Roughton, A. (2008). *Intellectual Property in Europe* (3rd Edition ed.). London: Sweet & Maxwell, p. 1.025.
[434] The Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property, Official Journal of the European Union, L 346, 27.11.1992, p. 61.
[435] Ibid, p.61.
[436] Official Journal of the European Union, L 290, 24.11.1993, p.9.
[437] Official Journal of the European Union, L 167, 22.06.2001, p.10.
[438] Official Journal of the European Union, L 376, 27.12.2006, p.28.
[439] Rental Directive 92/100/EEC of 19 November 1992, Recital, para 4.
[440] Ibid, para 2.
[441] Ibid, para 3.
[442] Ibid, para 5.
[443] Goldstein, P., & Hugenholtz. (2010). *International copyright: Principles, law and practice.* Oxford: Oxford University Press, p. 337.

broadcasts, including both direct and indirect reproduction and distribution of fixation of their broadcasts. The fixation right was drafted in such a way that it is wider and more inclusive than the Rome Convention;[444] in addition the Directive changed used a different description of broadcasting and form of distribution that was used in the Convention. Unlike in the Rome Convention, the Directive extended the broadcasting to other forms of distribution to wire based transmission of broadcast signal including cablecasting and broadcast by satellite.[445] However, the Directive stated that a cable distributor, which merely retransmits by cable the broadcasts of broadcasting organizations, does not have protection of the fixation right set out in the Directive.[446] EU Member States felt it was not appropriate to grant neighboring rights for cable distributors that only make simultaneous retransmissions of received broadcasts,[447] instead broadcasting organizations also were conferred the exclusive right to authorize or prohibit the direct or indirect reproduction of fixations of their broadcasts.[448] Nonetheless, in regard to the right of rebroadcasting and communication to the public, the Directive did not go beyond the Rome Convention, meaning that the Directive recognized only the right of 'simultaneous terrestrial rebroadcast' and the right of communication to the public in places accessible to the public against payment of an entrance fee.[449]

Finally, another important feature of the Rental and Lending Directive is that it created a new 'distribution right' or 'the right to make available to the public'[450] for broadcasting organizations by the sale or otherwise of fixation of their broadcasts including copies thereof.[451] This gives broadcasting organizations the rights of 'control over their broadcasts' even after the broadcasts are received. The distribution right of the Directive does not exhausts within the European Community except where the first sale of the fixation in the Community is made by the right holder or the party with the consent of the right holder.[452] This means that the right holder in the EU can prevent the fixation of the broadcast, which was legitimately made outside the EU from being sold in the EU. A commentator stated that the right of distribution can be equivalent to the 'right of importation', which is not recognized in the Rome Convention.[453]

3.2. Satellite and Cable Directive (1993)[454]

The Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission also known as SatCab is the second EU Directive, which updated the

[444] Rental Directive 92/100/EEC of 19 November 1992, Article 6 (2).
[445] Ibid, Articles 6 (2) and 6 (3).
[446] Ibid, Article 6 (3).
[447] Guibault, L., & Melzer, R. (2004 йил November). The legal protection of broadcast signals. *IRIS Plus, Legal observations of the European Audiovisual Observatory* (10), p. 4.
[448] Rental Directive 92/100/EEC of 19 November 1992, Article 7.
[449] Ibid, Article 8(3) Member States shall provide for broadcasting organizations the exclusive right to authorize or prohibit the rebroadcasting of their broadcasts by wireless means, as well as the communication to the public of their broadcasts if such communication is made in places accessible to the public against payment of an entrance fee.
[450] The right of distribution or making available to the public in the Rental Directive does not cover making available the public through interactive on-demand services.
[451] Rental Directive 92/100/EEC of 19 November 1992, Article 9(1).
[452] Ibid, Article 9 (2).
[453] Ogawa, M. (2006). *Protection of broadcaster's rights.* Leiden: Martinus Nijhoff Publishers, p.56.
[454] Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and Cable retransmission, OJ L 248 6 October 1993 p.15.

protection of broadcasting organizations in the EU. It was adopted with a view to removing the legal uncertainty that impedes cross-border satellite broadcasting and aims to deal with copyright issues arising from satellite and cable technology.[455] This Directive recognizes and extended the rights provided for the broadcasting organizations to both Cable transmission and Satellite broadcasting.[456]

According to SatCab, 'for the purpose of communication to the public by satellite, the rights of broadcasting organizations shall be protected in accordance with the provisions of Articles 6, 7, 8 and 10 of the Rental Directive 92/100/EEC'.[457] In this regard, the term 'broadcasting by wireless means' in the Rental and Lending Right Directive shall be understood as including communication to the public by satellite.[458] Nevertheless, the key provisions of SatCab are Article 2 and 1(2). Under Article 2 Member States shall provide an exclusive right for the author to authorize the communication to the public by satellite of copyright works, subject to the provisions set out in SatCab. It means that the author of a work has "the right to control the communication of its work to the public by satellite"[459] but it is subject to other provisions of SatCab. One of the provisions is Article 1(2), which stipulates that the act of communication will be deemed to take place in the country in which the satellite signals are injected into the space circuit under the control of the broadcasting organization. Its effect is to require broadcasters to pay the collecting societies in the place where the communication is deemed to have taken place. This relieves broadcasters of the need to obtain the consent of the numerous right holders, which are behind a satellite's footprint.[460]
As regards the cable retransmission right, SatCab provides that Member States shall ensure that, when programs from other Member States are retransmitted by cable in their territory, the applicable copyright and related rights are observed and that such retransmission takes place on the basis of individual or collective contractual agreements between copyright owners, holders of related rights and cable operators.[461] Article 9 of SatCab contains special provisions concerning the exercise of the cable retransmission right, notably that such rights may be exercised only through a collecting society, but according to Article 10, these provisions do not apply to the rights exercised by a broadcasting organization in respect of its own transmission, irrespective of whether the rights concerned are its own or have been transferred to it by other copyright owners and/or holders of related rights.[462] In cases that agreements are not made, Articles 11 and 12 contain provisions on mediation and prevention of the abuse of negotiating positions.[463]

As regards the right of 'communication to the public by satellite', Article 1(2)(d) of SatCab draws two clear guidelines for Member States law providing that where such an act occurs in a non-EU State which does not provide the level of protection concerning satellite broadcasting provided for in SatCab and if the program-carrying signals are transmitted to the

[455] Vousden, S. (2012). Airfield, Intermediaries and the Rescue of EU Copyright Law. *Intellectual Property Quarterly* (4), p. 312.
[456] Ogawa, M. (2006). *Protection of broadcaster's rights.* Leiden: Martinus Nijhoff Publishers, p.57
[457] Satellite and Cable Directive (1993), Article 4 (1).
[458] Ibid, Article 4 (2).
[459] Vousden, S. (2012). Airfield, Intermediaries and the Rescue of EU Copyright Law. *Intellectual Property Quarterly* (4), p. 311
[460] Ibid.
[461] Cable and Satellite Directive (1993), Article 8(1).
[462] WIPO Document SCCR/1/3, Existing international, regional and national legislation concerning the protection of the rights of broadcasting organizations, Memorandum prepared by the International Bureau of September 7, 1998, para. 19.
[463] Ibid, para 20.

satellite from an uplink station situated within a Member State, then that act of communication to the public by satellite shall be deemed to have occurred in that Member State and the rights provided for in the SatCab shall be exercisable against the person operating the uplink station. If there is no such use of an uplink station situated in a Member State but instead a broadcasting organization established in a Member State has commissioned the act of communication to the public by satellite, then that act shall be deemed to have occurred in the Member State in which the broadcasting organization has its principal establishment in the EU and the rights provided for under the SatCab shall be exercisable against the broadcasting organization.[464]

3.3. Term Directive (1993)[465]

The European Council Directive 93/98/EEC of 29 October 1993 on harmonizing the term of protection of copyright and certain related rights has played an important role in the updating of protection for broadcasting organizations through extending the terms of protection.[466] The Berne and the Rome Convention laid down only minimum terms of protection of the rights and leave the Contracting States free to grant longer terms if they so desired. In the EU there were certain Member States that had exercised this entitlement but there were other Member States that had not yet became party to the Rome Convention.[467] This situation created differences between the national law governing the terms of protection of copyright and related rights and impeded the free movement of goods and freedom to provide services and distorted competition in the internal market, one of the cornerstones of the EU. Therefore, with a view to the smooth operation of the internal market, the Term Directive aimed to harmonize the laws of the EU Member States in respect of the terms of protection throughout the Union.[468]

According to the Term Directive,[469] the rights of broadcasting organizations shall expire 50 years after the first transmission of a broadcast, whether this broadcast is transmitted by wire or over the air, including by cable or satellite.[470] The distinguishing feature of the Term Directive from the Rome Convention, was that, in addition to the extension of term of protection from 20 years to 50 years, was establishing the criterion of the 'first transmission'. Based on this criterion, the rights of broadcasting organizations shall expire 50 years after the first transmission of a broadcast, whether this broadcast was transmitted by wire or over the air, including by cable or satellite.[471] This means that the duration of term of protection is

[464] Cable and Satellite Directive (1993), Article 1(2)(d).
[465] Council Directive 93/98/EEC of 29 October 1993 harmonizing the term of protection of copyright and certain related rights, OJ L 290 24 November 1993, p. 9.
Available at: http://www.wipo.int/wipolex/en/text.jsp?file_id=126897 (Last visited September 2014)
[466] *Official Journal of the European Union*, (L 290, 24.11.1993, p.9). This Directive amended by Directive 2001/29/EC of the European Parliament and of the Council, *Official Journal L 167, 22.6.2001, p. 10* and codified by the Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006, *Official Journal L 372, 27/12/2006 P. 0012 – 0018*
[467] Term Directive 93/98/EEC (1993), Recital, para 2.
[468] Ibid, para 3.
[469] Ibid, Article 3 (4).
[470] WIPO Document SCCR/1/3, Existing international, regional and national legislation concerning the protection of the rights of broadcasting organizations, Memorandum prepared by the International Bureau of September 7, 1998, para. 24.
[471] Term Directive 93/98/EEC (1993), Article 3 (4).

calculated from the first broadcasting only; and each repeated broadcasting individually is not granted another separate term of protection.[472]

3.4. Information Society Directive 2001[473]

The Copyright Directive (2001/29/EC of 22 May 2001) also known as InfoSoc Directive is the last and most important EU Directive, which addressed the protection of broadcasting organizations in 2001. As a minimum level of protection to be conferred to the broadcasting organizations, its provisions are now implemented in all Member States of the EU. However, the national law of some Member States, for example the UK, goes further than the minimum rights and protections, which were conferred by the Directive. The Directive aimed to implement the EU's obligations under the WCT and WPPT, and to consolidate and extend existing economic rights, such as the right of reproduction. It also introduced new intellectual property rights, such as the right of making available online and other non-intellectual property rights protections.[474] The main goal of this directive was; to adapt the rights conferred to broadcasting organizations and other right holders to the digital environment; and to respond adequately to economic realities such as new forms of exploitations and technological challenges and finally improve the means to fight new forms of piracy.[475]

There are five important sections of the InfoSoc Directive that should be studied in closer detail:

1. Broad definition of the reproduction right

The Directive defines the scope of the acts covered by the reproduction right in regard to the different beneficiaries of copyright and related rights. In order to ensure legal certainty, it presented a broad definition of reproduction[476] because "prior to this directive there was a divergence in the approach of Member States on the question of electronic and transient copying. This led to inconsistency in relation to protection against online digital acts of reproduction." [477] Article 2(e) of the Directive stated that Member States shall provide for broadcasting organizations the exclusive right to authorize or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part of fixations of their broadcasts, whether those broadcasts are transmitted by wire or over the air, including by cable or satellite. Therefore it "extends the reproduction right of broadcasting organizations to include temporary digital copies." [478]

---

[472] Walter, M. (2000). The relationship of, and comparison between, the Rome Convention, the WIPO Performances and Phonograms Treaty (WPPT) and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement); the evolution and possible improvement of the protection of the neighboring rights recognized by the Rome Convention . *Copyright Bulletin , XXXIV* (3), p. 31.

[473] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society, Official Journal L 167, 22 June 2001, p. 10.
Available at: www.wipo.int/wipolex/en/text.jsp?file_id=126977 (Last visited September 2014)

[474] Goldstein, P., & Hugenholtz. (2010). *International copyright: Principles, law and practice.* Oxford: Oxford University Press, p. 339.

[475] Copyright Directive 2001/29/EC (2001) Recitals, para 5, 6 and 15.

[476] Ibid, para 21.

[477] Tritton, G., Davis, R., Graham, J., Malynicz, S., & Roughton, A. (2008). *Intellectual Property in Europe* (3rd Edition ed.). London: Sweet & Maxwell, para. 4- 114.

[478] Goldstein, P., & Hugenholtz. (2010). *International copyright: Principles, law and practice.* Oxford: Oxford University Press, p. 342.

2. Creation of a new right to make available to the public

Before adoption of this Directive, there was legal uncertainty within Member States regarding the nature and the level of protection of acts of on-demand transmission of copyright works and subject matter protected by related rights over networks. It was felt necessary to be overcome this by providing a harmonized protection at the Union level.[479] Under this Directive, for the first time in European law, an exclusive right to make available to the public of copyright works or any other subject matter by way of interactive on-demand transmissions was recognized for all right holders including authors and owners of related rights. The Directive emphasizes that such interactive on-demand transmissions are characterized by the fact that members of the public may access them from a place and at a time individually chosen by them. The Directive granted the authors a broad right of communication to the public, which covers 'making available' activities.[480] However, due to the fact that owners of the related rights do not enjoy such a broad and exclusive general communication right [481] the Directive grants the owners of related rights a separate right of making available.[482] In regard to broadcasting organization, an exclusive right to make available to the public was granted in respect of the fixation of broadcasts.[483] The extent of the broadcaster's exclusive right to authorize or prohibit the making available to the public to a broadcast, covered the act of making available fixation of broadcast 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. It does not matter if the original broadcasts were transmitted by wire, cable or satellite. In addition, the right to make available to the public is referred to in the Directive, and should be understood as covering all acts of making available (for example on-demand services over the Internet) of such subject-matter to members of the public not present at the place where the act of making available originates, and as not covering any other acts.[484]

3. Uncertainty on the webcasting and online transmission

Remarkably, for the first time, this Directive presented a broad and unrestricted definition of the right of communication to the public to authors in European law. It was intended to be further harmonization of the author's right of communication to the public.[485] Under Article 3(1), Member States shall provide authors with the exclusive right to authorize or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them. Such a broad concept of the right of communication to the public in European law is unprecedented. It clarifies that this right should be understood in a broad sense covering all communication to the public not present at the place where the communication originates. It covers any such transmission or retransmission of a work to the public by wire or wireless means, including broadcasting.[486]

[479] Copyright Directive 2001/29/EC (2001) Recitals, para 25.
[480] Ibid, Article 3(1).
[481] Walter, M. M. (2010). Article 3 Right of communication to the public of works and right of making available to the public of other subject-matter. In M. M. Walter, & S. V. Lewinski, *European Copyright Law A Comentary* (p. 1555). Oxford: Oxford University Press, para 11.3.21.
[482] Ibid, Article 3(2).
[483] Copyright Directive 2001/29/EC (2001) Recitals, para 25
[484] Ibid, Article 3(2)(d) and Recitals, para 24.
[485] Ibid, Recital, para 23.
[486] Ibid.

With regard to broadcasting organizations, some commentators believed that it was unclear whether broadcasting organizations were protected under the Directive for their webcast and other similar types of on-line transmission techniques, and it would seem that such a right is not conferred by this Directive.[487]

In respect of the authors, their exclusive right of communication to the public covers simulcast, webcasting and other live and/or on-line transmission system of their works to the public. Though, in paragraph 1 of Article 3 of Directive, it was made clear that this right was given to authors only; and broadcasting organizations were not protected or conferred such broad right of communication to the public of their broadcast through webcast, simulcast and any other live or online transmission.

4. Protection of technological measures

In addition to the creation of new rights, another advantage of the Directive was that it recognized obligations for the protection of technological measures adopted by broadcasters. For the purpose of its application and implementation into Member States legislation, the Directive has defined 'technological measures' as any technology, device or component that, in the normal course of its operation, is designed to prevent or restrict acts, in respect of works or other subject-matter, which are not authorized by the right holder of any copyright or any right related to copyright. Technological measures are considered 'effective' for the purposes of the Directive where the use of a protected work or other subject matter is controlled by the right holders through the application of an access control or protection process, such as encryption, scrambling or other transformation of the work or other subject matter or a copy control mechanism, which achieves the protection objective.[488] The obligations, which the Directive sets out for Member States are that the Member State shall provide adequate legal protection against the circumvention of any effective technological measures, which the person concerned carries out in the knowledge, or with reasonable grounds to know, that he or she is pursuing that objective.[489]

In addition, the above obligations also apply against the manufacture, import, distribution, sale, rental, advertisement for sale or rental or possession for commercial purposes of devices, products or components or the provision of services for the purpose of circumvention. The criterion was that they had only a limited commercially significant purpose or uses other than to circumvent, or are primarily designed, produced, adapted or performed for the purpose of enabling or facilitating circumvention of, any effective technological measures.[490]

5. Protection of rights management information

Similar to the protection granted in regard to the technological protection measures, the Directive also defined 'rights-management information' as any information provided by broadcasting organizations and any other right holders, which identifies the broadcaster, broadcast, author or any other right holders, or information about the terms and conditions of use of the broadcast, work or other subject-matter, and any numbers or codes that represent

[487] Guibault, L., & Melzer, R. (2004, November). The legal protection of broadcast signals. *IRIS Plus, Legal observations of the European Audiovisual Observatory* (10), pp. 4-5.
[488] Copyright Directive 2001/29/EC (2001), Article 6 (3).
[489] Ibid, Article 6 (1).
[490] Ibid, Article 6 (1).

such information.[491] Accordingly, the protection of 'rights-management information' obliged the Member States to provide adequate legal protection against any person who knowingly and without authority removes or alters any electronic rights-management information.[492]

At the end of Parts one and two above, it seems that this discussion has three natural and practical consequences. Firstly, the comparative and realistic efficiency assessment of the existing international and regional regimes of protection of broadcasting organizations shows that these regimes do not meet the considerable changes, developments and challenges the broadcasting industry faces. Accordingly, the current regimes are not able to effectively protect broadcasters' legitimate interests in their broadcast signal and against different models and stages of broadcast piracy. Secondly, such comparative analysis would help international policy makers including WIPO Member States to choose the best model of protection to be adopted in order to update the existing rights and protections of the broadcasting organizations within the framework of international intellectual property law. Thirdly, though we are not in a position to set–up a relationship between international and regional instruments and of course such relationship does not exist in light of the present discussion, we believe such analysis may assist international policy makers, particularly, WIPO Member States in seeing to what extent broadcasters need new rights or additional protection in the new digital era. Nevertheless, it seems that a signatory State to two or even more existing international and regional instruments would not faced with a type of regulatory asymmetry, since these instruments initially came into existence in parallel with the gradual development of information and communication technologies. Besides, they are not contradictory; rather, they are complementary to each other. Each new instrument in turn gives complementary or new rights and protections to broadcasting organizations, which older instruments had not conferred. Accordingly, it seems that there could not be negative external effects that need to be internalized by the given signatory state.

[491] Ibid, Article 7 (2).
[492] Ibid, Article 7 (1).

CHAPTER FOUR

WIPO AND A NEW BROADCASTING TREATY

Chapter Four

WIPO and a new broadcasting treaty

In the preceding chapters, we reviewed the history of broadcasting organizations, discussed the current situation and new business models that have been employed by the industry. Building on this further, we have analyzed the latest developments and improvements in communication and information technologies that have led to the flourishing of the industry. This analysis has revealed that broadcasting organizations are currently facing difficult challenges and concerns. Of these concerns, one of the greatest is the negative effect brought about by the convergence of communication and information technologies that have allowed for an increase in the quality and quantity of broadcast piracy. We also recognized the three major categories of broadcast piracy: piracy of pre-broadcast signal, piracy of broadcast signal (or during actual broadcast) and finally piracy of post-broadcast signal.

In the previous chapter, we assessed the existing legal regime for the protection of broadcasting organizations in the international and regional context. There are a large number of disparities amongst the legal regimes in regard to their scope of application and level of rights or protection. It is also stated that the existing international legal regime (and the instruments within this regime), which provide legal protection for broadcasting organizations in the international context is ineffective, unreliable and inadequate in its ability to enforce broadcasters existing intellectual property rights.

In addition to this, the first and leading international instrument, the Rome Convention (1961) with its 91 contracting parties, is based only on the recognition of the minimum neighboring rights; thus covering the classical and conventional concept of broadcasting. This coverage includes specific primitive means or technical platforms of broadcasting i.e. wireless terrestrial broadcasting. Accordingly, this instrument is no longer adequate for the effective protection of broadcasting organizations. Meanwhile, it is acknowledged that merely relying on technological solutions alone cannot remove various challenges and concerns of broadcasting organizations.

It is understood that before the Rome Convention came into existence in 1961, broadcaster's neighboring rights were recognized only in a few countries. Therefore the disparities between national legislation were relatively limited. The Rome Convention adopted a minimum level of protection and gradually, the number of countries, which adhered to it increased. The positive effect of the Convention goes beyond its signatories however, with non-contracting countries, such as Iran, also influenced by the content and spirit of the Convention.

Today, broadcasting has become an activity with an ever-increasing international nature. Adoption of a new international binding instrument to fill existing gaps appears inevitable. On a national level, although few countries have updated new intellectual property rights for broadcasting organizations through national legislation, such legislation would not be applicable extra-territorially, further increasing the need for an international instrument. Additionally, countries from both legal traditions (common law and civil law) are seeking to update or recognize new intellectual property rights and other supplementary protection for the broadcasting organizations in their national legislation. Unfortunately, due to the lack of a comprehensive and modernized internationally binding instrument, each country is left to try and update its internal legislation independently.

In order to address this lack of international support for broadcasting organizations, WIPO Member States have, under their consideration a draft treaty on international protection for such organizations. If current negotiations amongst Member States are not successful and a new broadcaster's treaty is not signed then there will be an increase in countries that will seek to address this area through national legislation. Such an increase will see a greater number of national variations and the exacerbation of existing disparities making it harder to secure the adoption of a new broadcaster treaty in the future.

If, however negotiations reach a common understanding and a new broadcaster's treaty adopted, such a treaty would provide a good basis for national governments to draw up their own individual legislation in the area, regardless of whether they adhere to the new treaty or not. Usually a new international treaty would lead to a relative level of unification or harmonization in the relevant international regime of protection as well as it would help to remove or minimize existing disparities and variations in national legislation.

Nevertheless, it is very important that any new treaty be formulated in such a way to ensure that it is flexible enough to be compatible with current major national legislations. A new treaty would be a positive step in updating the shortcomings of the current international legislation. The scope and extent of new rights and protection should be compatible with the existing realities and cover all platforms or technological means of broadcasting. It should seek to stop prevalent forms of broadcast piracy as much as possible. Be sensitive to current business models, and finally, even though minimal, bring a global level of harmonization and unification.

In seeking the best international regime and in proposing more suitable provisions in a new international norm setting, we need to consider that the convergence of information and communication technologies is the main cause of many of the inconsistencies and ambiguities in regards to the protection of broadcasting organizations affecting the potential of granting new rights and protection at both national and international levels.
The Internet and digitization has seen the convergence of information and communication technologies. Such convergence has a number of different aspects that should all be considered in greater detail.

In the new digital age, the Internet is the most important means of communication, information and data exchange, particularly for broadcasting activities. As mentioned earlier, information and communication technology convergence is a product of this new reliance on the internet as all media and communication, developed and transmitted from all over the world, meet within the internet. More fundamentally, convergence has influenced the development of different technologies, industries, and markets. However, it is necessary to emphasize that convergence is a process not an endpoint. It brings with it interactivity, more choices and the ability to select. In addition to these numerous changes, which convergence has used to alter the business models of broadcasting activities, it has also allowed for persons to receive, produce and send data (audio, video, message and etc.) simultaneously or access them from a place and time selected by them Finally, the digitalization of the traditional broadcasting activities has opened a new perspective for the broadcasting industry in general and affected satellite broadcasting, cable casting and terrestrial broadcasting.[493] "Digitalization of broadcasting has led to convergence of the whole field of information and

[493] WIPO Document SCCR/ 17/Info/1, Informal paper prepared by the chairman of the Standing Committee on Copyright and Related Rights (SCCR) according to the decision of the SCCR at its 16th session of November 3, 2008, para. 10.

communications technology. Internet-originated, Internet Protocol radio and television are growing in an environment where there is no scarcity of bandwidth and terrestrial and other broadcasts may be both simulcast and retransmitted over the Internet." [494]

Therefore, this Chapter will recommend that an updated international regime of protection of the broadcasting organizations should be made in an effective and uniform manner as possible within the realm of international intellectual property law.

During this Chapter we are going to answer the following questions: whether the new treaty should be an independent and self-standing treaty? Would it be appropriate if it follows the Rome Convention or drafted in so-called Rome plus model? Or whether it should take a different route and follow a model based on the Brussels Convention (1974), which does not grant any IP rights to broadcasting organizations, instead obliges its member countries to take measures to prevent piracy of satellite signals from their territories?

To adapt to further developments within the broadcasting industry, the Chapter will consider either updating and amending the broadcaster's existing neighboring rights, or proposing new IP rights and other protections by a new international treaty as a proper response to the current and potential future needs of the industry. This will be built under recent WIPO-sponsored major trends and discussions developed since 1998 and will show how the prevailing trends would have direct bearing on the protection of the worldwide broadcasting industry.

Part one

I. Initiatives for a new treaty in WIPO

There are approximately 150 national laws on copyright and related rights each with differing theoretical, cultural and economic backgrounds, and variations in language, text and content.[495] Almost all these national laws protect broadcasting organizations but under different legal regimes and with differences in the scope and level of protection. In an international context, the Rome Convention was the first binding international instrument that recognized broadcaster's neighboring rights in the modern era as well as recognizing rights for performing artists and phonogram producers. However, though this convention played an important role in the harmonization of the minimum protection of broadcasting organizations in its 91 contracting parties, due to the unprecedented technological developments since its adoption, its technology-dependent wording and minimum based protection it soon proved outdated and no longer an efficient instrument for protecting the legitimate rights of its target beneficiaries.

Therefore, the necessity of updating international protection of broadcasting organizations was discussed in the meetings preceding the WIPO digital treaties; WPPT and WCT.[496] To no great affect however, as the Delegation of Switzerland noted at the first session of the

[494] Ibid.
[495] Sterling, J. (2002). International Codification of Copyright Law: Possibilities and Imperatives . *International Review of Intellectual Property and Competition Law , 33*, p. 272.
[496] WIPO Document SCCR/1/9, Report of the first session of the Standing Committee on Copyright and Related Rights of November10, para 17.

SCCR "broadcasters had been neglected when the other related rights were brought up-to-date (i.e. WIPO WPPT)." [497]

Very soon after adoption of WIPO Internet treaties in 1996, WIPO organized two international symposiums; first in Manila (1997);[498] second in Cancun (1998) to consider how best to update the protection of broadcasting organizations. These two international symposiums witnessed broad participation from the delegations of WIPO Member States, and other non-governmental stakeholders, particularly representatives of the world broadcasters unions, content owners and ICT experts. Deliberation of different aspects of the broadcasting industry, threats to it, particularly that of piracy and the negative effects of the convergence that the industry now faces, resulted in a universal consensus towards the necessity of a new WIPO broadcasting treaty, which can encompass updated, fair and reasonable protection of broadcasting organizations. The view was that the proposed treaty should take into account existing legal and practical realities, developments in the communication and information technologies which have resulted in new, enhanced business models and new services, and finally should be able to satisfactorily assist broadcasting organizations in their fight against different methods of broadcast piracy.[499]

After convening the Manila Symposium, in March 1998 WIPO adopted its two-yearly work program for 1998/99 to focus on analyzing the international legislative framework, which was applicable to the rights of broadcasting organizations, with the aim of possibly adopting a new international instrument.[500]
WIPO Standing Committee on Copyright and Related Rights (SCCR) was established in 1998 and given the task of implementing the work program and making the important decision as to whether a new broadcaster treaty would be needed, and in case of necessity, to prepare or propose a draft treaty on protection of broadcasting organizations.

The first session of SCCR was held in Geneva from November 1998. Analysis of this first session and the individual Member States initial positions is potentially beneficial as it shows their preliminary goals and aspirations in regards to a new treaty and might also help to answer the question of how best to protect broadcasting organizations and how it is possible to solve existing theoretical and practical disparities? Later SCCR sessions show a more disparate array of positions from Member States, which will be discussed later in this chapter, analysis of initial positions in 1998 might also help to judge why this is the case.
Nearly all participants of the Manila and Cancun Symposiums attended this first session of the SCCR,[501] where it adopted protection of the rights of broadcasting organizations as its third agenda item.[502]

---

[497] Ibid, para 172.
[498] WIPO world symposium on broadcasting, new communication technologies and intellectual property, Manila, April 28 to 30, 1997.
[499]Detailed discussions made in the Manila Symposium is published by WIPO:
World Intellectual Property Organization, *WIPO world symposium on broadcasting, new communication technologies and intellectual property*, Manila, April 28 to 30, 1997, WIPO publication No. 757(E/F/S), 1998. Some researcher also has commented on the discussions made in Manila Symposium: See for example: Ogawa, Megumi, *Protection of broadcaster's rights*, Leiden, Martinus Nijhoff Publishers, 2006.
[500] WIPO Document SCCR/2/5, Submission by Switzerland of April 6, 1999, p. 3.
[501] WIPO Document SCCR/1/9, Report of the first session of the Standing Committee on Copyright and Related Rights of November10, para 2,3,4 and 5.
[502] Two other agenda items of the first SCCR was protection of audiovisual performances and protection of databases.

In the first SCCR, a descriptive document, which had been prepared by the WIPO Secretariat on the protection of broadcasting organizations,[503] together with additional drafts prepared by non-governmental organizations were distributed in the Committee.[504] When the Committee moved to the relevant agenda item the Chairman suggested "only one discussion round take place, dealing with the questions: (i) whether continued work should be undertaken as regards the protection of broadcasting organizations? (ii) Under which forms such work should proceed? And (iii) what further information and preparations would be required for such continued work?" [505]

The Delegation of Switzerland was the first Member State to take the floor in this meeting and expressed that, "broadcasters had been neglected when the other related rights were brought up-to-date. The WIPO international forums (Manila and Cancun Symposiums) had helped identify relevant issues, and agreed a better protection was necessary to help fight piracy while at the same time striking the right balance between the different interested groups." [506]

Other Delegations and non-governmental organizations then presented their initial positions on this issue and intentions to address protection of rights of broadcasting organizations. It is being said that the Rome Convention is almost irrelevant in the present context because it had been overtaken by the technological development and the WIPO international forums in Manila and Cancun in 1997 and 1998 had helped to identify relevant issues and a better protection is necessary to fight piracy. They added that broadcasting is becoming an ever more complicated activity due to technological development; new broadcasting technology had appeared and became an activity with international nature. Therefore all three traditional groups of owners of related rights deserved to have their protection examined and updated in view of technological progress. Further, the work of the committee should continue with the aim of updating and adapting the Rome Convention with regard to the protection of broadcasting organizations in the light of the technological development. Other delegations, also stressed that while majority of the national legislations provides proper protections to broadcasting organizations and many countries already granted a stronger protection than the Rome Convention, the major problem is inappropriateness or lack of an updated international treaty. In addition, having protection established only through bilateral and trade treaties, would lead to a difficult international situation. The TRIPS Agreement granted an even lower level of protection and a new multilateral treaty is urgently needed. Broadcasting organizations need to be protected by rights as an incentive for investment, quality and a tool in fight with piracy. Consequently, the existing protection of broadcasting organizations at the international level is not responsive and a better protection is necessary to fight against piracy. [507]

Of course, broadcast piracy is not only harmful for broadcasters, but harmful to the interests of authors, performers and producers also; broadcaster's rights therefore are directed against pirates. Accordingly, when broadcasters receive stronger protection this would also benefit

[503] WIPO Document SCCR/1/3, Existing international, regional and national legislation concerning the protection of the rights of broadcasting organizations, Memorandum prepared by the International Bureau of September 7, 1998.

[504] These drafts are published in WIPO Document SCCR/2/6, Submissions received from non-governmental organizations on the protection of broadcasting organizations of April 7, 1999.

[505] WIPO Document SCCR/1/9, Report of the first session of the Standing Committee on Copyright and Related Rights of November10, 1998, para 171.

[506] Ibid, para 172.

[507] Ibid, See: Interventions made by the Delegations of the European Broadcasting Union (EBU); URTNA; Japan, Argentina, the European Community, USA, Norway, UK, Australia, Mexico and China.

the content owners.[508] However, in updating the rights of broadcasting organizations, the appropriate balance between the different interested groups e.g. broadcasters, users and program contributors should be observed and prioritized[509] and it was also agreed that in order to encourage the work of preparing a draft treaty for broadcasters a time limit should be decided by the Committee.[510]

It is striking in the above statements and analysis that there was no opposing view voiced regarding the necessity of the enhancement of the rights of broadcasting organizations. It seems that there was also a consensus that the intended enhancement should be in light of broadcaster's related rights, which the Rome Convention has founded in 1961.

The first SCCR agreed upon a road map and plan of action towards preparation of a new broadcasters' treaty. Central to this was that the WIPO Secretariat should organize consultations, whether in the form of regional meetings, seminars or round tables, during the second quarter of 1999 to which it should invite its Member States, as well as intergovernmental and non- governmental organizations which were observers at the SCCR to submit, by the end of March 1999, proposals and/or views in treaty language or in other form[511]. In conclusion to the first SCCR, the Chairman stated that "there had been an overwhelming willingness to start considering enhanced rights for broadcasting organizations and that the Standing Committee should start discussing the substantial issues at its next session." [512]

II. Overview of activities and negotiations in WIPO

Although in the first SCCR there was a considerable consensus towards the necessity of preparing a new broadcasters' treaty, some delegations (including Switzerland and Argentina) requested that a time limit should be implemented on the aforementioned road map. None of the delegations could have imagined that work would have gone on for so long, from the first SCCR in 1998 to the latest twenty-sixth SCCR in 2014. In addition to the thirteen SCCR meetings, Special Sessions of the SCCR and numerous international and regional consultations and information meetings have all been organized under auspices of WIPO for the purpose of the proposed broadcasting treaty.

In that time, thirty-three proposals (in treaty language) have been submitted to the Committee by Member States, one from UNESCO and two from non-governmental organizations.
In addition, several proposals in the form of consolidated text, working documents and chairmen non-papers has been prepared and discussed in the Committee. No other IP area has received such vast amounts of submissions in treaty language, consuming time and energy from all sides without any real success in the adoption of a new broadcasters' treaty. The period of activities and negotiations in this area can be divided into three distinct time spans:

1. First period
(First SCCR in November 1998 to Tenth SCCR in November 2003)

[508] Ibid, Interventions made by the Delegations of Argentina and EBU.
[509] Ibid, Interventions made by the Delegations of Switzerland, European Community and Benin.
[510] Ibid, Interventions made by the Delegations of Switzerland and Argentina.
[511] Ibid, para 204.
[512] Ibid, para 203.

The first period of activities and discussions goes from the first SCCR session in November 1998 until the end of its tenth session in November 2003.
In this period, twenty-one treaty language proposals were submitted to the Committee from different parties including, the Delegation of the European Community, UNESCO[513] and world broadcasting unions. [514]
Due to the existence of numerous technical complexities and at the request of the Committee, the WIPO Secretariat prepared several introductory and informatory documents regarding different aspects of protection of the broadcasting organizations.[515]

The Committee then discussed the received proposals. Due to the increase in the number of received proposals, the Secretariat prepared several documents containing comparisons of the received proposals to facilitate the discussion process of the Committee.[516]At the end of its tenth regular session (November 3 to 5, 2003), the Committee reviewed the latest updated version of comparison of proposals[517] and decided that based on the received proposals and discussions in the Committee, a consolidated text with explanatory comments should be prepared by the Chairman of the Committee in consultation with the WIPO Secretariat with the aim of completion to be April 1 2004. In fact the consolidated text aimed to be considered by eleventh session of the Committee in June 2004.

2. Second period
(Eleventh SCCR in June 2004 to fifteenth SCCR in September 11-13, 2006)

In the tenth SCCR session it was decided that at its eleventh session of the Committee, which intended to convene in June 2004, the discussions would be based on this "consolidated text" of the draft treaty to assess the progress of the work and to decide whether to recommend to the WIPO General Assembly in 2004 to convene a Diplomatic Conference.[518]

In the eleventh session of the SCCR (June 7 to 9, 2004), and following the decision taken by the tenth SCCR, the document (SCCR/11/3) entitled "Consolidated text for the treaty on the protection of broadcasting organizations", was discussed. This document was drafted in a treaty language with a preamble followed by 31 Articles each with its explanatory notes.

---

[513] WIPO Document SCCR/2/8, Submission by the United Nations Educational, Scientific and Cultural Organization (UNESCO) of April 12, 1999.
[514] Submission by ABU, ACT, AER, IAB, ASBU, CBU, EBU, NAB, NANBA, OTI and URTNA (Non-Governmental Organizations)[514] contained in document SCCR/2/6, April 7, 1999 and Submission by National Association of Commercial Broadcasters in Japan (NAB Japan) contained in document SCCR/2/6, April 7, 1999. Nevertheless, it should be recalled that later on the Committee adopted that only the governmental Delegations are allowed to submit their proposals on the new draft treaty.
[515] For example the WIPO Secretariat has prepared for the eighth session of the Committee a working paper, which describes generally accepted terms in the broadcasting industry, See WIPO Document SCCR/8/INF/1, Protection of broadcasting organizations: Terms and concepts, working paper prepared by the Secretariat of August 16, 2002.
[516] WIPO Document SCCR/7/9, Comparative table of proposals (received by May 6, 2002) of May 6, 2002; WIPO Document SCCR/8/5, Comparative table of proposals (received by September 16, 2002) of September 16, 2002; WIPO Document SCCR/9/5, Comparative table of proposals (received by April 15, 2003) of April 15, 2003; WIPO Document SCCR/10/3,Comparative table of proposals (received by September15, 2003) of September15, 2003.
[517] WIPO Document SCCR/10/3, Comparative table of proposals (received by September15, 2003) of September15, 2003.
[518] WIPO Document SCCR/10/5, Report of the tenth session of the Standing Committee on Copyright and Related Rights of January 31, 2004, para 80.

The Chairman of the Committee in his introductory note said "a basic proposal for a new treaty will be prepared later, taking into account the outcome of the forthcoming discussions, and following the decisions of the Standing Committee depending on its assessment of the progress of the work." [519] The consolidated text included clear areas where there was a high degree of agreement and areas where there were important divergences.

At the end of its eleventh Session, the Committee adopted the following recommendation concerning the 'Consolidated Text for a Treaty on the Protection of Broadcasting Organizations' (SCCR/11/3):

"The Chair of the present session of the Standing Committee will prepare, for the Twelfth Session of the Committee, which will take place from November 17 to 19, 2004, a revised version of the Consolidated Text in which the possible protection of webcasting organizations and other proposals having received very limited support will be indicated in square brackets." [520]

In October 4, 2004, the SCCR Chairman and the WIPO Secretariat prepared and distributed the document 'Revised consolidated text for the treaty on the protection of broadcasting organizations' (SCCR/12/2) to be considered in twelfth session which was to be held between November 17 to 19, 2004.

This new 'Revised consolidated text' had major differences with the 'Consolidated text' (SCCR/11/3). One such example was Article 3 entitled "Scope of Application" which added the following two alternatives:

Alternative E
(3) The provisions of this Treaty shall apply *mutatis mutandis* to the rights of broadcasting organizations in respect of the "simultaneous and unchanged webcasting" by them of their own broadcasts.

Alternative F
(3) The provisions of this Treaty shall apply *mutatis mutandis* to the rights of "webcasting organizations" in respect of their webcasts.

The twelfth session of the SCCR ran from November 17 to 19, 2004 and considered the new revised consolidated text (SCCR/12/2). In this session the Committee discussed Article 3 on "Scope of Application" which allowed for the extension of the proposed treaty to the webcasting and simulcasting organizations and other major substantive issues (all Articles on which alternatives had been presented). Finally, based on the discussions, the alternatives that had been put in square brackets following the conclusions of the June meeting (eleventh SCCR) of the Committee, which included all elements concerning "webcasting and simulcasting" were removed from the text but were adopted in a separate working paper on these topics to be prepared to accompany the Consolidated Text.

Therefore, at the end of the twelfth session of the SCCR, the Committee adopted that "a second revised version of the Consolidated Text will be prepared by the Chairman of the present session of the Standing Committee on the basis of the discussions in the Standing Committee in November 2004 and a working paper on alternative non-mandatory solutions on the protection of

[519] WIPO Document SCCR/11/3, Consolidated text for a treaty on the protection of broadcasting organizations prepared by the Chairman of the Standing Committee on Copyright and Related Rights in cooperation with the Secretariat of February 9, 2004, para 5.
[520] WIPO Document SCCR/11/4, Report of the eleventh session of the Standing Committee on Copyright and Related Rights of May 1, 2007.

webcasting organizations, including simulcasting organizations will be prepared to accompany the second revised version." [521]

It was also decided that the second revised version of the Consolidated Text and the Working Paper referred to above would constitute the basis for discussions at the regional meetings to be organized by the WIPO Secretariat as requested by the Member States.[522] On May 2, 2005 the "second revised version of the consolidated text for the treaty on the protection of broadcasting organizations" [523] was prepared and distributed by the Chairman of the SCCR and the WIPO Secretariat. In this document it was stated that, "the objective of these documents is to further promote consensus on the various treaty proposals submitted by the Member States and the purpose of the working paper (alternative non-mandatory solutions on the protection of webcasting organizations, including simulcasting organizations) is to facilitate the search of non-mandatory and more flexible solutions. The solutions may be based on an Article or Articles in the treaty, or on an Additional and "Optional Protocol" that would be attached to the treaty at the time of its conclusion or later."[524]

From September 26 to October 5, 2005, the WIPO General Assembly in its twenty-third session considered the question of the protection of the rights of broadcasting organizations and decided that "two additional meetings of the Standing Committee on Copyright and Related Rights (SCCR) would be scheduled to accelerate discussions on the "Second revised Consolidated Text" (document SCCR/12/2 Rev.2) and on the Working Paper (SCCR/12/5 Prov.). These meetings shall aim to agree and finalize a Basic Proposal for a treaty on the protection of the rights of broadcasting organizations in order to enable the 2006 General Assembly to recommend the convening of a Diplomatic Conference in December 2006 or at an appropriate date in 2007." [525]

In its thirteenth session in November 2005, the SCCR discussed extensively 'Second Revised Consolidated Text' (SCCR/12/2 Rev.2) and Working Paper (SCCR/12/5 Prov.). After discussing the remaining issues of contention, particularly regarding the scope of application of the proposed treaty, there was a consensus by the end of the meeting that a new revised consolidated text would be prepared for the fourteenth session of the SCCR scheduled to take place in May 2006.

To fulfill its obligations handed down from the 2006 General Assembly, the SCCR Chair, in cooperation with the WIPO Secretariat prepared two documents. Firstly, a "Draft Basic Proposal for the WIPO Treaty on the Protection of Broadcasting Organizations including a non- mandatory Appendix on the protection in relation to webcasting." [526] This document was a clean text of the draft treaty without any alternative provisions and included a draft solution in relation to webcasting, in the form of a draft appendix and without different options. The second document was entitled, "Working paper for the preparation of the Draft

[521] WIPO Document SCCR/12/4, Report of the twelfth session of the Standing Committee on Copyright and Related Rights of March 1, 2005.
[522] Ibid.
[523] WIPO Document SCCR/12/2 Rev.2, Second revised consolidated text for a treaty on the protection of broadcasting organizations prepared by the Chairman of the Standing Committee on Copyright and Related Rights in cooperation with the Secretariat of May 2, 2005.
[524] Ibid, p. 2.
[525] WIPO Document WO/GA/32/13, Report the WIPO General Assembly in its twenty-third session (September 26 to October 5, 2005) of October 5, 2005, para 84.
[526] WIPO Document SCCR/14/2, Draft basic proposal for the WIPO treaty on the protection of broadcasting organizations including a non-mandatory Appendix on the protection in relation to webcasting prepared by the Chair of the Standing Committee on Copyright and Related Rights in cooperation with the Secretariat of February 8, 2006.

Basic Proposal for the WIPO Treaty on the Protection of Broadcasting Organizations", [527] which had been prepared to accompany the Draft Basic Proposal and was scheduled to be considered during the fourteenth SCCR. Therefore, it contained all the alternative provisions that have been removed from the body of the Draft Basic Proposal, as well as all elements from the new proposals, which were submitted at the thirteenth SCCR session.

During the fourteenth SCCR from May 1 to 5, 2006, the two aforementioned documents together formed the basis for further negotiations of the Committee. After five days extensive discussion on the substantive issues especially the scope of application and scope of the protection of the proposed treaty, the Committee took two separate decisions.

Firstly, on the issue of the protection of broadcasting organizations and cablecasting organizations it was decided that one more SCCR session was to be convened before the WIPO 2006 General Assembly and that the agenda of this session was to be confined to the protection of broadcasting organizations and cablecasting organizations "in the traditional sense". To this end, a revised draft basic proposal was to be prepared for the meeting and all efforts made in order to make the document available to the Member States by August 1, 2006. It was to be prepared on the basis of documents SCCR/14/2 and SCCR/14/3 and proposals, and taking into account the discussions of the Committee. It was intended that through this process and through organizing a further meeting of the Committee, it would be possible to finalize a basic proposal for a treaty on the protection of the rights of broadcasting organizations and enable the 2006 General Assembly to recommend convening a Diplomatic Conference in December 2006 or on an appropriate date in 2007.

Secondly, on the issue of protection of webcasting and simulcasting, the deadline for the proposals determined at the fourteenth session of the SCCR concerning webcasting and simulcasting was extended to August 1, 2006. In this regard a revised document on the protection of webcasting and simulcasting was to be prepared on the basis of document SCCR/14/2 and proposals, and taking into account the discussions of the Committee. [528]

In addition to these two decisions, the second period of the SCCR activities on the protection of broadcasting organizations ended at the fifteenth SCCR, which took place from September 11 to 13, 2006. Based on the decision taken by the fourteenth SCCR, its Chairman in cooperation with the WIPO Secretariat prepared and distributed "Revised Draft Basic Proposal for the WIPO Treaty on the Protection of Broadcasting Organizations" on July 31, 2006. This document was called SCCR/15/2 constituted the main document for further consideration by the Committee in its fifteenth session.
Despite the fact that in its fourteenth session, the Committee had stated that its fifteenth session would be confined to the protection of broadcasting organizations and cablecasting organizations in a traditional sense, and that the separate issue on the protection of webcasting and simulcasting would be considered at a later date, in reality, the fifteenth session discussed extensively the latter issue, whilst also discussed the right to retransmission over the internet and any other computerized networks as a new right to be conferred to

[527] WIPO Document SCCR/14/3, working paper for the preparation of the basic proposal for the WIPO treaty on the protection of broadcasting organizations prepared by the Chair of the Standing Committee on Copyright and Related Rights in cooperation with the Secretariat of February 8, 2006.
[528] WIPO Document SCCR/ 14/7, Report of the fourteenth session of the Standing Committee on Copyright and Related Rights of May 1, 2007, Appendix 1 [The Committee also decided that the issue of webcasting and simulcasting would be taken on the agenda of a meeting of the SCCR to be convened after the WIPO 2006 General Assembly.]

traditional broadcasting organizations. [529]
This discussion also covered other divergent issues on many issues, and brought to the fore that fact that serious differences remained between Member States on many basic and more substantive issues.
Nevertheless, the Chairman of the Committee was of the view that the document SCCR/15/2 (revised Draft Basic Proposal), with further revision representing the discussions of the fifteenth SCCR could be the basis for final negotiation in a Diplomatic Conference. The Chairman did this despite opposition from the Delegations of India and the United States of America, who stated that they felt further clarification and agreement in certain areas was required. [530] The Chairman concluded the session with the following statement:

> "The SCCR observed that the preparatory work on the rights of the traditional broadcasting and cablecasting organizations is well advanced, and there was broad consensus in the SCCR that bringing the matter for final negotiation into a diplomatic conference may now conclude the work. The SCCR stated that there was sufficient common ground on substantive questions in order to transmit a proposal to the General Assembly of the WIPO in 2006 to recommend the convening of a diplomatic conference."[531]

The Chairman also concluded that "a basic proposal for the diplomatic conference (SCCR/15/2 Rev.) would be prepared on the basis of the revised draft basic proposal and the discussions in the September meeting of the SCCR to be distributed to the Member States of the WIPO, the European Community, as well as to the observer organizations by February 28, 2007".[532] "…The meeting of a preparatory committee will be convened for mid December 2006, to prepare the necessary modalities of the diplomatic conference. The preparatory committee considers the draft rules of procedure to be presented for adoption to the diplomatic conference, the lists of states, as well as intergovernmental and non-governmental organizations to be invited to participate in the conference, as well as other necessary organizational matters.[533]

Based on the above statements, the fifteenth SCCR requested that the WIPO 2006 General Assembly recommend convening the diplomatic conference on the protection of broadcasting organizations in May or July 2007, in Geneva with the objective to negotiate and conclude a WIPO treaty on the protection of broadcasting organizations, including cablecasting organizations. The scope of the treaty would be confined to the "protection of broadcasting

---

[529] WIPO Document SCCR/15/6, Report of the fifteenth session of the Standing Committee on Copyright and Related Rights of May 15, 2007, para 24 to 29; *See* interventions made by Delegations of India, Egypt and Iran. Also Intervention made by Delegation of Australia, para. 30.
[530] According to the report of the 15th SCCR session:
"The Delegation of the United States of America noted "it had listened to other delegations in order to test the degree of consensus and strength of the agreement of Members on the draft basic proposal in document SCCR/15/2. It had agreed that the proposal should exclude webcasting and new means of transmission so as to clear the air and gauge agreement among Members on the protection of traditional broadcasting organizations. The Delegation was of the view that document SCCR/15/2 of itself did not form the proper basis to go forward to a diplomatic conference. More certainty was required, whether by revision of the text or further instructions. The principle of inclusiveness had benefits and costs, and there was less certainty of success in a diplomatic conference because areas of concern remained for many delegations. The Delegation had concerns with document SCCR/15/2, in particular the general principles in Articles 2, 3 and 4, which went beyond protection of broadcasting organizations and into difficult areas. It was also concerned with the uncertainty of the scope of technological protection measures, especially as the draft text contained no alternative provision based on the provisions on technological protection measures contained in the WPPT."
See: WIPO Document SCCR/15/6, Report of the fifteenth session of the Standing Committee on Copyright and Related Rights of May 15, 2007, para 110.
[531] Ibid, Annex 1.
[532] Ibid.
[533] Ibid.

and cablecasting organizations in the traditional sense."[534]

3. Third period

(WIPO General Assembly from September 25 to October 3, 2006 to thirteenth SCCR session from June 29 to July 3, 2015)

As previously mentioned, at the fifteenth session of the SCCR in September 2006, the Committee invited the General Assembly to approve the convening of the Diplomatic Conference on the Protection of the Rights of Broadcasting Organizations, from July 11 to August 1, 2007.[535]

The WIPO General Assembly, therefore in its meeting from September 25 to October 3, 2006 discussed this issue. Despite the fact that there was not any opposition to the treaty on the protection of broadcasting organizations; and in spite of the strong support made by the Delegations of the European Community, Japan, Croatia on behalf of the Group of Central European and Baltic States, Mexico, Ukraine and many other delegations to the convening of Diplomatic Conference as proposed by the fifteenth SCCR; several other Delegations including the United States of America, Brazil, Iran, India, Uruguay, Chile, Canada, Pakistan and Nigeria on behalf of the African Group expressed contrary views. These Delegations said that although the SCCR had made good progress, it was premature to call for a Diplomatic Conference and that there remained many issues, which needed to be agreed upon. In their respective views, the document, SCCR/15/2 as the basic proposal of the new proposed treaty had unresolved issues, inconsistencies and contradictions; more expert meetings were needed in order to obtain a broader consensus before going any further.[536] In addition to these, in order to enable the transition from the work in the SCCR into a diplomatic conference, the basic proposal should be cleaned up and the number of alternatives reduced. [537]

After these discussions, the Chairman said that the General Assembly would be asked to approve the recommendation, but at present it was not possible to state that the Committee had achieved a consensus, for although a large number of delegations approved the recommendation, many still had reservations. No Delegation had declared them against the proposed treaty on a conceptual basis, but many had stated that more time was needed to resolve the differences and decrease the number of alternatives.[538] Therefore, the Chairman suspended the meetings in order to attempt to reach a compromise via informal consultations. Finally after three days of informal consultations amongst the delegations the General Assembly made the following decisions:

> "(i) The General Assembly approves the convening of the Diplomatic Conference on the Protection of the Rights of Broadcasting Organizations under the conditions set out in paragraph

[534] Ibid.

[535] WIPO Document SCCR/15/6, Report of the fifteenth session of the Standing Committee on Copyright and Related Rights of May 15, 2007, Annex 1; See also: Document WO/GA/33/4, Protection of broadcasting organizations, Report prepared by the WIPO Secretariat of September 22, 2006.

[536] WIPO Document WO/GA/33/10, Report adopted by the WIPO General Assembly, Thirty-Third (16th Extraordinary) Session of October 3,2006, See interventions made by the Delegations of India, United States of America, Pakistan, Iran, para 75, 81, 82, 89.

[537] WIPO Document WO/GA/33/10, Report adopted by the WIPO General Assembly, Thirty-Third (16th Extraordinary) Session of October 3,2006, para 75, 82, 84,86, 89 and 96.

[538] Ibid, para 106.

(iv) below from November 19 to December 7, 2007, in Geneva. The objective of this Conference is to negotiate and conclude a WIPO Treaty on the protection of broadcasting organizations, including cablecasting organizations. The scope of the Treaty will be confined to the protection of broadcasting and cable casting organizations "in the traditional sense."
(ii) The Revised Draft Basic Proposal (document SCCR/15/2) will constitute the Basic Proposal with the understanding that all Member States may make proposals at the Diplomatic Conference.
(iii) The meeting of a preparatory committee will be convened for June 2007 to prepare the necessary modalities of the Diplomatic Conference. The preparatory committee will consider the draft rules of procedure to be presented for adoption to the Diplomatic Conference, the lists of States, as well as intergovernmental and non-governmental organizations to be invited to participate in the conference, as well as other necessary organizational matters.
(iv)Two special sessions of the Standing Committee on Copyright and Related Rights to clarify the outstanding issues will be convened, the first one in January 2007, and the second one in June 2007 in conjunction with the meeting of the preparatory committee. It is understood that the sessions of the SCCR should aim to agree and finalize, on a signal-based approach, the objectives, specific scope and object of protection with a view to submitting to the Diplomatic Conference a revised basic proposal, which will amend the agreed relevant parts of the Revised Draft Basic Proposal referred to in paragraph (ii). The Diplomatic Conference will be convened if such agreement is achieved. If no such agreement is achieved, all further discussions will be based on document SCCR/15/2.[539]

In order to fulfill the above mandate of the WIPO General Assembly, SCCR convened its first Special Session from January 17 to January 19, 2007; and its second Special Session took place from June 18 to June 22, 2007. During these two Special Sessions, the Delegations discussed the Revised Draft Basic Proposal (SCCR/15/2 Rev) and a non-official paper prepared by the Chairman of the Committee;[540] but due to differing views regarding the forms and level of protection offered, particularly on the protection against retransmission to the public, the SCCR Special Sessions were suspended several times in order for informal meetings to take place in an attempt to find a compromise. These meetings proved unsuccessful and there was no agreement on the objectives, specific scope and object of protection of the new treaty.

Therefore, at the end of the second Special Session, the Chairman concluded that the Committee had, by consensus adopted the following conclusions:

"The discussions in the Second Special Session were based on the Revised Draft Basic Proposal (SCCR/15/2 Rev) which is the official comprehensive working document of the Committee, and a non-paper of April 20, 2007 prepared by the Chair. During the session the delegations made their general statements and discussed thoroughly the procedure of deliberations. The intergovernmental and non- governmental organizations were given the opportunity to make statements. In the informal discussions it became evident that, during the session, it would not be possible to reach an agreement on the objectives, specific scope and object of protection with a view to submitting to a diplomatic conference a revised basic proposal as mandated by the General Assembly. While several delegations urged that the efforts to conclude a treaty on protection of broadcasting organizations be continued, it was felt that there was a need to take time to reflect before proceeding further to explore agreement as mandated by the General

[539] Ibid, 107.
[540] However according to the mandate received from the 2007 General Assembly it was decided that the Revised Draft Basic Proposal (SCCR/15/2) would be the SCCR's official working document; but due to the complexity of that inclusive document based on numerous alternatives; the first special session had mandated the Chairman of the Committee to prepare a revised non-paper which was sent to Member States for comments and was released in its final version on April 20, 2007. See: 'Non-paper on the WIPO Treaty on the Protection of Broadcasting Organizations prepared by the Chairman of the Standing Committee on Copyright and Related Rights (April 20, 2007)'
Available at: http://www.wipo.int/edocs/mdocs/copyright/en/sccr_s2/sccr_s2_paper1.pdf

Assembly."[541]

The Committee recommended to the General Assembly (in its 2007 sitting) that it takes note of the current work being done in the SCCR on the protection of broadcasting organizations and cablecasting organizations, and requested that the subject be retained on the agenda for the SCCR for its regular sessions to come. In addition to this, it requested that the General Assembly consider convening of a Diplomatic Conference only after agreement on objectives, scope and the object of protection had been achieved. [542]

In the same year, the WIPO General Assembly made the following decision on the report and work of the SCCR:

> The General Assembly:
> (iv) Expressed the wish that all the parties continue to strive to achieve an agreement on the objectives, specific scope and object of protection, as mandated by the General Assembly;
> (v) Decided that the subject of broadcasting organizations and cable casting organizations be retained on the agenda of the SCCR for its regular sessions and consider convening of a Diplomatic Conference only after agreement on objectives, specific scope and object of protection has been achieved.[543]

In light of the WIPO General Assembly's decision, numerous commentators predicted that reaching an agreement on a new broadcaster's treaty with even a relatively low level of protection would be very difficult in the near future, this difficulty was put down to the persistence of divergent views on substantive issues of the new draft treaty.[544]

After the 2007 WIPO General Assembly and until its twenty-fifth from November 21 to December 2, 2011, the SCCR concentrated its time on three agenda items: the protection of the performers in their audiovisual performances which led to the adoption of the Beijing Treaty[545] , protection of persons who are blind, visually impaired or otherwise print disabled and facilitating their access to published works, which led to the Marrakesh Treaty[546]. The third item continued to be the protection of broadcasting organizations but this item continued to achieve little success due to the differences mentioned earlier.

An informal consultation was held in Geneva in November 2011 with the aim of progressing the work on a draft treaty into a position where it would be possible to recommend to the 2012 General Assembly to convene a Diplomatic Conference. The outcomes of the

---

[541] WIPO Document SCCR/S2/5, Report of the second special session of the Standing Committee on Copyright and Related Rights of August 31, 2007, para 146.
[542] Ibid.

[543] WIPO Document WO/GA/34/16, Report adopted by the WIPO General Assembly, Thirty-Fourth (18th Ordinary) Session of September 24 to October 3, 2007, para 228.
[544] See for example: Barczewski, M. (2011). From hard to soft law- A requisite shift in the international copyright regime? *International Review of Intellectual Property and Competition Law , 42* (1), p. 44. and Lewinski, S. v. (2008). *International Copyright Law and Policy.* Oxford: Oxford University Press, p. 525.
[545] Beijing Treaty on Audiovisual Performances adopted by the Diplomatic Conference on the Protection of Audiovisual Performances in Beijing, on June 24, 2012.
Available at: www.wipo.int/treaties/en/text.jsp?file_id=295837
[546] Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled adopted by the Diplomatic Conference in Marrakesh, June 17 to 28, 2013, available at:
www.wipo.int/edocs/mdocs/copyright/en/vip_dc/vip_dc_8_rev.pdf

discussions were reported to the twenty-third session of the SCCR. [547]

At its fortieth General Assembly, which took place from September 26 to October 5, 2011, the WIPO General Assembly took note of the current status of the work of the SCCR, and requested the Secretariat to report at its 2012 session on the discussions of the SCCR on the protection of broadcasting organizations. Between the fortieth and the forty- first session of the General Assembly, the SCCR met twice in its twenty-third session from November 21 to December 2, 2011, and its twenty-fourth session from July 16 to 25, 2012. During these two sessions, the SCCR made positive progress: three additional new proposals were submitted by South Africa (Document SCCR/23/6), Mexico (Document SCCR/24/5) and a third by Japan (document SCCR/24/3) and the Committee also took into account various proposals and comments from previous SCCR sessions.
However, a consensus on the new proposals still could not be found, and the Chairman suggested that informal consultations should continue with only Member States and not with non-governmental organizations, this was agreed by the Committee. At the end of the twenty-fourth session, the Committee adopted a single text entitled "Working document for a treaty on the protection of broadcasting organizations" (SCCR/24/10), to constitute the basis of further text-based discussions of its subsequent sessions, subject to any modifications or further textual comments to be submitted by the Member States. In the twenty-fifth session of the SCCR some corrections were made in the single working document and it was renumbered as SCCR/24/10 Corr. The Committee "reaffirmed its commitment to continue work, on a signal-based approach, consistent with the 2007 General Assembly mandate, towards developing an international treaty to update the protection of broadcasting and cablecasting organizations in the traditional sense". It also agreed to recommend to the WIPO General Assembly that it would continue its work toward a text that will enable a decision on whether to convene a Diplomatic Conference in 2014.[548]

Accordingly, in its forty-first (twenty-first extraordinary) session, the WIPO General Assembly (October 2012), under agenda item 26, discussed the report of the SCCR regarding its work on the protection of broadcasting organizations.[549] According to the report, "subject with renewed energy in its previous few meetings, at the twenty fourth SCCR a single text was adopted by the Committee, which was going to be an important tool for the SCCR to work towards reaching a decision on the possible convening of a diplomatic conference on the protection of broadcasting organizations in 2014."[550] After the report, the General Assembly discussed the issue. Interventions made by WIPO Member States and group coordinators showed that despite the fact that the majority of the delegations supported the early adoption of a new treaty,[551] divergent views still existed amongst a minority of Member

[547] WIPO Document SCCR/23/9, Report on the Informal Consultations on the protection of broadcasting organizations prepared by the Chair of the informal consultations of January 27, 2012.
[548] WIPO Document SCCR/24-refrence-conclusion, Conclusion of the 24th SCCR session, para 16 and 18.
[549] WIPO Document WO/GA/41/14, Report on the Work of the Standing Committee on Copyright and Related Rights (SCCR) on the protection of broadcasting organizations to the Forty-First (21st Extraordinary) session of the WIPO General Assembly of August 13, 2012.
Available at: www.wipo.int/edocs/mdocs/govbody/en/wo_ga_41/wo_ga_41_14.pdf (last visited October 2014)
[550] WIPO Document WO/GA/41/18, Report of the forty-first (twenty-first extraordinary) session of the WIPO General Assembly (October 2012) of October 9, 2012, para. 106.
[551] The Delegations of Hungary speaking on behalf of the Group of Central European and Baltic States (CEBS), USA on behalf of Group B, Peru on behalf of GRULAC and European Union welcomed and supported the

States. The WIPO General Assembly finally took the following decision:

> The WIPO General Assembly:
>
> (i) Took note of the information contained in document WO/GA/41/14;
> (ii) Encouraged the SCCR to continue its work regarding the issues reported on in this document; and
> (iii) Approved the recommendations of the SCCR as set out in paragraphs, 9, 14,19 and 23 of document WO/GA/41/14 regarding broadcasting organizations and limitations and exceptions.[552]

After the WIPO General Assembly (October 2012) the SCCR has continued its intensive work on the protection of broadcasting organizations in several additional sessions. The last session was its thirteenth session that was convened from June 29 to July 3, 2015 without having considerable progress except consensus on coverage of the scope of application of the new broadcasting treaty only to the unauthorized simultaneous retransmission of broadcast signal over the Internet and any other technological platforms. It seems that the SCCR still desires to discuss and reach to an agreement on the beneficiaries of the new proposed treaty, subject matter of protection, objectives of the new treaty and scope of rights and protection of the new treaty.

Part two
Determination of fundamental elements

I. The objectives of protection

Determining the objectives of a new broadcasters' treaty played a crucial role in the ongoing SCCR sessions. In circumstances where the broadcasting industry was affected by the requirements of the digital economy, a new demarcation of the objectives of the protection of the broadcasting organizations was necessary. Since 1998 a number of different statements have been made regarding the objectives of the new broadcasters' treaty by the Delegations of WIPO Member States. One view was that updating and modernizing the international protection of broadcasting organizations[553] constitutes the central objective of any new treaty. Another stated that the objective would be the establishment of a balanced new instrument that achieves the necessary protection in the complex and evolving communications

---

progress on the work of SCCR on the protection of broadcasting organizations. They also reiterated on their commitment to work towards a treaty as high priority that would update the international protection granted to broadcasting organizations. After intervention made by the group coordinator, several delegations made interventions on their national capacity. Delegations of Russia, Kenya, Morocco and Algeria, Mexico, Japan, Iran, South Africa Nigeria on behalf of African group strongly supported the work of the Committee on the preparation of the new broadcaster treaty enabling the General Assembly to take a decision on calling a diplomatic conference for the year 2014. Other Delegations namely, Trinidad Tobago, Thailand, Colombia, Brazil, Ell Salvador, Belgium, Germany, US, EU and India have supported the work of the Committee toward preparation of the new broadcaster treaty without referring to convening of the diplomatic conference in 2014. *See*: WIPO Document WO/GA/41/18, Report of the forty-first (twenty-first extraordinary) session of the WIPO General Assembly (October 2012) of October 9, 2012, para 107, 108, 109, 110, 117, 118, 115, 124, 121,125, 127, 129 and131.

[552] WIPO Document WO/GA/41/18, Report of the forty-first (twenty-first extraordinary) session of the WIPO General Assembly (October 2012) of October 9, 2012, final decision

[553] WIPO Document SCCR/ 17/Info/1, Informal Paper Prepared by the Chairman of the Standing Committee on Copyright and Related Rights (SCCR) according to the decision of the SCCR at its 16th session of November 3, 2008, para1.

environment.[554] In addition to this, an international uniform system of protection is required. The goal therefore of any new treaty would be to provide a stable legal framework for the activities of broadcasting organizations through facilitating a strong anti-piracy function, and effective protection of broadcasting organizations against all methods of broadcast piracy or signal-theft.[555] A new treaty can protect broadcasting organizations against competitors and against unfair exploitation of their broadcasts. In addition, as the Chairman of an informal consultation meeting summarized, "the new proposed treaty's main objective is to fight against the increasing global phenomenon of signal theft taking into account technological developments, in order to update the protection of broadcasting organizations."[556] Some Delegations supported the notion that "broadcasters should benefit from protection in a new treaty for their role in giving access to information, entertainment and education"[557], whilst others supported the work of the committee on the protection of broadcasting organizations to overcome divergences and to reinforce protection at the international level through a new legally binding instrument, allowing broadcasting organizations to tackle new forms of signal piracy.[558]

Finally, it should be added that broadcasting organizations are providing new services for their audiences. These services have led to new business models, which require new rights. In this regard, national legislation, for example Swedish copyright law, recognized online rights for online services to enforce the rights of the broadcasting organizations in the signals on all mediums, whether physical or electronic. But in an international context adoption of new broadcasters' treaty is being necessary.

II. The scope of treaty (beneficiary of protection)

The second element of the draft treaty, which is still under negotiation in SCCR, is determination of its scope in regards to the persons or entities that it entitles to protection (beneficiary of the rights or protection). In 1998 when the SCCR began its works on the new broadcaster treaty, it was not envisaged that this topic, the determination of beneficiaries, would lead to such large and time-consuming debates amongst Member States and that such large disparities would be seen. In the beginning of the work in the first SCCR, due to a common understanding that exists on the classic notion of "traditional broadcasting" and "traditional broadcasting organizations" and also due to the fact that there was not yet new competitors in the content distribution market, it was thought that there would be no issue on the determining of who should be the beneficiaries of the new treaty. At that time except for broadcasting and cablecasting organizations, there were no other entities that carried out broadcast-like activities. Therefore, nobody foresaw what a time-consuming issue it would become, leaving it unresolved for more than a decade. As discussions continued however, it became apparent that the defining of broadcasting organizations and the differences on

[554] Ibid, para 8 and 13.
[555] Ibid, para 41.
[556] WIPO Document SCCR/23/9, Report on the Informal Consultations on the protection of broadcasting organizations prepared by the Chair of the informal consultations of January 27, 2012.
[557] WIPO Document SCCR/17/5, Report of the seventeenth session of the Standing Committee on Copyright and Related Rights of March 25, 2009, Intervention made by the Delegation of Australia, para 94.
[558] WIPO Document SCCR/17/5, Report of the seventeenth session of the Standing Committee on Copyright and Related Rights of March 25, 2009, Intervention made by the Delegation of France, on behalf of the European Community and its member States, para 77.

determination of beneficiaries would be more complex. New players in the content distribution market had emerged for example webcasters, net-casters, OTT (over the top television service providers), Internet service providers and hosting, telecommunication and cable companies, all engaged in broadcast-like activities. That has led to some doubts and concerns regarding potential beneficiaries of the new treaty, the concept of broadcasting organization and asking who is a broadcaster in the new information age? Should casters be differentiated from castings? "Would they be those who merely initiate the transmission of a signal; those who bear responsibility for the operation; those who bear responsibility for securing the appropriate licenses, assemble or have editorial responsibility for the content; those who necessarily have traditional wireless broadcasting or who make the investment necessary for the transmission to take place?"[559] Other questions also emerged such as what are criteria would an entity have to fill to be deemed as a broadcasting organization under national law? And whether it is necessary for the new treaty provisions to redefine broadcasting organization relying on the main criterions in the national laws. In addition to this, if the main criteria for broadcaster's neighboring rights is its role and function in dissemination of content and information to the public, why neighboring rights do not extend to other organizations particularly webcasting organizations and other casters or communicators engaged in broadcast-like activities or even to the real persons that playing similar function or provides similar services for the public?[560]

The above issues have led to the elevation of the definitions of broadcasting and broadcasting organizations at both a national and international level as a topic for discussions amongst Member States. It was felt that the persons or entities that would benefit from protection must be clearly defined in the new treaty.

In regards to the definition of a broadcasting organization, it should be stated that there is no definition in any international binding instrument relating to intellectual property law. The Rome Convention contains no definition of broadcasting organization and makes it understood from the concept of broadcasting as a radio/television organization that broadcasts to the public. In the context of international regional agreements, the Cartagena Decision 351 (1993)[561] defines broadcasting organization Article3 as follows:

"Broadcasting organization means the radio or television company that transmits programs to the public."

In the academic sphere, several definitions have been proposed. A commentator in broadcast law stated that a "broadcasting organization is an organization that engages in broadcasting activities"[562] whereas another commentator defined it as "an organization that produces or purchases a broadcasting program and makes a decision to broadcast it."[563]
The above definitions, not only have no clear response to the aforementioned questions, but also fail to clarify whether their definitions covers those postal or telecommunication organizations or any other Communication or internet service providers (ISP) who merely retransmit or rebroadcast the broadcasts of a broadcasting organization. Currently these stated

[559] WIPO Document SCCR/ 8/9, Report of the eighth session of the Standing Committee on Copyright and Related Rights of November 8, 2002, para 30.
[560] Ibid.
[561] ANDEAN Decision No. 351 - Common Provisions on Copyright and Neighboring Rights, Gaceta Oficial del Acuerdo de Cartagena, 17 December 1993, X - No 145 (entered into force 21 December 1993) [ANDEAN Decision No. 351].
[562] Rumphorst, Werner, A selection of Articles and speeches, (Geneva, European Broadcasting Union, 2007), p. 127.
[563] Ogawa, M. (2006). *Protection of broadcaster's rights.* Leiden: Martinus Nijhoff Publishers, p. 27.

entities are not beneficiaries of the neighboring or related rights in the existing intellectual property law. They are organizations,[564] which simply rebroadcast the program of a broadcasting organization through; assembling, scheduling and broadcasting.[565] In addition, current definitions do not conform to the existing realities of the broadcasting industry and are described in general terms, which do not include major criterions such as preparation of a broadcast, responsibility for the content of broadcast, programming, editing, assembling and scheduling of the program. Finally, it is not clear whether the existing concept of broadcasting organization covers individual persons who may carry out broadcasting activities, or those persons who hire or buy a radio transmitter.

Therefore, during the SCCR discussions, several proposals were submitted on the definition of broadcasting organization. Resolving this doubt regarding the beneficiary of the future WIPO broadcast treaty was a necessity. It was sought also to solve deep concerns that had frequently been raised by several delegations including those of the European Union, India, Iran, Egypt and Brazil[566] on the possible expansion of the new treaty to 'webcasting organizations' and any other organizations with broadcast-like activities. All these encouraged defining broadcasting organization in the draft treaty.

Without such definitions in the future broadcasting treaty, there is a danger that the scope of the treaty will be ill defined and its beneficiaries not securely determined, undermining its goal of uniformity and will make the current disparities among national laws worse.

The fact is that, there are some common features or similarities between broadcasting organizations and other organizations with broadcast- like activities, but there exist minor differences that carry with them huge practical consequences and justify the necessity for precise demarcation among broadcasting organizations and other new competitors in the content distribution markets. That is the reason why the determination of the beneficiaries of the future treaty is one of its fundamental elements.

As mentioned in chapter one, based on the current situation in many national jurisdictions, not only is every caster not a broadcaster but also every casting is not necessarily broadcasting. Broadcasters are usually established in the form of a legal entity, be it a company, association or organization under a national law. Therefore, almost all current broadcasters in national jurisdictions are legal persons not individual persons. There are three extra conditions. Firstly it must attain several legal and technical qualifications regulated by national law or determined by a relevant national authority, for example a national regulatory office, which grants a broadcast license. These qualifications and prerequisites are mentioned in a package of regulation[567] including regulatory license acts. They should fulfill license requirements, notify radio and TV programs, accept application of national/local media policy, maintain continues compatibility to the regulation on frequencies, antennas, equipment, transmission and technology installations and go under surveillance and monitoring. Secondly, a broadcaster is an originating organization that makes its own decision what to broadcast and conducts all organizational tasks such as programming, scheduling, assembling, transmitting, acquisitioning broadcast right from the right holders

[564] It refers to broadcasting organization in the law of telecommunication.
[565] WIPO, *Guide to the Copyright and Related rights Treaties Administered by WIPO and Glossary of Copyright and Related Rights Terms*, WIPO Publication No. 891(E), (Geneva, WIPO, 2003), p. 271.
[566] WIPO Document SCCR/11/4, Report of the eleventh session of the Standing Committee on Copyright and Related Rights of May 1, 2007, para 46,48,50, 51 and 54.
[567] For example relevant regulation in Swiss jurisdiction are published in the web site of the Swiss Federal Office of Communication:
www.bakom.admin.ch/themen/radio_tv/01107/02357/index.html?lang=en

and bears editorial responsibility for all its broadcast content. Thirdly, it is subject to subsequent supervision by technical and content regulatory authorities.

The result of the new entrants (including webcasters, cablecasters, simulcasters, internet service providers) into the distribution of content market led to the SCCR engaging in discussions regarding notions of 'broadcasting' and broadcasting organization.
The WIPO Secretariat prepared a technical background paper and distributed it in the seventh session of the SCCR in May 2002.[568] This document made reference to the definition of broadcasting services in the ITU Radio Regulations, which apply to both radio and television and defined it as a service in which the transmissions *via* Hertz waves (i.e., electromagnetic waves of frequencies propagated in space without artificial guide) are intended for direct reception by the general public.[569] In addition, it stated that under international copyright and related rights treaties the word broadcasting has generally been understood to mean transmission *via* Hertz waves. Despite this there is no established legal definition of webcasting or of a webcaster, and it may be understood as applying to any number of different kinds of services active over the web. Finally, it does not appear that any national copyright law gives express recognition of, or protection to, webcasters as broadcasting organizations.[570] Accordingly it has been recommended that, to the extent the SCCR might wish to include webcasting under a possible international instrument, an appropriate definition of webcasting would also have to be formulated.[571]

Following the discussions and decision made at the seventh SCCR, the WIPO Secretariat prepared a new working document entitled 'protection of broadcasting organization: Terms and concepts'. This document, distributed in the eighth SCCR session, provided a description of the generally accepted terms used in relation to the protection of broadcasting organization.[572]While it reiterated that the Rome Convention has not defined a broadcasting organization, it is generally accepted that they are organizations, which provide broadcasting services to the general public over Hertz (wireless) waves.[573] In addition to this, due to the technological developments, new program-transmitting entities and new casters, it raised the question whether every entity distributing signals and involved in the distribution of programs or any other casters should qualify as broadcasting organizations and therefore benefit from protection of the new treaty. As a concluding remark it was recommended that, as it was suggested in SCCR sessions, the new broadcaster treaty should define broadcasting organization to limit the kind of organizations or beneficiaries to be protected; in particular if other forms of transmission other than broadcasting are included as objects of protection of the new treaty.[574]

In the eighth session of SCCR in November 2002, the Delegation of the United States of America submitted its first proposal in treaty language.[575] The importance of that proposal was its position on the scope of the treaty and determination of who should be protected (beneficiary of protection), it was subsequently discussed at the SCCR. The proposal defined

[568] WIPO Document SCCR/7/8, Protection of broadcasting organizations, technical background paper prepared by the WIPO Secretariat of April 4, 2002.
[569] Ibid, para 83.
[570] Ibid, para 84.
[571] Ibid, para 85.
[572] WIPO Document SCCR/8/INF/1, Protection of broadcasting organizations: Terms and concept, prepared by the WIPO secretariat of August 16, 2002.
[573] Ibid, para 57.
[574] Ibid, para 60.
[575] WIPO Document SCCR/8/7, Proposal submitted by the United States of America of October 21, 2002.

three categories of casters as beneficiary organizations that the new treaty should protect, being broadcasters, cablecasters and webcasters. The Delegation of the USA believed that an individual could also qualify as an organization under certain conditions, such as meaningful investment, the provision of an actual programming package, etc.[576] Furthermore, the Delegation of USA was of the view that the new treaty should be an up-to-date treaty and take into account the actual and future state of technology.[577] It stated that it was also important to provide protection to all real actors the area, including traditional broadcasters, cablecasters and webcasters. [578] Otherwise it was thought that this would represent an incomplete solution.[579] Indeed, in the view of Delegation of the USA, there was no good reason to limit the type of beneficiary or scope of the new treaty only to one kind of caster i.e. the traditional broadcasters of traditional broadcasting organizations.

After the presentation of proposal of the USA, the SCCR went on to deliberate it. The Delegation of Singapore said that the proposal would broaden the scope of the beneficiaries of the protection through providing a wide definition of the concept of broadcasting organizations.[580] The Delegation of Australia felt that the proposal extended the scope of protection too far and seemed to extend protection also to individuals who were not operating as a corporate entity. Furthermore it raised the question whether it was to extend rights also to individuals who might engage in webcasting from their private homes or personal computers.[581] The Australian Delegation also noted that traditional broadcasting organizations were subject to regulation as part of their public service function, whereas webcasters were not regulated and anyone could set up a website and engages in webcasting. Therefore it was felt that it was also necessary to discuss the criteria to be used to protect those who carry out web-based broadcast activities.[582]

The Delegation of Japan also raised concerns regarding the extension of the scope of treaty to webcasting organizations. For it would cover a large number of newly emerging beneficiaries with ambiguities regarding the influence on other right holders and enforcement. It added that even if a new treaty differentiated between the treatment of a broadcasting organization and that of a webcaster, due to lack of a clear criterion, it would be difficult to decide upon the separation of these rights.[583] After the above-concerns had been raised the Delegation of the European Community shared its concern and requested for caution in regards to the inclusion of webcasting organizations in the scope of the possible treaty.[584]

The above analysis focused mainly on disagreements between developed countries, though the proposal also attracted attention from others. The Delegations of Algeria (on behalf of African countries) Russia, China and Thailand all expressed that due to existence of uncertainty with regards to the extension of such protection to webcasting organizations it was premature and inappropriate to incorporate protection for webcasting organizations at the

[576] WIPO Document SCCR/ 8/9, Report of the eighth session of the Standing Committee on Copyright and Related Rights of November 8, 2002, para 32.
[577] Ibid, para 19.
[578] Ibid, para 84.
[579] WIPO Document SCCR/8/7, Proposal submitted by the United States of America of October 21, 2002, Article 2 and 7
[580] WIPO Document SCCR/ 8/9, Report of the eighth session of the Standing Committee on Copyright and Related Rights of November 8, 2002, para 22
[581] Ibid, para 23.
[582] Ibid, para 34.
[583] Ibid, para 31.
[584] Ibid, para 36.

present time. Accordingly, they stated that it should be dealt with in a separate instrument.[585] After discussion on the scope of the treaty the Delegation of Japan also stated that it might be appropriate to discuss webcasting organizations as an independent question separate from that of the protection of broadcasters.[586]

From the NGOs in attendance at the SCCR, the representative of the National Association of Commercial Broadcasters in Japan (NAB-Japan) stated that the proposal of the USA to add webcasting organizations to the scope of the treaty was unprecedented and the social and economic implications of webcasting were not clear, and that, there was neither national nor international legislation in place protecting webcasters and webcasting.[587] The representative of the International Literary and Artistic Association (ALAI) also referred to the uneasy distinctions of 'who is communicator' (broadcaster or webcaster) and 'what is communication medium' (broadcasting or any other casting). It stated that inclusion of the webcasters in the new treaty could provide unjustified protection to millions of individuals who maintained a mere web presence. Protection of webcasting organizations should be distinguished from the possibility of conferring a new right to broadcasting organization to control webcasting of their broadcasts.[588]

In an attempt to solve the above disparities, interventions made by the Delegation of Singapore and Switzerland opened a new avenue for discussion. These two Delegations rightly understood that though there was no need to add webcasting organizations to the beneficiary persons of the new treaty, but rather the extension of the current rights and protection of broadcasting organizations over their broadcast activities in the web or giving them to control webcasting of their own broadcast in the Internet was inevitable. The Delegation of Singapore stated that in light of the controversy surrounding possible extension of protection to individual operators of websites, a possible way forward could be focusing on granting protection to broadcasting organizations when they used new means of delivering signals, for example web, rather than broadening the beneficiaries of protection by including entities such as webcasters. It felt it was necessary to carry out a careful study of what additional economic rights should be granted to broadcasting organizations to take into account new means of signal transmission.[589] The Delegation of Switzerland also disagreed with the USA's proposal by saying that the underlying investment in webcasting did not alone justify the extension of protection to new beneficiaries or to other casters, and joined the Delegation of Singapore in saying that instead of creating new categories of beneficiaries of protection, such as webcasters, the focus should be on possible new rights for traditional broadcasting organizations in the context of webcasting.[590]

The discussion on the types of potential beneficiaries continued at the ninth SCCR session in June 2003. The Delegation of the USA submitted its revised version of its proposal[591] in response to questions raised during the previous session. It reiterated its position on the beneficiaries by saying that it favored a treaty that would be sensitive to the current state of technology and how that technology would develop in the future. Adopting a treaty focusing on traditional broadcasting organizations alone would therefore represent an incomplete solution. A 21st century treaty should encompass the concerns of the 21st century as well as its

[585] Ibid, para 35, 37, 38 and 39.
[586] Ibid, para 36.
[587] Ibid, para 45.
[588] Ibid, para 43.
[589] Ibid, para 40.
[590] Ibid, para 83.
[591] WIPO Document SCCR/9/4 Rev, Proposal submitted by the United States of America of May 1, 2003.

developments, irrespective of the means of delivery, and the value added by the deliverer of content. Therefore, appropriate protections for cablecasters and webcasters should be a part of any new treaty.[592] "The revised definitions did limit the scope of the webcasters that would be covered. Individuals making transmissions from their own computers were eliminated from the definition by redefining 'webcasting organization' as a 'legal entity' and it has focused on the streaming of signals over the Internet by organizations that had the same sort of activities as broadcasting organizations."[593]

The Delegation of Japan submitted a different proposal, which drew a distinction between broadcasting organizations and webcasting organizations. The Japanese proposal focused on several crucial areas relating to the inclusion of webcasting in the new treaty. Namely; its concept and definition; its technical and physical characteristics and how they differed from those of traditional broadcasting; possible impacts of the inclusion of webcasting organizations in the new treaty on other neighboring right holders, and the complex issue of enforcement given transnational character of webcasting. The Japanese proposal concluded that if the webcasting organizations were added as beneficiaries of the new treaty there would be the risk that every individual involved in webcasting activities could claim to be a beneficiary of that protection. Finally in as much as it was a point-to-point communication, webcasting could not be considered as transmission to the public under the Rome Convention and if it were added, it would represent one of the biggest changes to the fundamental concept of neighboring rights since adoption of the Rome Convention. [594]

In addition to the above documentation, a new document was prepared by the WIPO Secretariat and distributed in this session of the SCCR, which aimed to do a comparison of the proposals received by April 2003.[595]

Following on from the discussions on the determination of the beneficiary persons of the new treaty, the Delegation of the European Community submitted a new proposal. Under this proposal "the simultaneous and unchanged retransmission on computer networks of its broadcast by a broadcasting organization is granted the protection provided under this Treaty, as if it were broadcasting."[596] The Delegation stated, "It would not be appropriate to grant protection to a large and unidentified number of webcasters on an equal footing with the recognized broadcasters. However, it did not favor the exclusion of all transmissions based on new technology from the scope of the new instrument. The technical means of transmission by wire or wireless means were not relevant for determining the nature of a transmission as broadcasting or non-broadcasting. It was equally clear that not every transmission to the public should qualify as broadcasting within the meaning of the new instrument."[597] However, the delegation viewed that mere retransmission by cable of broadcasts of broadcasting organizations, the making available of fixations of broadcasts relating to interactive activities and transmissions in computer networks, whether or not originating there, should not qualify as broadcasting.[598]

---

[592] WIPO Document SCCR/ 9/11, Report of the ninth session of the Standing Committee on Copyright and Related Rights of September 1, 2003, para 25.
[593] Ibid, para 42.
[594] WIPO Document SCCR/9/9, Proposal submitted by Japan of May 28, 2003, para 4, 5, 6, 11, 13 and 16.
[595] WIPO Document SCCR/9/5, Comparative table of proposals (received by April 15, 2003) of April 15, 2003.
[596] WIPO Document SCCR/9/12, Proposal by the European Community and its Member States of June 24, 2003, Article 1*bis*.
[597] WIPO Document SCCR/ 9/11, Report of the ninth session of the Standing Committee on Copyright and Related Rights of September 1, 2003, para 38.
[598] Ibid, para 38.

At the end of the ninth session of SCCR, due to the fact that the African Group, the Asian Group, the Group of countries in Latin America and the Caribbean (GRULAC), and the European Community had taken the position that they could not accept the proposal of the USA, the Chairman of the SCCR concluded that the vast majority of delegations had agreed that traditional broadcasting should be the core and substance of protection in the new instrument and cable-originated (program-carrying) signals should be within the scope of the new treaty. The vast majority of delegations agreed to deal with the issue of protection of webcasting separately from protection of traditional broadcasting.[599]

In the tenth session of the SCCR (November 2003), the Committee did not discuss the topic of potential treaty beneficiaries. In its eleventh session (June 2004) the Committee once again discussed this issue and the majority of delegations opposed the extension to webcasting organizations the status of beneficiary under the new treaty.[600]

In the twelfth SCCR session (November 2004), the USA delegation expressed its view that every developing or industrialized country needed to promote and protect communication to the public by all technological means. Giving exclusive rights would promote investment in this important task and the impact of the continuing development of technology must not be forgotten. This meant that the new treaty had to include all technological methods including the increasingly important medium of webcasting. In addition, it was stated "there is no good reason to exclude one category of communicator from this instrument that SCCR taken so long do develop merely because the means by which they make their material available to the public. Protection must be adequate to protect the legitimate interests of casters without impinging on the rights of creators."[601]

In contrast to the Delegation of the USA, the Delegation of the European Community opposed the inclusion of webcasting organizations but stated that they "believe (d) the time is probably not yet right to include webcasting or webcasting organizations in the scope of the instrument, but it would be logical to give protection to broadcasting organizations for simulcasting over the web of their own broadcasts." [602]
Nevertheless, the majority of delegations reiterated previously stated reasons to set aside protection of webcasting organization from the scope of the new broadcaster's treaty. They emphasized that it was premature for international legislation in the area of webcasting, for it was subject to considerable differences to more traditional broadcasting, and more information was required on the full implications of webcasting activities, especially in developing countries. In addition to this, webcasters should first demonstrate that they could gain acceptance for new legal protections in national legislations before they should be allowed to claim such rights in an international treaty. Other delegations for example Australia noted that broadcasters were licensed in Australia and as such they had public obligations under existing regulations but webcasters in many countries were not subject to the same obligations that were imposed on broadcasters.[603] Finally, due to the fact that there was no clear supervisory machinery for webcasters in all countries, such extension in beneficiaries of protection of the new treaty would result in complexity and uncertainty in its application.

[599] Ibid, para 65.
[600] Details of interventions is mentioned in WIPO Document SCCR/11/4, Report of the eleventh session of the Standing Committee on Copyright and Related Rights of May 1, 2007, para 27, 28, 46,48,50, 51 and 54.
[601] WIPO Document SCCR/12/4, Report of the twelfth session of the Standing Committee on Copyright and Related Rights of March 1, 2005, para 49.
[602] Ibid, para 42.
[603] Ibid, para 56.

The Delegation of Iran suggested that if the SCCR was going to accelerate the work on the protection of broadcasting organizations, it should put aside the controversial elements, especially that of webcasting.[604] At the end of the twelfth SCCR session, it was decided that "a working paper on alternative non-mandatory solutions to the protection of webcasting organizations, including simulcasting organizations," would be prepared.[605] In the thirteenth session of the SCCR (November 2005), the Committee was not engaged in detailed discussion about who should be protected in the new treaty.

In the fourteenth session (May 2006) all text relevant to protection of webcasting organizations transferred to a non-mandatory appendix of the working document.[606] It was envisaged that a contracting party to the broadcaster treaty might declare to extend to webcasting organizations the protection provided for in the Treaty on the Protection of Broadcasting Organizations in an analogous and adequate manner. Through this declaration or an active assuming of the obligations by notification, the Appendix would form an integral part of the Treaty's implementation in that country. The Appendix added its provisions to be applicable in addition to the Treaty but it does not change or reduce any of the obligations of the Treaty. Nevertheless, the majority of delegations opposed maintaining the non-mandatory appendix on protection of webcasting organization. The Delegation of European Community strongly opposed it by saying that "the beneficiary of protection under the new treaty had to remain the broadcasting organizations and no new beneficiaries of protection should be created under the new treaty. However, if the broadcasting organization were to use the new means of transmissions to reach its public, then that additional form of communication, would have to be protected. No new beneficiary, no new organization of any sort would have to be protected. Only the existing categories of beneficiaries using new additional technological means had to be protected." [607] At the end of the fourteenth SCCR session, due to lack of consensus on the inclusion of webcasting organizations and simulcasting, the Committee approved to provisionally split the work into a traditional broadcaster's treaty and new media package including webcasting and simulcasting. Therefore, the SCCR set aside the controversial issue of webcasting and simulcasting for later separate discussions and decided to concentrate on the protection of traditional broadcasting and cablecasting organizations in the next SCCR. Thus, it was agreed to remove all text on webcasting and simulcasting from the texts on the table with the following condition as concluded by the chairman of SCCR.[608] He concluded "one delegation (USA) had stated that if the 2006 General Assembly did not decide about the convening of a diplomatic conference on

[604] Ibid, For details see: Intervention by delegation of Togo, para 54; Intervention by delegation of Australia, para 56; Intervention by (delegation of Colombia), para 51; Intervention by the representative of the Ibero-Latin-American Federation of Performers (FILAIE), para 192; Intervention by Intervention by the representative of the Arab Broadcasting Union (ASBU), para 185; Intervention by the representative of the International Confederation of Societies of Authors and Composers (CISAC), para 202; and Intervention by the Representative of the Union for the Public Domain, para 191.

[605] Ibid, Conclusion of the chairman of the Committee.

[606] WIPO Document SCCR/14/2, Draft basic proposal for the WIPO treaty on the protection of broadcasting organizations including a non-mandatory Appendix on the protection in relation to webcasting prepared by the Chair of the Standing Committee on Copyright and Related Rights in cooperation with the Secretariat of February 8, 2006.

[607] WIPO Document SCCR/ 14/7, Report of the fourteenth session of the Standing Committee on Copyright and Related Rights of May 1, 2007, para 133.

Many other delegations has raised serious concerns about non-mandatory appendix on webcasting organization including South Africa, Algeria, Bangladesh, Brazil, Iran, Chile. They stated that webcasting organizations deserved to be discussed separately. See para 134 to 170.

[608] Ibid.

traditional broadcasting matters, then the parallel treatment of the traditional broadcasting with webcasting and simulcasting would resume. Another delegation (the European Community) had put a similar condition regarding, not the web-originated webcasting, but simulcasting."[609] The Delegation of the European Community said "it could go along with the split into a traditional broadcasters' treaty and a new media package, without prejudice to the status of simulcasting. That would imply that, at any moment, the next SCCR could determine that traditional broadcasting also included the transmission in parallel of the broadcast signal on the Internet. If a decision was not taken at the General Assembly in September 2006 to move to a diplomatic conference, then the discussions on the second package or the new media package should be reintegrated into the future discussions of the SCCR." [610]

1. Decision of WIPO General Assembly

In the October 2006 WIPO General Assembly after a long discussion on the new broadcaster's treaty and the report of SCCR it was decided that "the scope of the treaty will be confined to the protection of broadcasting and cable casting organizations in the traditional sense".[611] However, this decision did not tie-up all disputed issues on the future works of SCCR on protection of broadcasting organizations. Following the decision of the WIPO General Assembly, several questions still remained and new questions arose in future sessions of SCCR. Questions such as; how to define broadcasting organization? Did the WIPO General Assembly intend to limit the new treaty to protection of traditional broadcasting organizations in the traditional media or platforms? Or the question to the contrary; did it intend to protect traditional broadcasting organizations in both traditional and non-traditional media or platforms?
The following analysis of the interventions made by delegations indicated that there existed differing views on the interpretation of the WIPO General Assembly decision in 2006. After more than a decade of debate, the decision made by the General Assembly remained a problematic issue at the SCCR due to the numerous ways of interpreting it.

Difficulties have arisen from the mandate handed down from the WIPO General Assembly of 2006. Despite clearly stating that the scope of the treaty would be confined to the protection of broadcasting and cablecasting organizations in a 'traditional sense' and that the convening of a diplomatic conference would take place only when agreements on objectives, scope and object of protection had been secured, the interpretation of the phrase 'traditional sense' differed from Member State to Member State and continued to cause problems.

Logically, it was expected that after the decision of the WIPO General Assembly in 2006 and 2007, the process of works in SCCR negotiations towards a new broadcaster's treaty would move faster than they had in the previous decade. As the WIPO General Assembly limited beneficiaries of the new treaty to traditional broadcasting organizations and cablecasting organizations. But, not only has SCCR not achieved an agreement on the three issues i.e. objectives, scope and object of protection, but also a new problematic issue was created by the General Assembly, that of the meaning of 'traditional sense'. The question raised was

[609] WIPO Document SCCR/ 14/7, Report of the fourteenth session of the Standing Committee on Copyright and Related Rights of May 1, 2007, para 370.
[610] Ibid, para 371.
[611] WIPO Document WO/GA/33/10, Report adopted by the WIPO General Assembly, Thirty-Third (16th Extraordinary) Session of October 3, 2006, para 107.

'what did the WIPO General Assembly intend by 'traditional sense' in the text of its decision in 2006?

From the 2006 WIPO General Assembly meeting until now several regular sessions, two special sessions of SCCR and several regional and informal consultation meetings were convened. The SCCR has devoted considerable time to discuss three problematic issues highlighted by the General Assembly in 2006 and 2007; but now also had to address the additional problem of differing interpretations of the phrase 'traditional sense'.

Whilst the General Assembly's use of the phrase 'traditional sense' refers to the scope of the treaty and aimed to confine its beneficiaries, its use after the word 'organizations' is what has led to the confusion amongst certain delegations.
If one supposes that "traditional sense" in the text of General Assembly decision reverts to the beneficiaries of the treaty, which are broadcasting and cable casting organizations it would have different consequences rather if one assume that 'traditional sense' reverts to the 'specific scope of protection'. The latter case is a matter of 'media' or 'distribution platforms'. It means that the 'specific scope of protection' provided by the new treaty should be confined to the protection of broadcasting and cable casting organizations only in their traditional media or platforms.

The majority of delegations in both the SCCR and WIPO General Assembly were of the same opinion on the concept of 'traditional sense'. For example, during the 2012 WIPO General Assembly meeting, the Delegation of Iran reiterated its support and commitment to the mandate of the General Assembly in 2006 and 2007, and expressed that "the Delegation welcomed the Committee's reaffirmation of commitment to continue its work on a signal-based approach towards developing an international treaty to update the protection of broadcasting organizations in the traditional sense. The new treaty should provide appropriate and effective protection for broadcasting organizations against any form of signal piracy on all media or distribution platforms, which they use for their signal transmission to the public."[612]

Generally, the position of the Delegation of Iran, whose national legislation currently protects broadcasting organizations as a member of neighboring right is akin to the position of other delegations e.g. EU, Germany, Switzerland, Mexico, South Africa, Japan and regional broadcasting unions, though with minor differences. These delegations, except Japan which has its own view on the technological neutrality, and other civil law countries were of the view that the broadcasting organizations should confer protection in their broadcasts to the public apart from the technological or distribution platforms, which they may use. Therefore, in practice their position is that 'traditional sense' in the text of 2006 and 2007 WIPO General Assembly is not a question of scope of protection, rather it is a question of scope of the proposed treaty i.e. determination of broadcasting and cable casting organizations in the traditional sense as the sole beneficiaries of new treaty.[613]

[612] WIPO Document WO/GA/41/18, Report of the forty-first (twenty-first extraordinary) session of the WIPO General Assembly (October 2012) of October 9, 2012, para 118.
[613] Ibid, Intervention made by the Delegation of EU, para 115; Also see intervention made by Delegation of Germany in WIPO Document A/50/18, Report of the Assemblies of the Member States of WIPO, Fiftieth series of meetings, Geneva, October 1 to 9, 2012 prepared by the Secretariat, para 134 (The protection of existing and emerging technologies needed to be updated to match the protection currently afforded by international treaties to authors and other rights holders.)

As a proponent of this understanding, the Delegation of India expressed its views in the 2012 WIPO General Assembly that it reiterated its commitment to comply with a signal-based approach towards developing an international treaty to update the protection of broadcasting and cable casting organizations in the traditional sense consistent with the original 2007 General Assembly mandate. But the delegation also reiterated its opposition to the inclusion of any element of webcasting under the framework of the broadcasting treaty. It has opposed any attempt to update the earlier mandate for retransmission over any other platforms because it viewed these activities were not broadcasting in the traditional sense.[614]

Notably, the Indian delegation stated that by transposing the meaning of 'traditional sense' to the scope of the treaty or broadcasting organizations, as beneficiaries of the treaty, this would represent an extension of the protection of the treaty to new distribution platforms, and thus, go further than the General Assembly mandate allowed. In the twenty-fifth session of SCCR (November 2012) the Delegation of India expressed newer, more flexible views on the mandate of WIPO General Assembly decision in 2006 and 2007. It stated that it was flexible in supporting the issue of unauthorized live transmission of signal over the computer networks because this was the cause of a lot of economic loss to broadcasting organizations; but also emphasized that this should not be understood to mean that all webcasting or simulcasting by the broadcasting organization should be protected in this treaty.[615]

It is also necessary to note that after the decision of the WIPO General Assembly in 2006 and 2007 the Delegation of the USA expressed the same view as stated by the Delegations of the European Community, Iran, South Africa, Mexico and Switzerland as to the scope of the treaty (i.e. determination of broadcasting and cable casting organizations as the beneficiaries of the new treaty). It did not oppose at all the extension of the protection of broadcasting organizations to new media and signal distribution platforms, which they use in their broadcasts to the public.[616]
The WIPO General Assembly appeared to have successfully differentiated casters from casting media. Since it confined the beneficiary casters of the new treaty to traditional broadcasting organizations and cablecasting organizations, and excluded any other casters including webcasters and simulcasters from the scope of the treaty. It has not, however confined the protection of broadcasting organizations only to the traditional media or traditional signal distribution platforms. Therefore, the extension of the protection that any future broadcaster's treaty would provide for broadcasting organizations to the new media for example simulcasting would not contradict with the mandate of the WIPO General Assembly. New media including simulcasting, which the latter is indeed transmission in parallel of the broadcast signal on the Internet also deserves to be protected by the new treaty. In another say simulcasting is the simultaneous and unchanged retransmission on computer networks of its broadcast by a broadcasting organization. The new treaty may confer a new

[614] WIPO Document WO/GA/41/18, Report of the forty-first (twenty-first extraordinary) session of the WIPO General Assembly (October 2012) of October 9, 2012, para 119.
[615] WIPO Document SCCR/25/3, Report of the twenty-fifth session of the Standing Committee on Copyright and Related Rights of January 23, 2013, para 84.
[616] WIPO Document WO/GA/41/18, Report of the forty-first (twenty-first extraordinary) session of the WIPO General Assembly (October 2012) of October 9, 2012, para 122.
However, regarding the scope of protection (rights and protection to be conferred to broadcasting and cable casting organizations) delegation of the USA has a very narrow interpretation of signal-based approach, which is somehow similar to the position taken by delegation of India. Delegation of the USA has not yet agreed to grant post fixation rights to broadcasting organizations.

right to broadcasting organization to control webcasting of their broadcasts, which should be distinguished from protection of webcasting organizations.

2. Redefining broadcasting organization

The necessity of redefining what is or is not a broadcasting organization was the outcome of further discussions regarding beneficiaries of the new treaty. The question posed in the SCCR was just what that definition would be? A lack of definition in the existing instruments and in much national legislation increased its complexity of the question and the failure of existing treaties to satisfactorily define broadcasting organizations also adds to the ambiguity.
However, defining broadcasting organizations in the new treaty is imperative. Otherwise, due to the development in communication and information technologies, indefinite numbers of entities or individuals that may carry out broadcast-like activities or dissemination of sounds, images or images and sounds to public may claim rights and protections as a contracting party to the new treaty. During negotiations at the SCCR, the different definitions under national jurisdictions, using different rational and criteria came to light. Therefore the SCCR was faced with numerous proposals on the definition of broadcasting organization each based on national legal tradition. Some delegations emphasized the existence of a broadcast license for an entity in a contracting party as the criteria to be named broadcasting organization. In the view of these delegations, holding a concession license or special authorization would be a prerequisite to being named broadcasting organization as a contracting party. It means that having broadcasting activities would not suffice for an entity to be deemed as broadcasting organization, if it has not obtained broadcasting license or specific authorization.[617] In other proposals, existence of three criterion of practical engagement in broadcasting activities would suffice for an entity to be a broadcasting organization. In these proposals, the three elements were; assembling, scheduling and lastly, transmitting a program to the public.[618] There was a third category of proposed definition, which puts emphasis on the taking of the initiative and having the responsibility for the first transmission to the public of program, the assembly and scheduling of the content of the transmission.[619]

---

[617] WIPO Document SCCR/2/7, Proposal submitted by Mexico of April 12, 1999: "For the purposes of the Law, an entity holding a concession license that is capable of emitting sound or video signals or both that may be received by a public of more than one person is considered a broadcasting organization".
Also see proposal submitted by delegation of the Argentina, document SCCR/3/4: broadcasting organization means the body authorized by any Contracting Party that is capable of emitting sound or visual signals, or both, in such a way that they may be perceived by a number of receiving individuals; the authorized entity that engages in cable distribution is also a "broadcasting organization"

[618] WIPO Document SCCR/9/3 Rev, Proposal submitted by Kenya of May 1, 2003:
"Broadcasting organization means an organization that assembles the schedule of programs and transmits the sounds and images or both or representations thereof, in such a manner as to cause such sounds and or images to be received by the public."

[619] WIPO Document SCCR/8/7, Proposal by the United States of America on protection of broadcasting organizations of October 21, 2002:
"A broadcasting organization a "cablecasting organization" or a "webcasting organization" means the person or the legal entity, who or which takes the initiative and has the responsibility for: (i) the first transmission to the public of sounds, images or sounds and images or the representations thereof; and/or (ii) the assembly and scheduling of the content of the transmission."

Also see the second proposal submitted by delegation of USA, WIPO Document SCCR/9/4, Proposal by the United States of America on protection of broadcasting organizations of October 21, 2002:

'A broadcasting organization a cablecasting organization or a webcasting organization means the legal entity that takes the initiative and has the responsibility for: (i) the first transmission to the public of sounds, images or

In the discussions at the SCCR sessions it was felt that some limits should be set concerning the beneficiaries of the treaty. Everybody, be it individual or organization, transmitting program-carrying signals should not be regarded as a broadcasting organization. In addition, it should be a legal person not an individual, to be licensed or authorized to conduct broadcasting activities. Thus in the joint proposal submitted by the Delegations of South Africa and Mexico during the twenty third session of the SCCR in November 2011 it was defined that "the legal entity that takes the initiative for packaging, assembling and scheduling of program content for which it has, where necessary, been authorized by rights holders and takes the legal and editorial responsibility or otherwise has rights of use for the broadcasting to the public of everything which is included in its broadcast signal."[620] In this

---

sounds and images or the representations thereof; and (ii) the assembly and scheduling of the content of the transmission.'

Finally proposal submitted by delegation of the Egypt, WIPO Document SCCR/9/8 Rev, Proposal submitted by Egypt of June 24, 2003: "A broadcasting organization or a cablecasting organization means the person or the legal entity, who or which takes the initiative and has the responsibility for: (i) the transmission to the public of sounds, images or sounds and images or the presentations thereof and/or (ii) the assembly and scheduling of the content of the transmission."

In the Fifteenth Session of the SCCR in September 2006, the Chair of the Standing Committee on Copyright and Related rights in cooperation with the WIPO Secretariat prepared WIPO Document SCCR/15/2 Rev, The Revised Draft Basic Proposal for the WIPO Treaty on the Protection of Broadcasting Organizations of July 31, 2006: "Broadcasting organization and cable casting organization mean the legal entity that takes the initiative and has the responsibility for the transmission to the public of sounds or of images or of images and sounds or of the representations thereof, and the assembly and scheduling of the content of the transmission."

The Chairman of the Standing Committee according to the request made by the First Special Session of the Committee (January 2007) prepared a Non-Paper on the WIPO Treaty on the Protection of broadcasting Organizations in April 20, 2007. This Non-Paper was distributed in the Second Special Session of the SCCR, which was held in June 2007 (Geneva) for further consideration by the WIPO Member States.
Article 2(c) of this Non-paper presented another definition of the broadcasting organization, which reads as follows:
'Broadcasting organization" means the legal entity that takes the initiative and makes arrangements for the transmission of a broadcast for the reception by the public.'
See: http://www.wipo.int/edocs/mdocs/copyright/en/sccr_s2/sccr_s2_paper1.pdf

[620] SCCR/23/6, Article 2 (d)
In the Twentieth SCCR session in the proposal submitted by delegation of the South Africa broadcasting organization is defined as 'the legal entity has the responsibility for packaging, assembly and/or scheduling of program content for which it has legitimate license, or rights of use, for the transmission to the public, sections of the public or subscribers in the form of an unencrypted or encrypted output signal containing sounds, visual images or other visible signals whether with or without accompanying sounds.'
WIPO Document SCCR/22/5, Proposal by the Delegation of South Africa on the draft treaty on the protection of broadcasting organizations of March 1,2011, para 3, 2 and 6

Following convening of the WIPO Informal Consultation Meeting in April 2011(Geneva), after deliberating definition of broadcasting organization by a panel of experts and other participants it was decided that the Chair of Informal Consultation Meeting with consultation of the Panel of Experts drafts her proposal and submit it at the next SCCR Meeting (22nd) in June 2011. The Chair of the WIPO Informal Consultation Meeting submitted her proposal titled "Elements for a Draft Treaty on The Protection of Broadcasting Organizations" and presented a new definition of broadcasting organization in her Proposal, which it reads as follows: "broadcasting organization means the legal entity which takes the initiative for the assembly, and arranges the transmission, of the program output, in an encrypted or non-encrypted form, and in accordance with its program schedule, informing the public of its program schedule, taking legal and editorial responsibility for the communication to the public of everything which is included in its program output". WIPO Document

definition however the areas of broadcasting licenses or authorization to engage broadcast activities were ignored. Finally, in Article 5 of the current single working document of SCCR, major definitions of broadcasting organizations are mentioned as different alternatives.[621] By virtue of the above discussion it seems that we can propose the following definition. It includes public broadcasting organizations and commercial broadcasters, which transmit their signal in an encrypted or non-encrypted form, and excludes other entities or persons that carry out broadcast-like activities without being licensed or authorized by a contracting party to be involved in broadcasting activities. In addition, it does not cover the cable service or telecommunication companies that merely transmit broadcast signals by their technical and telecommunication facilities.

Broadcasting organization means the legal entity which either has legitimate broadcasting licence or authorized to broadcast with the legal and editorial responsibility for the communication to the public of everything which is included in its broadcast signals and/or programme output; and takes the initiatives for assembling, programming, scheduling and arranges the transmission of the programme output in an encrypted or non-encrypted form."

Unless the new treaty includes a precise definition of broadcasting, be it the above definition or otherwise there is a risk that it covers those broadcasting organizations under jurisdiction of a contracting party that has no traditional wireless broadcasting (via Hertz wave) and solely conducts web-originated broadcasting to the public.

Notably, the new treaty cannot impose upon any contracting party to license or authorize which entity as broadcaster under its jurisdiction; or impose a contracting party to dictate licensed/authorized broadcasting organizations within its jurisdiction to broadcast through which distribution or transmission platform. Due to technological developments we may soon find broadcasting organizations that devote particular channels on the web to conducting only 'web-originated broadcasting to the public'. The major complexity here would be cases in which a contracting party licenses or authorizes an entity to carry out broadcasting activities but the same entity with the same qualification in other contracting parties could not be licensed or authorized so therefore does not qualify as a broadcasting organization. In this case, if the new treaty accepts the rights and protection provided for broadcasting organizations as minimum rights and protection, the contracting parties must grant minimum rights and protection as provided by the new treaty to licensed/authorized broadcasting organization of another contracting parties even it does not qualify as broadcasting organization in other contracting parties. Furthermore, if a contracting party licenses an entity to broadcast and the said broadcaster decides to devote 20 percent of its entire activities to 'web-originated broadcast' without their simultaneous traditional or satellite broadcast, it would not be easy or indeed rational to exclude that 'web-originated broadcast activity' from the rights and protection provided by the new treaty.

III. The object (subject-matter) of protection

SCCR/22/11, Elements for a draft treaty on the protection of broadcasting organizations of May 30, 2014 prepared by the chair of the informal consultation meeting held in Geneva on April 14 and 15, 2011, para b.9
It seems that the above definition has ignored the fact that in majority of jurisdiction broadcasting organizations need a broadcast license, which national regulatory office or other relevant authority issue and allocate frequency accordingly to do broadcasting activities.

[621] WIPO Document SCCR/24/10 CORR. Working document for a treaty on the protection of broadcasting organizations, adopted by the SCCR of March 6, 2013.

1. Object of protection in the existing treaties

The object of protection in international treaties simply means 'what is to be protected' by the treaty in question.
About half of the WIPO Member States are not party to the Rome Convention, which recognized the concept of a broadcaster's neighboring right in respect of their broadcasts in an international context. Broadcasting organizations use different content as their broadcast program items, these items consist of a variety of content including works protected under copyright, previously protected works that have fallen into the public domain and unprotected content under copyright, e.g. daily reports, news, sports and weather forecasting.

In the Rome Convention and the WTO TRIPS Agreement the broadcaster's neighboring rights exist in regard to their radio and television broadcast and the object of protection in both these international instruments is broadcast. The object of the neighboring or related rights is also the right of performing artists in their performances; the rights of producers of sound recordings in their recordings. Nevertheless, it is not clear what exactly is a broadcast for the purposes of international law, as it has not yet been defined in any international binding instrument.

What audiences of broadcasting organizations can see or hear *via* their TV or radio may consist of different subject matters or programs that are known as broadcast contents. The content of a broadcast is live or recorded material consisting of images, sounds or both. Accordingly, a program is any item or any individual content item, which is included in a broadcast.[622] Nevertheless, the concept of program in the Brussels Satellites Convention (1974) is different from its concept in the field of broadcasters related rights. Article 1 (ii) of the Satellite Convention provides (for the purposes of that Convention) that a program is a body of live or recorded material consisting of images, sounds or both, embodied in signals emitted for the purpose of ultimate distribution. The reason for this difference is that the Satellite Convention does not cover direct broadcasting satellites, but only fixed – service satellites and thus in its context, a program is supposedly still in its pre-broadcasting stage. According to the Report of the Diplomatic Conference, the Brussels Satellite Convention deals with signals and not the messages those signals carry; as was often said, the subject of the Treaty is the container and not the content. But the scope of the Convention is limited to those signals that carry programs and as defined, this item refers to bodies of material put together for transmission through a satellite to the general public.[623]

However, what is a broadcast for the purposes of this proposed international instrument? It is very important to discuss what broadcast means in the context of intellectual property law particularly in terms of their related rights. In the present situation, there are ambiguities on the precise meaning of broadcast as the object of protection. These ambiguities on the lack of an international agreed definition of broadcast led to the WIPO General Assembly in 2006 and 2007 mandating the SCCR to discuss and agree on the object of protection of the new broadcaster's treaty. Unfortunately, the SCCR was unable to come to an agreement over two extraordinary sessions.

[622] Article 6 (3)(b) of The UK Copyright, Design and Patent Act 1988 amended by Copyright and Related Rights Regulation (2003) also provides that '… references in this Part to a program, in the context of broadcasting, are to any item included in a broadcast'.
[623] See: Records of the 1974 Brussels Conference, p. 50, para 63.

Almost all the national copyright laws of those countries following the civil law system (including France, Switzerland, Germany) which recognized related rights or neighboring rights for the broadcasters, have not defined broadcast in their national legislations. This situation is also present in some common law jurisdictions, which recognize the existence of copyright in 'broadcasts', with inevitable exceptions. Under United Kingdom copyright law broadcast means an electronic transmission of visual images, sounds or other information' for reception by member of public in the ways mentioned in the Copyright Act.[624] The Australian copyright law also provided that 'Television broadcast' is defined as 'visual images broadcast for reception along with those images. 'Sound broadcasts' is defined as sound broadcast otherwise than as part of a television broadcast. Broadcast is defined as meaning, "transmit by wireless telegraphy to the public."[625]
Nonetheless, WIPO has relied upon its informatory published documents and reports[626] in which the definition of broadcast could be deduced from the definition of broadcasting in Article 3(f) of the Rome Convention, which describes broadcasting as the transmission of content. It stated "a broadcast is the signals constituting the wireless transmission of images and/or sounds when such signals are intended for public reception."[627] The reason seems that, this inference from the Rome Convention is based on the signal, not merely as a conveyer or carrier phenomenon, but that it also covers the data, information, images and sounds that superimposed on the transmitted signal to the air. In other words, according to the given inference, broadcast or signal in the context of intellectual property law particularly in related rights and in the Rome Convention (1961) covers both the carrier and the data, (information, images and sounds) together. This does not mean that any contradiction or conflict would appear between the rights of author of work (content) used in broadcast and the rights of broadcaster (in its broadcast).[628] It is exactly the same relationship, which exists between phonogram producer (in regard its phonogram) and author whose underlying work is incorporated in the phonogram.[629]

2. Analysis of discussions in WIPO

In 1998, when the SCCR had started its work on preparation of the broadcaster's treaty, there were frequent requests from content right holders societies stating that in giving new rights and protection to the broadcasting organizations should not prejudice their rights in broadcast underlying content and the new treaty should not be at their expense. Interestingly, non-governmental organizations representing owners of underlying works or broadcast content not only did not oppose efforts of the SCCR to adopt a new broadcasters' treaty; but also supported the work of the SCCR in its fight against global signal piracy. For example, the Representative of the International Video Federation (IVF), also speaking on behalf of the International Federation of Film Producers' Associations (FIAPF) and the Motion Picture

[624] The UK Copyright, Design and Patent Act 1988 amended by Copyright and Related Rights Regulation (2003), Article 6(1).
[625] The Australian Copyright Act 1968 (s. 10 (1)).
[626] Distributed during the negotiations of Standing Committee on Copyright and Related Rights (SCCR) on the protection of broadcasting organization started 1998 and still continues.
[627] WIPO Document SCCR/8/INF/1, Protection of Broadcasting Organizations: Terms and Concepts, working paper prepared by the Secretariat of August 16, 2002, para 9, p.3.
[628] Article 1 of the WIPO Rome Convention as a *Safeguard Clause* provides that: "protection granted under this Convention shall in no way affect the protection of copyright in literary and artistic works. Consequently, no provision of this Convention may be interpreted as prejudicing such protection".
[629] Article 1 (2) of the WIPO Performances and Phonograms Treaty (WPPT) (1996) requires: " Protection granted under this Treaty shall in no way affect the protection of copyright in literary and artistic works. Consequently, no provision of this Treaty may be interpreted as prejudicing such protection.

Association (MPA) expressed support for work on a treaty that was focused on signal piracy and that would effectively protect the rights of broadcasting organizations without impinging on the underlying rights of copyright owners, provided that it had no negative impact on the international copyright framework.[630] The Representative of the International Federation of Film Producers (FIAPF) also stated its hope that Member States could come to agreement on the protection of the 'broadcasting signal', as broadcasters were crucial partners for the creation and dissemination of works.[631]
By virtue of this introductory note, a question was raised that; if the broadcast underlying content is separate from broadcaster's neighboring right, what then, is the object of protection or subject –matter of protection of broadcasting organizations? Is it broadcast, signal or 'program-carrying signal'?

In the second session of SCCR (1999), broadcaster's unions[632] submitted their Draft Proposal on the proposed Treaty.[633] In this Draft, the broadcast as the object of protection was defined. According to Article 2 (a) of the Draft, broadcast, "means the program output as assembled, scheduled and broadcast by the broadcasting organization"[634], which led to debates on the objective of the new treaty. Although countries, like Switzerland, Iran and the European Community emphasized the updating and improvement of broadcaster's neighboring rights at international level and fighting against piracy as two objectives of the new treaty,[635] there were other views, particularly from other right holder societies that the discussions should be focused on broadcast signal piracy. This opposite viewpoint felt that the object or subject matter of protection of the new treaty should be the broadcast signal. They stated that they expected the new treaty to have to overcome broadcast signal piracy challenges. Accordingly, protection that would be provided by new broadcaster's treaty should center on the protection of signals only, as these organizations are not necessarily owners the program items, which use or put in their broadcasts.
This discussion became the basis of debate and the forwarding of different proposals in regards to the object or subject matter of protection. Hence, from the second session of the SCCR (1999) until twenty-seventh session (May 2014) several definitions of broadcast, signal and program-carrying signal as the object of protection were presented in the numerous proposals in treaty language.
It seems that assigning broadcast, 'program-carrying signal' and signal as the object of protection is affected by the objective/s, which the author of the individual proposer sought from the new treaty. Therefore, this difference is more embedded than a simple literal or

[630] WIPO Document A/50/18, Report of the Assemblies of the Member States of WIPO, Fiftieth series of meetings, Geneva, October 1 to 9, 2012 prepared by the Secretariat, para 123.
[631] WIPO Document WO/GA/41/18, Report of the forty-first (twenty-first extraordinary) session of the WIPO General Assembly (October 2012) of October 9, 2012, para 146.
[632] Including Asia-Pacific Broadcasting Union (ABU), Association of Commercial Television in Europe (ACT), Association of European Radios (AER), International Association of Broadcasting Arab States (IAB), Caribbean Broadcasting Union (CBU), European Broadcasting Union (EBU).
[633] WIPO Document SCCR/6/2, Proposal submitted by the European Community and its Member States of October 3, 2001. This proposal had already been tabled during the first session of the Standing Committee on Copyright and related rights. It has been reconfirmed by a letter from EBU of March 29, 1999, as a basis for discussion.
[634] Ibid.
[635] Ibid. In their opinion the Rome Convention is a starting point of the level of protection and "the legal framework existing at international level for protection of broadcasting organizations must be updated and improved. This improvement of the level of protection is even more necessary in view of the urgent need to fight more efficiently against signal piracy acts. At the same time, it has to safeguard the balance with rights of the other categories of neighboring right holders covered by the WIPO Performances and Phonograms Treaty".

language difference. Placing each of these terms as subject matter or object of protection has practical consequences on level of rights and protection that the new treaty would provide.

i. Concept of signal

Describing or defining *signal* in a precise manner is a difficult task, for it contains a variety of different concepts and applications in the context of electronic, information technology and telephony with different functions. Generally, signals exist everywhere and humans and any other living organisms is at any one time, sending, receiving and processing a multitude of different signals. As a general term, signal is anything, which carries information. Some examples of modern high-speed signals are the voltage charger in a telephone wire, the electromagnetic field emanating from a transmitting antenna, variation of light intensity in an optical fiber.[636]

In an electronics context, a signal is defined as "an electric current or electromagnetic field used to convey data from one place to another."[637] Moreover, data is superimposed on a carrier by means of a process called signal modulation.[638] In information and communication technology the term signal "refers to electromagnetic or electrical signal that based on signal theory and via signal processing, it involves the representation and transmission of information." In other words, "signals carry information, in form of data, image, sound or pictures."[639] Finally, in the telephony, a signal is "special data that is used to set up or control communication also known as signaling."[640]

Signal as a concept has previously been defined in the Brussels Satellite Convention (1974).[641] Before explaining the concept of signal in this convention it is necessary to note that in the terminology of telecommunications, a signal "refers to any detectable- transmitted energy that can be used to carry information." [642] During the 1974 Brussels Conference, the delegations were comprised of leading communication experts, who tried to make the definitions and the use of terminology as technically accurate as possible, and in certain cases drew wording directly from the ITU Radio Regulations, but as a principle of drafting they agreed that "since the purpose of the Convention was fundamentally a judicial one, the terms used and their definitions should be made to serve legal objectives rather than conform to definitional standards developed for technical purposes." [643]
Therefore, Article 1 (i) of the Satellites Convention (for the purposes of the Convention) defined signal as "an electronically-generated carrier capable of transmitting programs."

[636] See: 'What is signal?' Available at:
http://nptel.iitm.ac.in/courses/Webcourse-contents/IITKANPUR/Digi_Sign_Pro/pdf/ch1.pdf
Last visited February 2011.
[637] What is signal? Available at: http://searchnetworking.techtarget.com/definition/signal. Last visited February 2011.
[638] Stoneytiti*;* 'What is signal theory?' Available at: http://www.divinekonection.info/articles/What-is-Signal-Theory-a2.html. Last visited February 2011.
[639] Ibid.
[640] http://searchnetworking.techtarget.com/definition/signal (Last visited February 2011)
[641] The Convention relating to the distribution of program-carrying signals transmitted by satellite (Satellite Convention, 1974).
[642] WIPO Document SCCR/8/INF/1, Protection of Broadcasting Organizations: Terms and Concepts, working paper prepared by the Secretariat of August 16, 2002, para 21.
[643] WIPO, *Guide to the Copyright and Related rights Treaties Administered by WIPO and Glossary of Copyright and Related Rights Terms*, WIPO Publication No. 891(E), (Geneva, WIPO, 2003) p. 175

According to the Records of the 1974 Brussels Conference[644] the term signal is intended to mean the electronic vector or carrier capable of transmitting a program from its point of origin. As long as a signal has the potential capacity of transmitting programs, it makes no difference what electronic means or combination of means are used to generate it.
In light of the above-mentioned observations, we can say that the signal as a technical concept is a physical phenomenon or carrier. Of course, this concept of signal does not include the data, video or audio superimposed on that signal. Thus, without the data or information, a signal could not be object of protection in a related rights treaty. In addition, this concept of signal applies equally for all kinds of signal not merely on a broadcast program-carrying signal. The new broadcasting treaty, logically intends to protect broadcast program-carrying signals not any signal that carries content.
In the course of negotiations in the SCCR, it has generally been suggested that broadcasters should be given protection for their signals independently of the copyright and related rights protection of their content.[645] Nonetheless, there was not any willingness to define signal in the draft treaty, also there was not any official proposal for the inclusion of signal in its pure technical concept as an object of protection in the draft treaty. For, in the broadcasting industry technically it is impossible to separate signal from the content that it carries and technically a signal with the data or information that it carries is capable to be captured and reproduced and "what remains after the fixation of the signal is an embodied fixed version of that signal."[646]
However, after the decision of the WIPO General Assembly in 2006 and 2007, where it was decided that the new treaty should follow a signal-based approach, it was incorrectly interpreted that the object of protection of the new treaty in the signal-based protection should be signal accordingly, and in the view of the Indian Delegation if the signal was to be accepted as the object of protection there would be no need to include any post-fixation rights like the Rome Convention[647] in the new treaty. For, signal only exists during its transmission, after it is received it disappears and what remains is the content and not the signal.[648] The Indian Delegation interpreted the mandate of the WIPO General Assembly in the strict sense of the signal and requested the SCCR to work on the new treaty like the Brussels Satellite Convention because this convention does not grant any neighboring or related rights to broadcasting organizations over their signals.

Hence, until April 2011 and before the twenty second SCCR session, in an informal consultation convened in Geneva under the auspices of the WIPO Secretariat, nobody tried to propose any definition of signal or to put it as the object of protection of the new treaty. It was in this informal consultation meeting that the panel of experts raised the necessity of defining signal for the sake of certainty and clarity in the new draft treaty. Accordingly, they suggested the following definition for signal:

---

[644] Records of 1974 Brussels Conference, P. 54, para 79.
[645] WIPO Document SCCR/7/8, Protection of broadcasting organizations, technical background paper prepared by the WIPO Secretariat of April 4, 2002, para 19.
[646] Intervention made by the Chairman of the SCCR, WIPO Document SCCR/ 14/7, Report of the fourteenth session of the Standing Committee on Copyright and Related Rights of May 1, 2007, para 251.
[647] Under the Rome Convention, broadcasters were given post-fixation rights including right to fixation of broadcast and right to reproduction of fixation of broadcast.
[648] See for example the intervention made by the Delegation of Brazil: "If a broadcast was only an electromagnetic signal it would vanish after the transmission, and therefore the Delegation questioned why a 50-year protection with exclusive rights were granted for such signals by the treaty. One had to be clear about creating a treaty against piracy of signals or for the protection of broadcasts that were embodied in some kind of a fixed manner." WIPO Document SCCR/ 14/7, Report of the fourteenth session of the Standing Committee on Copyright and Related Rights of May 1, 2007, para 250.

"Signal means the conveyance of broadcast radio or television program via an electronic means."[649]

Nevertheless, the panel of experts did not intend to assign a signal as an object of protection of the new draft treaty. On the contrary, in the report of the chairperson of the informal consultation to the twenty second SCCR in June 2014 it was emphasized that the object of protection under the signal-based approach the object of protection is the broadcast although is necessary to ensure that the underlying content of the broadcast remains outside the scope of the instrument.[650]

Later on, additional proposals received by the SCCR contained separate definitions of signal, broadcast and in one instance a broadcast signal. From December 2011 until May 2014 three definitions proposed for signal are as follows:

> Signal, means the electronically generated carrier of information, data and/or audiovisual content, consisting of sounds or images or sounds and images or representations thereof, whether encrypted or not.[651]
>
> "Signal means an electronically generated carrier consisting of sounds or images, or sounds and images, or representations thereof, whether encrypted or not." [652]
>
> "Signal is an electronically generated carrier capable of transmitting a broadcast or cablecast."[653]

The above definitions are all mainly based on the technical concept of signal and are not capable of being regarded as a broadcast, which would be the object of protection in the Rome Convention. Rather, these definitions derived from the concept of signal in the Brussels Satellite Convention[654]. Therefore, the proposers of these definitions also proposed a separate definition for broadcasts and broadcast signals along with a definition of signal itself to avoid any uncertainty or vagueness regarding the object of protection of the draft treaty.

ii. Broadcast signal or program-carrying signal

Whereas the broadcast signals play a central role in the activities of broadcasting organizations and are the main operation of broadcasting results in sending a stream of signals containing images and/or sounds for reception by the public at large,[655] therefore during the discussions in the SCCR, it has generally been stated that protection should be granted to broadcasting organizations for their broadcast signals, independent of the content which they carry and which may or may not be protected by copyright.[656]

---

[649] WIPO Document SCCR/22/11, Elements for a draft treaty on the protection of broadcasting organizations prepared by the chair of the informal consultation meeting (held in Geneva on April 14 and 15, 2011) of May 30, 2014, para 8.
[650] Ibid.
[651] WIPO Document SCCR /23/6, Proposal submitted by the Delegation of South Africa and Mexico of November 28, 2011, Article 2.
[652] WIPO Document SCCR /27/2 Rev, Working document for a treaty on the protection of broadcasting organizations prepared by the Secretariat of March 25, 2014, Article 5
[653] Ibid.
[654] Article 1(i) of the Brussels Satellite Convention.
[655] WIPO Document SCCR/8/INF/1, Protection of Broadcasting Organizations: Terms and Concepts, working paper prepared by the Secretariat of August 16, 2002, para 20.
[656] Ibid, para 22.

The reason for this is clear; because the object of protection for broadcasting organizations is the broadcast not the signal; and the notion of signal in intellectual property law is different from its notion in other legal fields like that of telecommunications. Therefore using the signal in the new treaty would be misleading and could risk creating confusion as to exactly what is the object of protection; broadcast or signal?

On the other hand, as has already been seen, the notion of signal in the context of intellectual property law is not exactly the same as it is in the electronic, telecommunication, information and communication technology areas. For, the definition presented in the above-mentioned contexts often has focused on the mere carrier, vector, conveyor and transmitting character of signal. Consequently, broadcast signal or 'program-carrying signal' was proposed in the SCCR sessions as the object of protection in the draft treaty. Those terms were proposed to eliminate concerns raised on purely technical concept of signal. Whilst the signal, which consists the concept of mere electromagnetic pulse and carrier or conveyor of any kind of information or data, a broadcast signal or program-carrying signal in the context of intellectual property law, particularly in related rights includes carrier and data (i.e. information, images and sounds) together.[657] Accordingly, it seemed that this concept was capable to include the notion of object of protection in both of the Brussels Satellite Convention and the Rome Convention.[658] Although, any signal that carries content alone is not broadcast signal or program-carrying signal. To be a broadcast signal or program-carrying signal, it must be intended for public direct reception either by wire or wireless means. Otherwise it would not be presumed as broadcast signal or program-carrying signal in the concept of broadcaster's related rights.
Accordingly, Delegations of Tanzania[659] and Cameroon, in their submission to SCCR in 1999 requested a precise definition of program-carrying signal in the draft treaty.[660]

iii. Broadcast as object of protection

Form the preliminary stage of the SCCR negotiations on protection of broadcasting organizations, many delegations were of the view that the object of protection in line with the Rome Convention and TRIPS Agreement is the broadcast, but some doubts and ambiguity were raised on the notion and precise definition of broadcast. Accordingly, the chairperson of the SCCR stated, "The scope of the instrument is normally dictated by the definition of the object of protection, which is broadcast"[661] and inasmuch any international instrument has not defined this term; it is necessary to define broadcast in technologically neutral language. The chairperson also stated that the new definition should be in line with the concept of

[657] In some information technology context, it has been said, "signal is what is sent or received, thus including both the carrier and the data together". This notion, of course is closed to the definition of signal in the context of intellectual property law, particularly in the context of protection of broadcasting organization in respect of their broadcasts.
See: http://searchnetworking.techtarget.com/definition/signal (Last visited February 2011).
[658] The Chairman of SCCR pointed out that the updating of the rights of broadcasting organizations might include the rights granted not only in the Rome Convention but also protection corresponding to the Satellite Convention, WIPO Document SCCR/ 5/6, Report of the fifth session of the Standing Committee on Copyright and Related Rights of March 1, 2005, para 60.
[659] WIPO Document SCCR/3/5, Proposal submitted by the United Republic of Tanzania of August 24, 1999.
[660] WIPO Document SCCR/2/12, Proposal submitted by Cameroon of May 18, 1999; Also see: WIPO Document SCCR/ 5/6, Report of the fifth session of the Standing Committee on Copyright and Related Rights of March 1, 2005, para 52 to 83.
[661] WIPO Document SCCR/ 17/Info/1, Informal paper prepared by the chairman of the Standing Committee on Copyright and Related Rights (SCCR) according to the decision of the SCCR at its 16th session of November 3, 2008, para 43.

broadcast in the Rome Convention and TRIPS Agreement in order to avoid a very complex international situation. In addition to this a definition of signal was also necessary.[662]

The reality is that, though the object of protection in the Rome Convention and the TRIPS Agreement is the broadcast, neither the notion nor concept of broadcast has changed since 1961, even after adoption of the TRIPS Agreement. New broadcasting platforms and broadcast signal distribution media have emerged and all have changed the landscape of the broadcasting industry. Although the need to update the older notion of broadcast is felt in both national and regional law, but as Sterling rightly has pointed out broadcast in fact is the series of signals constituting the wireless transmission of sounds, images, or image and sounds and its protection has two aspects, one relating to the signals themselves, in their unique collocation, and the other to the manifestations affected by the signals. [663]
It seems that all discussions on this issue were due to digitization and convergence of information and communication technologies that brought multi platform distribution of broadcast signal. For example in response to EU Law on the broadcaster's related rights, it is being felt that the notion of *broadcast* is in need of clarification and that it is due to the convergence of dissemination methods, which is not reflected in the technology-specific definitions of the Rome Convention. However, it has also been stated that in introducing a 'technology-neutral' definition of broadcast, adverse consequences of an unwarranted extension of rights to webcasters or any other casters should be taken into account. Therefore, the rationale of protection of future broadcasting-type activities would have to be scrutinized before embarking on any attempts to clarify or harmonize the European copyright law.[664]
European commentators strongly recommended that "definitions should not be carved in stone, considering that particularly in the area of broadcasting the transition to new forms of transmission, distribution and business models still is in full swing." [665]

Therefore, discussions of the WIPO Member States at the SCCR from the beginning of the work in 1998 to today has received a great level of importance in terms of the assignment of the object or subject matter of protection of the new treaty and any likely extension to its notion. Different Member States have submitted several proposals to define broadcast as the object of protection of the new treaty and agreement on this issue is one of the elements of conditionality that the General Assembly has set for convening of a diplomatic conference to consider adoption of a new broadcaster's treaty.
Seeking to define broadcast as the object of protection of the new treaty there was one proposal from the coalition of the world broadcasting unions[666] that was submitted in the second session of SCCR and several other proposals that were submitted by the Member States between1998 and 2014. Proposals made by Kenya[667], the chairperson of the SCCR,[668]

---

[662] Ibid.

[663] Sterling, J. (2003). *World Copyright law: protection of authors' works, performances, phonograms, films, video, broadcasts, and published editions in national, international and regional law* (2nd Edition ed.). London: Sweet and Maxwell, No. 20.06.

[664] Hugenholtz, B., Eechoud, M. v., Gompel, S. v., Helberger, N., Guibault, L., Steijger, L., et al. (2006). *The Recasting of Copyright & Related Rights for the Knowledge Economy.* Amsterdam: Institute for Information Law University of Amsterdam, p. II.

[665] Ibid, p. 77.

[666] "Broadcast" means the program output as assembled, scheduled and broadcast by the broadcasting organization; Document SCCR/2/6, Submission received from non-governmental organizations (1999) p. 4

[667] "Broadcast means the transmission by wire or wireless means of sounds or images or both or their representations thereof, in such manner as to cause such sounds or images to be received by the public and includes transmission by satellite. Document SCCR/9/3 submission by Delegation of Kenya, Article 2(a)

Mexico and South Africa[669] and two other proposals that were in the working document adopted by the SCCR in its twenty fourth session in July 2012.[670] However, not one offered a complete definition of broadcast and as the object of protection of the broadcasting organizations. In this regard, it seems that an appropriate definition of broadcast in intellectual property law should follow a 'technologically neutral approach' and be capable of covering all existing or future mediums or multiplex delivery platforms that broadcasting organization use in their broadcasts to the public. In this area European commentators recommended to European legislators that in order to determine what constitutes a protected broadcast three relevant factors should be taken into account. "(1) The extent of programming involved (prescheduled sequencing of contents or recipient-driven), (2) the intended audience (indeterminate or selected), and (3) timing of the transmission (simultaneous or on-demand)."[671] Otherwise, "simply extending broadcast rights to cover for instance webcasts may have the unintended effect of extending protection in broadcasts beyond its original rationale."[672]

Furthermore, a suitable definition of broadcast or object of the protection should include all the elements that constitute a broadcast i.e. programming or planning, production of content or broadcast right acquisitioning, scheduling of daily programming, making or producing signal through converting audio and video content into the signal and finally transmission it to the members of the public. Indeed, broadcasts or broadcasting is merely the output of these elements. This is the reason that any casting or transmitting signal carrying content is not automatically a broadcast. Only broadcast program-carrying signals, which represents all above-mentioned efforts and entrepreneurial works, is the object of protection in a new broadcaster's treaty. The audience's ability to receive the broadcast program is the result of combined efforts and investments of the broadcasting organization.

As a consequence of the above discussions on the object of protection, we can say that like in the Rome Convention and the TRIPS Agreement, the object of protection of the broadcaster's neighboring rights in the new treaty is the broadcast. Drafting the new treaty with the signal-based approach does not change the object of protection or put signal in its technical sense as the object of protection. We may redefine broadcast as being any wired or wireless

---

[668] Chairman of SCCR in its non- paper submitted in April 2007 to the Second Special Session of the SCCR (June 2007)[668]. He defined broadcast in the Article 2(a) of his draft as:
"An electronically generated signal transmitted by wireless means and carrying assembled and scheduled programs for the reception by the public. Such signals transmitted by satellite are also "broadcasts; such signals are also "broadcasts" when encrypted, if the means for decrypting are provided to the public by the broadcasting organization or with its consent"

[669] "Broadcast", means the transmission of the signal by a broadcasting organization for reception by the public of sounds or images or images and sounds, and broadcasting shall be construed accordingly. Such transmission does not include any rights with respect to the data and/or representations thereof. Joint proposal submitted by the Delegations of South Africa and Mexico (2011), Document SCCR/23/6, Article 2.

[670] Alternative (a)"broadcast" means the transmission of a signal by, or on behalf of, a broadcasting organization for reception by the public.
Alternative (b) "broadcast" means the transmission of a set of electronically generated signals by wireless and carrying a specific program for reception by the general public. "Broadcast" shall not be understood as including transmission of such a set of signals over computer networks. Working document for a treaty on the protection of broadcasting organizations adopted by the SCCR in its twenty-fourth Session (2012), Document SCCR/24/10, Article 5.

[671] Hugenholtz, B., Eechoud, M. v., Gompel, S. v., Helberger, N., Guibault, L., Steijger, L., et al. (2006). The Recasting of Copyright & Related Rights for the Knowledge Economy. Amsterdam: Institute for Information Law University of Amsterdam, p. 39.

[672] Ibid.

transmission of the program output as initiated, assembled and transmitted by (or on behalf of) the broadcasting organization on whatever medium or delivery platform for reception of members of the public. The object of protection in the new broadcaster's treaty is therefore wholly independent of the ownership of any underlying rights in the content of what it is being transmitted or broadcasted to the public. The legal and technical point of the broadcasters neighboring right is that it is independent and this is irrelevant to whether the content materials or each program item included into the broadcast is itself protected in copyright or not, or whether it is in the public domain. Broadcasters have independent rights in their broadcast, which is the final output of broadcasting. Although, it is clear that the underlying works or content, which are placed in a broadcast, may be separately protected under the relevant copyright laws. In addition, it is well established that the rights of broadcasting organizations should not derogate from the rights of the copyright owners protected under the copyright or author's rights.

IV. The scope of application

Determining the scope of application of any new treaty is another important element. This scope of application refers to the particular phenomena to which the provisions of the treaty would apply. This issue is made all the more important in regards to the protection of broadcasting organizations as they are dealing with constant development in information and communication technologies. In fact, the scope of application of a new broadcaster's treaty is closely connected to different technological spheres wherein broadcasters disseminate their broadcasts to the public. Accordingly, such a treaty should be drafted in a way that provides it with relative stability and should be able to withstand future technological developments. In other words it should not be a fully technology-dependent treaty, though it should be updated with the existing prevalent media/platforms, which are used for authorized or unauthorized exploitation of broadcast. It is this aspect of the industry that makes coming to an agreement so difficult for Delegations and the other stakeholders.
During the negotiating process in the SCCR, baring minor political disagreements delaying the negotiating process, it would seem that all Delegations have expressed a desire for a new treaty on the protection of broadcasting organizations to be adopted. Yet, one of the main issues, which have influenced the debates on the scope of application of the new treaty, in addition to the developments in different signal distribution media/platforms, is the gap that exists between countries in respect to their differing level of development in terms of information and communication technology. This issue connected the preparatory works of the new broadcasting treaty to the developmental concerns of the developing and least developed countries. Through the various SCCR reports, it is apparent that particularly the so-called Development Agenda Group (DAG) has raised serious development concerns by developing and least-developed countries.[673] Developmental concerns include; possible impacts of the new treaty on the public interests, the free flow of information, dissemination and access to knowledge, cultural diversity, increasing gaps in wealth between different countries and regions and difficulties in accessing the Internet.

In principle, the scope of application does not refer to the extent or level of rights and protections in a treaty. It also does not refer to the extension or limiting the beneficiaries who are to be protected by the new treaty. Rather, it concerns the coverage or fields that the

[673] DAG includes developing countries includes South Africa, India, Iran, Brazil, Algeria and some other countries.

conferred rights and protections of the beneficiary persons of the treaty would apply. Nevertheless, the SCCR discussions between 1998 and 2006 could not resolve all disputes concerning the potential scope of application of the new broadcaster's treaty. Therefore, the WIPO General Assembly discussed this key issue in both its 2006 and 2007 meetings and handed down a mandate for the SCCR in regards to the scope of application. In its September/October 2006 session, the General Assembly conditionally authorized the convening of a diplomatic conference to adopt a new broadcaster's treaty. . It decided that SCCR was to have two special sessions to agree and finalize on a signal-based approach, the objectives, specific scope and object of protection with a view to submitting to the diplomatic conference a revised basic proposal. Despite of the attempts made by all Delegations and other relevant stakeholders, the SCCR could not meet the conditions for a diplomatic conference set by the WIPO General Assembly. Indeed, neither the first Special Session of the SCCR in January 2007 nor the second Special Session in June 2007 could agree on any of the three issues mentioned in the decision of the General Assembly. Thus, the General Assembly once again took note of the matter in its September/October 2007 Session and stated that all the parties in SCCR continue to work towards achieving an agreement on the objectives, specific scope and object of protection, as mandated by the General Assembly in 2006 and decided that the subject of broadcasting organizations and cablecasting organizations be retained on the agenda of SCCR for its regular sessions and would consider the convening of a diplomatic conference only after agreement on these three issues has been achieved.

1. Identification of main elements

Whilst considering the scope of application of the new treaty sufficient attention must be made to its objectives, and it is also necessary to consider the following questions that would assist us in trying to identify the main elements of the scope of application of the new treaty:

i. Which media/distribution platform for broadcasts to the public should the new treaty protect?

ii. Should the new treaty, in addition to the broadcasting to the public, protect all other activities, services and new business models employed by broadcasters?

iii. To which kind of broadcast piracy and on which media/distribution platform the new treaty shall apply?

The answers to the above questions are vital in determining the scope of application of the new treaty. The answer to the first question concerns the specific concept of broadcasting activities of the broadcasting organizations. After confinement of the beneficiary persons of the new treaty to the traditional broadcasting organizations, the question remains in which scope of application the new treaty would apply? The answer to this question concerns the media or signal distribution platforms rather than the communicators or transmitters.
Today, broadcasting organizations use two main categories of media: Traditional media and 'new' media. The traditional media or traditional broadcasting includes broadcasting wireless or by wire that could be carried terrestrially or through satellite. 'New' media includes the transmission of broadcast signals over computer networks and Internet. Currently, broadcasting organizations use the Internet and computer networks for the following purposes:

a. Simultaneous and unchanged transmission of broadcast programs (simulcasting)
b. Near-simultaneous and unchanged transmission of broadcast programs

c. Deferred linear transmission of broadcast programs
d. On-demand transmission of broadcast programs (catch-up) and program related materials (showing material previously broadcasted)
e. Internet originated linear transmission (webcasting), online-only transmissions and non-program related (only online, not broadcasted, not related to linear service)[674]

In recent times, the majority of the broadcasting organizations have transmitted their broadcast signals across different platforms simultaneously. Audiences can choose whether to watch broadcast programs in terrestrial, satellite or its simulcast over the Internet.
In fact, simulcasting or simultaneous transmission of their own broadcast signal over the Internet (webcasting) has entered into the normal activities of all broadcasting organizations. Accordingly, the scope of application of the new treaty logically should extend to all media/distribution platforms, which broadcasters use in their 'broadcasts to the public'. In this regard, the new treaty should not discriminate between one media/platform and another. The new treaty should adopt a technologically neutral approach to all media/distribution platforms used for "broadcasts to the public". The criteria to be included in the scope of application of the new treaty should be usage of any particular media/platform to broadcast the public. If Member States adopt this approach that is supported by many Delegations including Iran[675] and Kenya[676] then the rights and protections, which the new treaty would give the broadcasting organizations, will extend to all current and future distribution platforms of broadcasts to the public. Therefore, some Delegations have requested the SCCR to "try to reach a definition of broadcasting that would fit into the new digital environment and which would address the needs and requirements of broadcasting organizations."[677] Providing a clear and encompassing definition of broadcasting may act as a criterion for inclusion of any future media/platform in the scope of application of treaty.

The second question is related to business models or services, which broadcasting organizations provide in addition to that of broadcasts to the public. These new business models include additional services to the broadcaster's audiences. Currently, on-demand services that cover fixation of a broadcasted program or program-related items are going to be the primary service of almost all broadcasting organizations. The question is whether the scope of application of the new broadcaster's treaty should extend to on-demand services of its own broadcast signals (broadcast program related) or even to their Internet originated non-linear transmission (online-only or non- broadcast program related). This question deserves to be responded to in light of whether, in updating rights and protection of broadcasting organizations, the new treaty shall take into account new services or new business models employed by them or not.
In answering the above question, it should be noted that broadcaster's on-demand services are not deemed to be broadcasts to the public in many jurisdictions, as it is not only broadcasting organizations who carry out these services. There are many other entities in the content distribution market that provide on-demand services and there are several reasons why these on-demand services should not be considered broadcasting. Rendering these

[674] Also known as original webcasting or web-originated transmission by a broadcasting organization.
[675] WIPO Document SCCR/22/18, Report of the twenty second session of the Standing Committee on Copyright and Related Rights of December 9, 2011, para 280; WIPO Document SCCR/24/12, Report of the twenty-forth session of the Standing Committee on Copyright and Related Rights of July 27, 2012, para 21 (Intervention made on behalf of Asian Group).
[676] WIPO Document SCCR/22/18, Report of the twenty-second session of the Standing Committee on Copyright and Related Rights of December 9, 2011, para 262. The Delegation of Kenya saw the need to take into account the new technologies, which offered new platforms for the dissemination of broadcast signals.
[677] WIPO Document SCCR/26/9, Report of the twenty-sixth session of the Standing Committee on Copyright and Related Rights of March 20, 2014, para 40 (Intervention made by Delegation of Iran).

services is conditional to the possibility of a level of interactivity between broadcasters and audiences. It is based on the point-to-point transmission system and only operable when there is an Internet or a similar computer network connection between the provider and user of the service. Otherwise, the choice of the user to demand these services may not be exercised. In contrast, broadcasting is based on a point-to-multi point transmission, passive communication and the audience has no choice except that of deciding whether to turn-on or off its receiver.
However, it should be acknowledged that as a consequence of the expansion in broadband connectivity, on-demand services now constitute a major activity of the majority of broadcasters in the world. Broadcasters invest huge resources to meet the expectations of their audiences through on-demand services. To be able to provide these services, they have invested in infrastructure, hardware, software, conditional access systems, the availability of sufficient broadband connectivity and specialized human resources. In addition to this they have also acquired additional rights to use contents in their on-demand services from the relevant right holders. It is logical therefore for broadcasters to advertise their on-demand services to return on their often-substantial investment. All these efforts constitute part of their mission and even their obligation to certain state regulations in the digital millennium.
Hence, though on-demand services are not broadcasting in its traditional sense in many jurisdictions, nevertheless protection of the broadcaster's investment in on-demand services in this regard is now being recognized as a legitimate and new business model in many different jurisdictions. Many other jurisdictions put broadcaster's on-demand services within the scope of application of broadcaster's neighboring rights and have granted them an exclusive intellectual property type right in regard to their on-demand services and making available fixation of their previously broadcasted programs.[678]
It seems that the new treaty, if there is not a consensus among WIPO Member States to grant an intellectual property type right, should at least give effective and appropriate protection to the broadcaster's on-demand services in regards to their previously broadcasted or program-related items. Aside from the kind and nature of rights or protection, this could be done through extending the scope of application of the new treaty to broadcaster's on-demand services in regard making available fixation of their broadcasts. Otherwise, it would be an incomplete treaty and there would not be any return to the broadcaster's legitimate investments.

Finally, the third question concerns the anti-signal piracy function of the new treaty and its relevance to the scope of application. The question here is that to which kind of broadcast piracy and on which media/distribution platform should the new treaty apply? In considering the scope of application of the new treaty in light of protection of broadcasting organizations against different methods and means of broadcast piracy, it should be noted that not only does current broadcast piracy include pre-broadcast, during broadcast and post-broadcast piracy but also occurrences of piracy are not limited to any specific means or distribution platforms; broadcast piracy may be conducted by any means and on any distribution platforms. Through studying the reports of SCCR, it seems that the Member States do not intend to limit protection of broadcasting organizations to only particular forms or specific

[678] For example Article 37(e) of the Federal Act of Copyright and Related Rights of the Switzerland (Inserted by Art. 2 of the Federal Decree of 5 Oct. 2007, in force since 1 July 2008 (AS 2008 2497; BBl 2006 3389); Recital no. 25 and paragraph 2 (d) of Article 3 of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society; Article 99bis.(1) Copyright Act of Japan (Act No. 48 of May 6, 1970, as last amended by Act No. 65 of December 3, 2010); Article 87(1) of the German Copyright Act of 9 September 1965 (Federal Law Gazette Part I, p. 1273), as last amended by Article 83 of the Act of 17 December 2008 (Federal Law Gazette Part I, p. 2586).

means of broadcast piracy. Otherwise the anti-piracy function of the new treaty would be – under-developed and risk being ineffective. Currently broadcast piracy usually occurs through the one or more of the following means or platforms:

i. Unauthorized traditional rebroadcasting by other broadcasting organizations (by wire and wireless terrestrial and satellite, and cablecast)
ii. Unauthorized retransmission of broadcast over Internet and any other computer networks (simultaneous, near-simultaneous, deferred and delayed)
iii. Unauthorized making available fixation of broadcast over Internet and any other computer networks

It is evident that all identified categories of broadcast piracy can be carried out through traditional and new distribution platforms. Therefore broadcasting organizations are to suffer the same fate as authors, performers and phonogram producers have done in preceding decades. The unauthorized exploitation of broadcast signals or fixation of broadcast signals in the Internet and digital environment is similar to the infringement of author's, performer's and phonogram producer's right. Accordingly, the scope of application of the new broadcaster's treaty should be extended to all means and distribution platforms without any discrimination or preferring one to another.

2. Overview of discussions in the SCCR

In the course of "the preparatory process of the new treaty the development of the communications environment has accelerated and completely new perspectives have opened."[679] Convergence of the whole field of information and communications technology together with the digitalization of the traditional broadcasting has affected the broadcasting industry and defined new missions for them to operate in (such as the internet). During the SCCR negotiations on the scope of application of the new treaty, Delegations discussed numerous desirable, potential scopes of application and each made it's reasoning as to what it had proposed. Some Delegations including the Delegation of Australia requested the extension of the scope of protection of broadcasting organizations to Internet retransmissions. These Delegations are not only in favor of maintaining the anti-piracy function of the new treaty but also for the protection of a broadcaster's new public mission in the information age emphasized by the suggestion that the extension of the scope of application should cover some or all transmissions of broadcasts over Internet. In the seventeenth SCCR "the Delegation of Australia considered that broadcasters should benefit from protection in a new treaty for their role in giving access to information, entertainment and education. To deny broadcasters the protection against Internet retransmission was tantamount to diminishing their ability to carry out their role in the digital environment."[680] This approach also has been advocated by other countries party to the Rome Convention as well as those not party to it, but affected by it. These countries consider the Rome Convention to be the basis for updating and modernizing the international protection of broadcasting organization. They also consider the new broadcaster's treaty has a role in mending the perceived gaps of the Rome Convention protection level, caused by the development of communication technology since it was ratified in the 1950's. Hence, in their opinion the Rome Convention is no longer adequate to protect broadcasting organizations against signal theft and piracy.[681]

[679] WIPO Document SCCR/ 17/Info/1, Informal paper prepared by the chairman of the Standing Committee on Copyright and Related Rights (SCCR) according to the decision of the SCCR at its 16th session of November 3, 2008, para 10.
[680] WIPO Document SCCR/17/5, Report of the seventeenth session of the Standing Committee on Copyright and Related Rights of March 25, 2009, para 94.
[681] Ibid, para 18.

Other delegations requested the extension of the scope of application to new forms of broadcast piracy to fulfill an anti-piracy functioning of the new treaty. The Delegation of France, on behalf of the European Community and its Member States, supported the protection of broadcasting organizations "at the international level through a new legally binding instrument, allowing broadcasting organizations to face new forms of signal piracy."[682] This position indicated that the scope of application of the new treaty should extend over the Internet in order to accomplish its anti-piracy function regarding unauthorized exploitation of broadcast over the Internet. Nevertheless, there are Delegations, for example the Delegation of India that still insists on a different interpretation of the mandate handed down by the WIPO General Assembly in 2006 and 2007. These Delegations are of the view that the scope of application of the new treaty should be confined to the protection of broadcasting organizations through the mediums of traditional broadcasting methods. Meaning that, in their opinion the mandate excluded non-traditional platforms, for example unauthorized exploitation of the broadcasts over the Internet and computer networks from the scope of application of the new treaty. This interpretation was criticized and argues that the mandate refers to confinement of the beneficiaries or persons to be protected by the new treaty to traditional broadcasting organizations, rather to broadcasting in the traditional platforms. Indeed, it would have not been rational for the WIPO General Assembly to impliedly allow broadcast piracy in non-traditional platforms or ignore unauthorized exploitation of broadcast in the new media/forms of distribution to the public.

The majority of the WIPO Member States including Iran[683], the United States of America[684], South Africa[685], Kenya[686] and the Delegation of the European Community[687] felt that the General Assembly mandated traditional broadcasting organizations to be beneficiaries of the new treaty and that their transmissions were to be protected over any technological means or platforms. In their opinion, the General Assembly did not limit the protection of broadcasting organizations to the traditional or any specific media or platforms of exploitation. These Delegations stated that in the protection of broadcasting organizations, the technological developments in the areas of broadcasting should be taken into account. On

[682] Ibid, para 77.

[683] WIPO Document SCCR/22/18, Report of the twenty second session of the Standing Committee on Copyright and Related Rights of December 9, 2011, para 280; and WIPO Document SCCR/24/12, Report of the twenty-forth session of the Standing Committee on Copyright and Related Rights of July 27, 2012, para 21 (Intervention made on behalf of Asian Group)

[684] Intervention made by the Delegation of the USA in twelfth session of the SCCR, ('Promoting the communication of information to the public by all technological means was a goal that benefited both developed and developing countries. It was necessary to take into account the progress of technology and therefore to include webcasting in the scope of protection of the proposed treaty. There was no reason to exclude one category of public communicator by reason of the technological means by which the communication took place.' WIPO Document SCCR/12/4, Report of the twelfth session of the Standing Committee on Copyright and Related Rights of March 1, 2005, para 49.

[685] WIPO Document SCCR/24/12, Report of the twenty-forth session of the Standing Committee on Copyright and Related Rights of July 27, 2012, para 180.

[686] WIPO Document SCCR/22/18, Report of the twenty second session of the Standing Committee on Copyright and Related Rights of December 9, 2011, para 262.

[687] Delegation of the European Community stated that "as regards scope, there seems to be consensus that transmission by wire should be covered. But major differences still exist on simulcasting and webcasting. In the opinion of the EC it would be a poor result if 43 years after the Rome convention and despite a technological revolution since then, cablecasting would be the only new elements on which we could agree. We believe the time is probably not right yet to include webcasting or webcasting organizations in the scope of the instrument, but it would be logical to give protection to broadcasting organizations for simulcasting over the web of their own broadcasts." WIPO Document SCCR/12/4, Report of the twelfth session of the Standing Committee on Copyright and Related Rights of March 1, 2005, para 182 and 42.

the other hand, other Delegations, for example the European Community whilst being of this view, also felt that the SCCR should place the Rome Convention at the core of its efforts to update broadcasters' neighboring rights but should also apply or execute their neighboring rights apart from specifying which technology of broadcasting they used to broadcast. This matter does not change the beneficiary persons of the new treaty. It also does not extend the scope of the treaty to other organizations such as webcasting and/or net-casting organizations. Instead, this approach protects the rights of broadcasting organizations as the sole beneficiaries of the new treaty in whichever platform they use to broadcast to the public.[688]

3. Scope of application and technological neutrality

However, adoption of technological neutrality in the scope of application of the new treaty alone does not solve all disparities among WIPO Member States, but may partially lead to an alignment of their views in this regard.

In principle, technological neutrality in the context of legislation means, "the rules should neither require nor assume a particular technology."[689] It should be "forward-looking, i.e. it should not hinder the use or development of technologies in the future."[690]

Technological neutrality has been accepted and exercised in national jurisdictions in regards to regulations governing the information and communication technologies. It is also known as 'principle of technological neutrality' and plays a significant role in the context of above technologies. Almost technological neutral regulation stands opposite the technology-specific regulations. Although it has been accepted "as a guiding principle for proper regulation of the information and communication technologies"[691] but gradually "it has continued to be a pervasive concept in that field, influencing among others the debates on convergence with broadcasting, voice over IP, universal service, spectrum allocation and net neutrality."[692]

Regarding conceptualization and the imperative impact of technological neutrality it has been said, "regulations can and should be developed in such a way that they are independent of any particular technology, neither favoring nor discriminating against specific technologies as they emerge and evolve."[693] Another commentator defined "technological neutrality of the law as the ability of legal mechanisms to comprehend changes independently of specific technologies."[694]

We can find many examples of the application of the technological neutrality in international copyright law. The Berne Convention followed a technologically neutral approach to

[688] The world broadcaster's unions attended in the SCCR meetings also reasoned that the Rome Convention reflects or represent only the prevailing communication technologies at 1960; and today almost all broadcasting organizations, in their broadcast to the public use different platforms of broadcasting simultaneously. Therefore, if the new treaty does not protect broadcasting organizations in all platforms of exploitation, it would not succeed to enhance the neighboring rights of broadcasting organizations and well fight against broadcast piracy. As it would be impossible or very difficult to prove from which platforms the transmitted broadcast signal were pirated.

[689] Reed, C. (2012). *Making laws for cyberspace.* Oxford: Oxford University Press, p. 190.

[690] Ibid.

[691] Reed, C. (2007). Taking Sides on Technology Neutrality. *Scripted , 4* (3), 264.

[692] Ibid.

[693] Craig, C. J. (2013). Technology Neutrality: (Pre) Serving the Purposes of Copyright Law. In M. Geist, *The Copyright Pentalogy: How the Supreme Court of Canada Shook the Foundations of Canadian Copyright Law* (pp. 272-273). Ottawa, Canada: University of Ottawa Press.

[694] Eleni Synodinou, T. (2012). The principle of technological neutrality in European copyright law: Myth or reality? *European Intellectual Property Review* (9), p. 618.

describe the concept of work. Since Article 3(3) of the Convention was conceived in an open-ended manner that protected new categories of works which derived from the application of new technologies such as computer programs, video games, multi media and electronic databases.[695] Article 2(1) also adopted technological neutrality in its granting of the exclusive right of authorizing the reproduction of works in any manner or form to authors of literary and artistic works. In this regard it does not matter in which manner or forms the protected works are reproduced. Similarly the exercise of the rights to make adaptations or performance to the public of the works protected under the Berne Convention and application of the right of communication to the public comes under Article 8 of the WCT. For this reason is that copyright law generally does not focus on the medium, technical or physical means used for exploitation of the works. The matter is the nature of use or exploitation of the copyrighted works.[696]

However, in regards to the protection of broadcaster's related rights, it seems that three different matters related to the scope of application of the new broadcaster's treaty should be separated. We may only consider technological neutrality when discussing *(a)* the broadcast media or platforms of exploitation and, *(b)* means and media of broadcast piracy. In the first instance, technological neutrality should be based on a common criterion, which is regulating "broadcast to the public' as an intended activity, and the second one should be based on another common criterion, which is banning 'unauthorized exploitation' of pre-broadcast signals, broadcast signals and fixation of a broadcast signal as an intended achievement or objective of the new treaty. Finally, technological neutrality is not capable of applying to new business models or additional non-broadcast services of broadcasting organizations.

However, there are questions as to 'why the new treaty should adopt technological neutrality in regards to the media and platforms of broadcast to the public?' 'Whether technological neutrality really is a desirable approach for demarcation of the scope of application of the new broadcaster's treaty?' and 'Can the application of technological neutrality to the scope of application of the new treaty achieve its anti-piracy objectives?'

We may answer to the first and second questions saying that the media and platforms of broadcasts to the public are changing and this new reality would have inevitable impacts for the broadcasting industry. It is not reasonable that a new treaty, like the Rome Convention, be a technology-specific treaty and made obsolete by the constant evolution of broadcast media. As one commentator rightly pointed out "society, business models, and technologies all change. If these changes were extensive they render the law meaningless to their subjects and the lawmakers need to address the matter again by amending the law to take this changes into account."[697]

On the other hand, we may answer to the third question; that one of the main objectives of the new treaty is giving ability to the broadcasters to fight against different categories of broadcast piracy as a global challenge. If the anti-piracy function of the new treaty is

[695] Ibid, p. 619.

[696] Article 3 (3) of the Berne Convention adopted a neutral approach to define "published works" by using "whatever may be the means of manufacture of the copies". It reads as follows:
'The expression 'published works' means works published with the consent of their authors, whatever may be the means of manufacture of the copies, provided that the 'availability' of such copies has been such as to satisfy the reasonable requirements of the public, having regard to the nature of the work.'

[697] Reed, C. (2012). *Making laws for cyberspace.* Oxford: Oxford University Press, p. 11.

intended to be its main achievement, it should be able to diminish all types of broadcast piracy, by any means and on any platform. If this were not the case, the anti-piracy function of the new treaty would not be meaningful. But if the "legislative purpose of application of technological neutrality is achievement of particular effects"[698] i.e. for an effective fight against piracy, it is necessary the scope of application of the new treaty be regulated with a technologically neutral approach in terms of means and platforms were used for broadcast piracy. Indeed, the effects of the technology or method used to carry out broadcast piracy must be regulated by the new treaty and not the method or platforms themselves. For the methods and platforms of broadcast piracy will continuously change. It is also not desirable that the new treaty specifies specific methods, platforms or technology of broadcast piracy. An effective Anti-piracy function or objective of the new treaty would require that it does not favor or discriminate a particular method, platforms and technology of one broadcast piracy to another. Only with these provisions can the new treaty continue to apply to new means and platforms of broadcast piracy without constant amendment of the treaty or the eventual need for another new treaty.

Therefore, the rights of broadcasting organizations should be updated and/or new rights and protection ought to be recognized and guaranteed in all existing and future broadcast platforms. Such a protection should not be like the Rome Convention in that it is a technology-dependent treaty that has confined protections and rights of broadcasting organizations only to the traditional platforms e.g. wireless terrestrial signal transmission. Consequently, by following a technologically neutral approach in drafting the new treaty, a broadcasting organization will be protected and could apply its neighboring rights if it uses terrestrial, satellite, cable, wired, Internet or any other computer networks to broadcast to the public.
Consequently, the above facts remind us that following a technologically neutral approach in determination of the scope of application of the new treaty is an ideal solution to achieve the objectives of protection of the new treaty. Insofar as the technology or platform of exploitation is concerned, broadcasters ought to be given complete protection of their signals on all platforms of exploitation. And concerning the anti-piracy function of the new treaty, it should be able to apply to all methods and platforms that are and will be used for broadcast piracy. The latter is very important because otherwise, broadcast pirates will claim that they intercepted broadcast signals by means and on platforms not specified in the new treaty or not covered by the scope of application of the new treaty.

[698] Reed, C. (2012). *Making laws for cyberspace.* Oxford: Oxford University Press, pagae 192. *Also see:* Koops, B.-J. (2006). Should ICT Regulation be Technology-Neutral? In B.-J. Koops, M. Lips, & C. a. Prins, *Starting Points for ICT Regulation: Deconstructing Prevalent Policy One-liners (Information Technology and Law Series)* (Vol. 9, pp. 77-108). Hague: The Hague: T.M.C. Asser Press, No. 4.7.

CHAPTER FIVE

PROPOSALS ON NEW RIGHTS AND PROTECTIONS

Chapter Five

Proposals on new rights and protections

Part one

Identification of 'signal-based' and 'right-based' approaches

It is possible to assess the history of the updated protection of broadcasting organizations by looking at the WIPO Diplomatic Conference of 1996, which resulted in the adoption of both the WCT and the WPPT.
In that diplomatic conference it was decided that work on the protection of broadcasting organizations would continue in the near future. In fact, the decision of the Diplomatic Conference was the starting point that the third beneficiary of the Rome Convention left alone. Since the beginning of the discussions on the protection of broadcasting organizations from within the framework of WIPO activities, although protection of broadcast signal against piracy was mentioned as a motive to work on the new broadcaster's treaty, there was no discussion regarding pursuing a particular approach for the way forward. The reason for this was that nobody was in doubt that broadcasters have neighboring rights over their broadcast signals and the reason for the need of a new treaty was that the Rome Convention could not be considered to effectively protect broadcasters from new challenges posed by the convergence of information and communication technology as well as the very real threat now posed by piracy. However, it frequently insisted that the rights and protection, which the new treaty would provide for these organizations, should not interfere with the rights of content owners or their exercise of those rights.

It was at the 2006 General Assembly where the phrase 'signal-based' was first recorded:

> "(i) The General Assembly approves the convening of the Diplomatic Conference on the Protection of the Rights of Broadcasting Organizations under the conditions set out in paragraph (iv) … The scope of the Treaty will be confined to the protection of broadcasting and cable casting organizations "in the traditional sense".
> (iv)… It is understood that the sessions of the SCCR should aim to agree and finalize, on a '**signal-based approach'** (emphasis added), the objectives, specific scope and object of protection. The Diplomatic Conference will be convened if such agreement is achieved. If no such

agreement is achieved, all further discussions will be based on document SCCR/15/2."[699]

However, the decision of the General Assembly in 2006 marked the beginning of more serious discussions on the 'signal-based' and 'right-based' approach in the subsequent SCCR meetings. Since the first post-2006 SCCR session, the differences on the interpretation of the decision handed down by the General Assembly and the concept of 'signal-based' has continued until July 2015 and the thirteenth session of the SCCR. Therefore, it is essential to discuss these two approaches and seek the reasons behind these approaches and different interpretations of the decision of the WIPO General Assembly. Only then can we seek to conclude and offer recommendations on this issue.

1. Signal-based approach

The notion of the protection of broadcasting organizations in relation to their signal, historically originated from the first SCCR meeting in 1998. Under this notion, which later has become the basis of the phrase 'signal-based approach'; the main objective expected from the new WIPO broadcaster treaty is that of reinforcing broadcasters against the piracy of their signals. Therefore, only their signal or 'broadcast program-carrying signals' disseminated by or on behalf of these organizations to the public should be protected against any unauthorized exploitation or piracy. Such an updated or new protection should be limited to the broadcaster's program-carrying signals, which they broadcast to the public during the transmission of the broadcast signal. It is also acknowledged that new forms of broadcast-signal piracy were invented and exploited by pirates, which existing international norms are not capable of preventing in an appropriate and effective manner. Hence, the international community has to take prompt measures to afford uniform and worldwide protection to broadcasting organizations in the fight against signal piracy.

Originally, proponents of what is now known as a 'signal-based approach' in WIPO sponsored meetings were mainly from different public sector groups, civil societies, non-governmental organizations and content owners unions all of whom regularly participate in SCCR since 1998.[700] In general, they claim that their approach is based on both their public interest concerns and the possible prejudicing against the rights of content owners or conferring protection to the works of public domain, which would have a negative effect on the general public interest. It seems that the signal-based approach is directly affected by the interpretation, which its proponents intend to make from the objectives and object of the protection of a possible new WIPO broadcasters treaty. Proponents including the Electronic Frontier Foundation (EFF), who are from so-called public interest groups, libraries, creative industry members, telecommunications and technology companies, claim that by granting broadcasters an intellectual property right by a new broadcaster's treaty would wreak havoc

[699] WIPO Document WO/GA/33/10, Report adopted by the WIPO General Assembly, Thirty-Third (16th Extraordinary) Session of October 3, 2006, para 107.

[700] ACA (American Cable Association), ATVA (American Television Alliance), CCIA (Computer and Communications industry Association), CC (Creative Common), CDT (Center for Democracy & Technology), CEA (Consumer Electronics Association), CI (Consumers International), CIS INDIA (Center for Internet &Society), CTIA (The Wireless Association), DiMA (Digital Media Association), EDRI (European Digital Rights), EFF (Electronic Frontier Foundation), eIFL (Electronic Information for Libraries), FSFE (Free Software Foundation Europe), IFLA (International Federation of Library Association and Institutions), IMMF (INTERNATIONAL MUSIC MANAGERS FORUM), Intel, IPJustice, KEI (Knowledge Ecology International) LCA (Library Copyright Alliance), OKFN (Open Knowledge Foundation), ORG (Open Rights Group), PK (Public Knowledge), TWCABLE (Time Warner Cable), Google, Verizon, AT& T, USTelecom etc.

on the Internet community; harm consumers, citizen, journalists, the free flow of information on the Internet, and innovation.[701]
For the EFF and others, if the main objective of the new treaty is harmonizing the rights of broadcasters through granting protection against signal piracy; it should not go far beyond this stated objective and overlap with the rights of other right holders, e.g. content owners and wider public interest. In addition to this, by protecting broadcasters against signal piracy, there is no need to grant them a new set of exclusive IP rights or even protection through protection of digital rights management (DRM) and/or technological protection measures. Thus, any attempt to update broadcaster's rights for the digital age and address signal theft, which is of serious concern to all broadcasters, it would not be wise to grant them intellectual property rights or other wide-ranging legal protection. For, they merely transmit the content produced by other right holders via their emitted signals, and do not necessarily, or indeed in the majority of cases, play a role in its creation or production.
Based on the above reasoning, providing broadcasting organizations with, for example, 50-year or any other exclusive intellectual property rights, which may apply in parallel with copyright and other related rights owners of the broadcast content, would create further complexity to copyright clearance regimes, creators of podcasts and documentary films and interfere with consumers' ability to make home recordings permitted under national copyright laws.[702]
Moreover, in a signal-based approach, not only should the duration of protection of program-carrying signals be confined from the point of origin of program-carrying signals to the point of destination, where such signals were intended; but also any legal provisions be national or international, which aim to protect broadcasting organizations to this ends, shall confine the protection only to the program-carrying signals themselves and not cover the content, works and any other program materials.

In general, the content, which the emitted signals carry, may fall into one of the three categories of content: *i*. The works of copyright or subject matter of related rights, which relevant copyright or related rights protect. *ii.* Content, which is not protected by copyright or related rights, for example sports programs, but their initial right to broadcast belongs to the sports organization concerned. *iii.* Finally, works, which are currently in the public domain or are other non-protected content that due to the social-public interest reasons, do not deserve to be protected by a new layer of intellectual property rights and protections. In addition to this, proponents of a signal-based approach feel that if broadcasters are given rights over the material they transmit, a person who records something from TV, the Internet, cable or satellite would need to get permission from both creator of the content and the broadcaster to re-use it.[703] Therefore, instead of granting IP rights to broadcasting organizations over their program-carrying signals, the most balanced way and preferable model for addressing broadcast-signal piracy is the narrower signal-based approach as adopted by the Brussels Satellite Convention. Otherwise, giving protection based on the IP rights-based approach would overlap with copyright and related rights; cause harm to innovation on the global Internet and bring unintended consequences for citizens' freedom of expression and for other

[701] Hinze, Gwen and Sguerra, Richard "*It's Back: WIPO Broadcasting Treaty Returns From The Grave"* Available at: www.eff.org/deeplinks/broadcasting-treaty (Last visited December 2012).
[702] Hinze, Gwen and Sguerra, Richard "*It's Back: WIPO Broadcasting Treaty Returns From The Grave",* Available at: www.eff.org/files/filenode/broadcasting_treaty/Joint%20Statement%20for%20SCCR%2022%20v4.pdf (Last visited December 2012).
[703] Doctorow, Cory, *WIPO's Broadcasting Treaty is back: a treaty to end the public domain, fair use and Creative Commons;* available at: http://boingboing.net/2012/08/11/wipos-broadcasting-treaty-is.html (last visited January, 2013)

relevant stakeholders.[704] According to this approach, creating new copyright-like rights for broadcasting organizations would possibly also extend to webcasters and simulcasters; which is contentious for other right holders and proponents of public interests. Proponents of signal-based approach argue that there is no example of harm to broadcasters, which cannot be remedied using existing international norms in the field. They also argue that "the harm alleged related to 'recordings of broadcasts' being made available on the Internet are not evidence of harm to broadcasters at all, since what is being disseminated is not a broadcast but a fixation of the program itself – for which copyright and related rights protection already provides remedies."[705] Intellectual property rights are for intellectual creation, whereas signals are not creative as they are transient and electronically produced carrier waves. Signals could not exist in fixed forms and any protection related to fixation or post-fixation activities is protecting something that did not exist after being perceived by audiences. What is fixed is content, which is already owned by someone else. In addition, a new treaty with anti-signal piracy function does not require giving intellectual property right to broadcasters on fixation of signals and other post fixation rights; otherwise the new treaty would create a new layer of intellectual property rights on top of copyright that would harm both consumers and copyright holders.[706]

The practical consequences of the signal-based approach, which we discussed above is that as the proponents view it, in principle the new treaty should protect current or flowing broadcast (to the public) signal; and any extension beyond this approach would go further the mandate of the WIPO General Assembly in 2006. Indeed, this concept of signal-based approach limits the object or subject matter of protection of the new treaty to:

i. Live (current of flowing) signal
ii. To be intended for the direct (non-interactive) reception of the public
iii. Protection shall only be given in relation to signal not any underlying content.[707]

Since 2006, this approach has impacted on all discussions regarding the objectives, object of protection and the specific scope of the new treaty. More precisely, we can classify its practical impacts as the following:

1. The nature of protection to be conferred to broadcasters should not be in the form of a positive exclusive intellectual property type right. Instead, they should be based on the model of protection, which the TRIPS and Brussels Satellite Convention adopted.[708] This means that

[704] Ibid.
[705] Joint Statement of Certain Civil Society, Rights holders, Cable casters and Webcasters, and Private Sector Representatives for the 22nd Session of the SCCR, Available at: www.eff.org/files/filenode/broadcasting_treaty/Joint%20Statement%20for%20SCCR%2022%20v4.pdf (Last visited December, 2012).
[706] See interventions made by the Computer and Communication Industry Association (CCIA), Internet Society and Knowledge Ecology International (KEI) in the WIPO General Assembly, WIPO Document WO/GA/41/18, Report of the forty-first (twenty-first extraordinary) session of the WIPO General Assembly (October 2012) of October 9, 2012, para142-3.
[707] WIPO Document SCCR/ 8/9, Report of the eighth session of the Standing Committee on Copyright and Related Rights of November 8, 2002, para 24: "The Delegation of India stated what was required to be protected under the new treaty was therefore the signal piracy, which could best be done through technological means. Some of the rights proposed for broadcasters by the governments had nothing to do with fighting signal piracy but were economic in nature and might have implication for the right holders of the underlying content."
[708] See, intervention made by the Delegation of India in eleventh session of SCCR "The Delegation of India stated that to the extent that the audiovisual company played a purely technical, non innovative, role in bringing an event to television viewers, the rights in the process were addressed by the Brussels Convention or, if that

broadcasters should be given defensive protections through the right to prevent or prohibit unauthorized access and exploitation of live or actual broadcast signal. This position on the notion of the decisions of the 2006 and 2007 General Assembly announced by the Delegations of India and the United States of America, however with differences on the coverage of new distribution platforms. In regard to the position of the Delegation of the USA, it is affected by the existing legal regime of protection of broadcasting organizations under their Communication Act, which protect the broadcast signals of broadcasting organizations to prohibit others from unauthorized retransmission of their broadcast signals in any other platforms. In addition, due to the fact that the USA is not a contracting party to the Rome Convention and does not recognize the concept of broadcasters neighboring rights; therefore the US Delegation has its specific and narrow interpretation of the 2006 and 2007 mandate of the WIPO GA, which is different from the interpretation made by the Delegation of India. The difference between the Delegations of the USA and India regarding the signal-based approach is that according to the Delegation of the USA, protection of broadcasting organizations in the signal-based approach is applicable in all technological platforms that were used by broadcasters for the transmission of their broadcast signal, either through traditional platforms or through new signal distribution platforms for example the Internet and other computer networks. In contrast, the Delegation of India argued that it could only be applied in the traditional platforms i.e. terrestrial, cable and satellite broadcasting.[709] Nonetheless, it should be acknowledged that the USA and the India share similar views regarding the non-extension of protection based on the signal-based approach to post fixation uses of broadcast signals and similar views regarding the nature of each individual protection.[710] Both have expressed a preference for the new treaty to provide rights or

---

protection proved inadequate, could be taken up in discussions at the International Telecommunications Union (ITU), and were therefore outside the remit of WIPO. The production of the program itself might be protected as intellectual property, whereas the technical act of broadcasting as such, while requiring investment, would qualify only for protection of the signal. The Committee's debates should focus on protection for intellectual property, rather than business investment, which fell outside the competence of WIPO." WIPO Document SCCR/11/4, Report of the eleventh session of the Standing Committee on Copyright and Related Rights of May 1, 2007, para 111.

[709] WIPO Document SCCR/25/3, Report of the twenty-fifth session of the Standing Committee on Copyright and Related Rights of January 23, 2013, para 84 (Intervention made by the Delegation of India): "The framework of the proposed treaty, protection of broadcasting organizations, is based on the signal-based approach in the traditional sense. Therefore, India opposes inclusion of any elements, which are akin to rights-based approach."

[710] The chairman of the WIPO SCCR also noted this issue by saying that "In the preparatory process there have been, during the last few years, especially from a number of non-governmental organizations, rather elaborate analyses and estimations on the potential effects of a new (exclusive, IP type) rights based instrument. According to these, the treaty would represent a new layer of IP rights in the content, it would be likely to harm consumers' position, lock up public domain content, and stifle technology innovation. The treaty would block fixations, transmissions and retransmissions over home or personal networks. Even if webcasting and simulcasting were excluded, a right of retransmission would bring control over unauthorized Internet retransmissions. The treaty could also lead to liabilities for intermediate network service providers for alleged infringements of prohibitions due to actions in the normal course of business actions of their customers." See: WIPO Document SCCR/ 17/Info/1, Informal paper prepared by the chairman of the Standing Committee on Copyright and Related Rights (SCCR) according to the decision of the SCCR at its 16th session of November 3, 2008, para 21.

In the WIPO General Assembly meeting some non-governmental organization echoed their concern. The Representative of the Internet Society stated "It recognized the work that both WIPO and Member States had put into the issue of protecting broadcasting organizations and supporting international initiatives on ways to prohibit signal piracy and it understood that some concerns had been expressed about the potential impact the new rights could have upon creativity and new business models by increasing costs for Internet users. Digital technologies and the Internet provided the tools for artistic expression through various forms. The sharing and circulation of

protections to prohibit or prevent third parties to use broadcast signals without authorization of the original broadcasters.[711]

2. The duration or term of protection of the broadcast signal must be limited to when the signal is current i.e. flowing during the actual broadcast. There should be no protection of signal when it is being received, because after that no program-carrying signal exists. Accordingly, the new treaty should not provide any post-fixation rights or protections for broadcasting organizations, and in contrast to the Rome Convention, assigning any term of protection for broadcast program-carrying signals make no sense in the signal-based approach.[712]

3. Protection should only be confined to the broadcast signal, not to any other signal transmission over the Internet or computer networks. Thus, any point-to-point transmission, interactive or on-demand services of broadcast signal and non-simultaneous retransmission of broadcast that are based on fixation of broadcast signal should be excluded from the scope of application of the new treaty since these instances are not considered broadcasting.

2. Right-based approach

We now turn our focus to the use of the word 'right' in the right-based approach when referring to the protection of broadcasting organizations.

Indeed, the term 'right' reminds us the basic notion or fundamental concept of 'neighboring or related rights' that originated in and was subsequently recognized by the Rome Convention in 1961 and later on updated by the WPPT and most recently by the Beijing Treaty of 2012.

In contrast to the original authorship or copyright regime, in which it is conditional upon the existence of a certain degree of originality, the protection of broadcasters' neighboring rights owes to their entrepreneurial, investment, and technical expertise and their efforts to broadcast program output to the public. In addition to this and in similarity to the other related rights treaties, protection of broadcasting organizations with the *right-based approach* follows the same rationale, justificatory arguments and/or *raison d'etre* of the broadcaster's

---

video and audio had become the norm on the Internet and it had allowed new platforms to emerge. Any treaty which related to issues pertaining to the Internet either directly or indirectly should respect the Internet's open nature as well as its underlying architecture and had to be addressed through a multi-stakeholder environment as established by paragraph 68 of the Declaration of the World Summit on the Information Society held in Tunis. See: WIPO Document WO/GA/41/18, Report of the forty-first (twenty-first extraordinary) session of the WIPO General Assembly (October 2012) of October 9, 2012, para 122.

Finally the Representative of KEI reminded, "Some versions of the treaty would create a new layer of rights on top of copyright that would harm both consumers and copyright holders. WIPO Document WO/GA/41/18, Report of the forty-first (twenty-first extraordinary) session of the WIPO General Assembly (October 2012) of October 9, 2012, para 144.

[711] In the seventieth session of SCCR the Delegation of India emphasized that it did not support any rights overlying the rights of the content providers in the form of exclusive rights. It stressed that the protection of broadcasters should be limited to the signals prior to and during transmission. See: WIPO Document SCCR/17/5, Report of the seventeenth session of the Standing Committee on Copyright and Related Rights of March 25, 2009, para 84.

[712] The chairman of the SCCR reflected this matter by saying that "Some delegations have argued that the objective of the treaty under preparation should be to establish a protection of the broadcast signal, enabling the broadcasting organizations to prevent piracy of that signal. A signal exists as it is being emitted, but then disappears, being an electromagnetic pulse. Thus, rights in the signal can logically only relate to the simultaneous retransmission of the signal and, possibly, its fixation. After fixation it is no longer a signal, but a fixation of the broadcast content." See, WIPO Document SCCR/ 17/Info/1, Informal paper prepared by the chairman of the Standing Committee on Copyright and Related Rights (SCCR) according to the decision of the SCCR at its 16th session of November 3, 2008, para 23.

neighboring rights (although much stronger rationales) as it is in the Rome Convention. Thus, as Helberger correctly noted "broadcasters are granted certain neighboring rights to protect the broadcast output against piracy and unfair competition and, in general, all acts whereby a third party derives unfair commercial profit from their investment."[713]

As it was the case for performing artists and phonogram producers, in the WPPT there is a fundamental need to update the neighboring rights conferred to broadcasters owing to the development of digital technology. New broadcast services, new distribution platforms, new forms of broadcast piracy and, in particular, unauthorized retransmission of broadcast signals over the Internet and any other computer networks have all motivated the WIPO Member States to begin work on protecting broadcasting organizations through a new treaty. Accordingly, like the 'signal-based approach', the initial concept of the so-called 'right-based approach' is based on the notion of neighboring rights that also originated since the first SCCR in 1998. However, the term 'right-based approach' was not used in any SCCR session before the WIPO General Assembly in 2006. It was after this General Assembly that proponents of the signal-based approach called proponents of the broadcaster's neighboring rights as being in favor of a so-called 'right-based approach'. Whereas, in fact the mandate of 2006 General Assembly is not a contradiction to protection of broadcaster's neighboring rights in their broadcast (broadcast program-carrying signals). Indeed, the real meaning of the signal-based approach is that the protection of broadcasting organizations should be extended only to their broadcast signal not to the underlying content. Protection of broadcaster's neighboring rights is fully distinct and leaves intact the contents, works and any other non-protected contents, which an emitted signal carries. Further, granting neighboring rights to the broadcasting organizations is fully consistent with the signal-based approach as mandated by the WIPO General Assembly in 2006. The General Assembly neither mandated that the SCCR should not overrule protection of broadcasting organizations within the notion of related or neighboring rights, nor ruled that the mechanisms of broadcaster's new or updated protection are like the model of protection that was established by the Brussels Satellite Convention. Consequently, the concept of the right-based approach to the extent that it is within the notion of related or neighboring rights is not in disagreement or conflict with the mandate of the WIPO General Assembly in 2006 regarding signal-based approach. Therefore, it seems that there is no difference between signal-based approach as decided by the General assembly and what is called a right-based approach within the notion of broadcaster's neighboring rights.

It seems that proponents of the signal-based approach in its strict sense have not drawn in their minds a clear perception or precise demarcation line between the notion of copyright and broadcaster's neighboring rights. Some commentators like Rumphorst state that "the main reason for this widespread lack of understanding lies in silence that existed about the broadcaster's neighboring rights between its introduction in 1960/61 and the early 90s, and that in reality it was not much relied on in practice."[714]

---

[713] Helberger, N. (1999). Neighboring rights protection of broadcasting organization: Current problems and possible lines of action. Strasbourg: Council of Europe, Doc. No. MM-S- PR (1999) def.
This article is available at:
www.coe.int/t/dghl/standardsetting/media/doc/mm-s-pr(1999)009def_EN.asp

[714] European Broadcasting Union. (2007). A selection of Articles and Speeches by Werner Rumphorst. Geneva p.149.

The center of reasoning of the *right–based approach* lies in its definition, which provides for subject matter of protection of broadcaster's neighboring rights i.e. broadcast. Although as it is discussed before, the Rome Convention does not define a broadcast itself, but according to the proponents of right-based approach, a broadcast is understood to be "the electronically generated signal, which transports radio or television programs for reception by the public, irrespective of the origin of such programs or the ownership of the content thereof."[715] To complete their reasoning, they say a broadcast is the fruit or output of broadcasters entrepreneurial and "organizational, technical and economic effort invested in a program and it's broadcasting."[716] It is similar to the fruit of entrepreneurial efforts of a phonogram producer, which is phonogram.

Further, in response to criticisms of the right-based approach (within the notion of related rights), its supporters tried to outline the divide, which exists between the broadcast content and broadcast signal. Hence, although an extensive part of broadcast content is protected under copyright of authors or neighboring rights of performers artists or phonogram producers; it is able to distinguish the copyright rights of authors from the neighboring rights of a broadcasting organization.

Here, there might be some confusion in situations where a broadcasting organization is the producer of the broadcast content or its underlying work. We may add that in such a case the broadcasting organization is the owner of copyright of the content and also is the owner of neighboring rights in relation the broadcast.

In regard the nature of rights and protections, which the proponents of right-based approach favor, some of the proponents, including the Delegation from the European Community stated that they give broadcasters several exclusive intellectual property type rights according to the Rome Convention and protecting broadcasters with intellectual property rights is well established and works well. In addition, its Member States have harmonized the protection of broadcasters in 1992 and they do not want to take a course of action that would affect this harmonization. Accordingly a new treaty should include Rome-plus elements and protection, which it offers should not be less than protection offered by the Rome Convention.[717] Other delegations stated that for them "a signal-based protection means only that it is the assembly of the broadcast content and the transmission of it that causes the protection, as opposed to the protection of the transmitted content"[718] and in order to give effective protection to the broadcasting organizations it is essential that the new treaty recognize the post-fixation rights,

---

[715] Ibid. p.150.

[716] Helberger, N. (1999). Neighboring rights protection of broadcasting organization: Current problems and possible lines of action. Strasbourg: Council of Europe, Doc. No. MM-S- PR (1999) def.
This article is available at:
http://www.coe.int/t/dghl/standardsetting/media/doc/mm-s-pr(1999)009def_EN.asp

[717] WIPO Document SCCR/12/4, Report of the twelfth session of the Standing Committee on Copyright and Related Rights of March 1, 2005, para 42.
Also see, Report of the eighth session of SCCR:
"The Chairman indicated that it would not be desirable to adopt a new treaty that would be below the level of protection granted under the Rome Convention and which would have the effect of reducing the existing level of protection or the minimum rights granted under that instrument." WIPO Document SCCR/ 8/9, Report of the eighth session of the Standing Committee on Copyright and Related Rights of November 8, 2002, para 67

[718] WIPO Document SCCR/ 17/Info/1, Informal paper prepared by the chairman of the Standing Committee on Copyright and Related Rights (SCCR) according to the decision of the SCCR at its 16th session of November 3, 2008, para 25.

as is established both in the Rome Convention and the TRIPS Agreement.[719] Therefore, the right of reproduction of fixations of the broadcast, right of deferred retransmission, which is a non-simultaneous retransmission of fixation of a broadcast by any means and on any platform and right to make available a fixation made from broadcast for interactive on-demand services "are important elements in an effective legal safeguarding of the broadcasting organizations' legitimate economic interests."[720] This approach was strongly supported by Delegations including that of Switzerland, which stated, " It was difficult to draw a distinction between protection based on economic rights and protection based on the fight against piracy. Piracy could take place only when rights had been granted to right holders, and piracy could not be said to exist if no rights–and therefore no protection–was in place."[721] The Swiss Delegation reasoned that the treaty language proposal, which it submitted to the second SCCR session[722] sought to improve protection for broadcasting organizations on the basis of the 1996 WIPO Internet treaties. Accordingly not only the Rome Convention, but in the opinion of the Swiss Delegation, "the WPPT had to be the starting point for affording protection to broadcasting organizations."[723]

Finally, at the end of this discussion we may conclude that technically it is proved that the broadcast signal consisting of content can be captured, fixed and reproduced after the actual broadcast.[724] Based on the notion of neighboring rights that is well established in the International related rights treaty, there is no contradiction between rights of authors over the content and broadcaster's neighboring rights over their signals as copyright and related rights are independent from each other and each has different subject matter or object of protection. It is the reason that all existing treaties on protection of neighboring rights have a copyright safeguard or non-prejudice clauses. For example the Rome Convention (Article 1), the WPPT (Article 1(2)), Beijing Treaty (Article 1(2)) have a provision that protection granted under these treaties shall leave intact and shall in no way affect the protection of copyright in literary and artistic works. Consequently, no provision of these treaties or the new WIPO broadcasters treaty may be interpreted as prejudicing such protection. Besides, it is always subject to the agreement concluded between broadcaster with the copyright owner that determines or authorizes broadcaster to fix its broadcast and use it in the rebroadcast, retransmission, on-demand services, sale and distribution of recording of their broadcast in any physical or digital storage devices.

---

[719] For example the right of reproduction of fixations in Article 13 of the Rome Convention and in Article 14 of the TRIPS Agreement

[720] WIPO Document SCCR/ 17/Info/1, Informal paper prepared by the chairman of the Standing Committee on Copyright and Related Rights (SCCR) according to the decision of the SCCR at its 16th session of November 3, 2008, para 25.

[721] WIPO Document SCCR/ 8/9, Report of the eighth session of the Standing Committee on Copyright and Related Rights of November 8, 2002, para 66.

[722] WIPO Document SCCR/2/5, Submission by the Switzerland on the protection of broadcasting organization of April 1999.

[723] WIPO Document SCCR/ 8/9, Report of the eighth session of the Standing Committee on Copyright and Related Rights of November 8, 2002, para 66.

Also see, intervention made by the Delegation of the European Community:
"Such an update should be based upon the Rome Convention and be complemented by certain elements that the WPPT and national or regional neighboring rights systems had to offer." WIPO Document SCCR/10/5, Report of the tenth session of the Standing Committee on Copyright and Related Rights of January 31, 2004, para 10.

[724] The Chairman of the SCCR made the following intervention:
"The notion of fixation was normally used when the signal was captured and the content was stored in a form from which it could be retrieved, possibly through a device." WIPO Document SCCR/ 5/6, Report of the fifth session of the Standing Committee on Copyright and Related Rights of March 1, 2005, para 72.

Nevertheless, the current situation is that for some countries that are contracting states to the Rome Convention "a treaty without the well-known enforceable rights is likely to be considered insufficient as a basis for international protection"[725] of broadcasting organizations. Therefore, in their opinion it is necessary that the new broadcaster's treaty accept the approach of the Rome Convention on broadcaster's neighboring rights with some Rome-plus elements, though it would, for some non-Rome countries, go beyond what they could support in the SCCR.[726]

Finally, since concerns have been raised about possible consequences of adopting an expansive exclusionary protection mechanisms in a new broadcasting treaty on the public interests, the proposed new broadcasting treaty may, like the WPPT, allow for its contracting parties to provide for the same kind of limitations and exceptions with regard to the protection of broadcast signal as they provide for, in their national legislation, in connection with the protection of copyright in literary and artistic works. Therefore, as the WPPT has updated phonogram producer's related rights by granting new exclusive IP-type rights and no contradiction with the dissemination and access to knowledge were reported by its contracting parties, there would not be any contradiction and/or oppositions between the update and the creation of new neighboring rights for broadcasting organizations on the one hand, with the dissemination and access to knowledge on the other. Besides, according to the majority of proposals received by the SCCR and the clear consensus that exists, the beneficiaries of the new broadcasting treaty could clearly be confined to broadcasting organizations and its peer cablecasting organizations. Therefore, the new rights and protections that the new treaty will provide do not extend to other entities or persons even though such entity or person might carry out broadcast-like activities. This attitude, accompanied by robust provisions on limitations and exceptions, would avoid any prejudice to public interests and the access of the public to knowledge and information. The new treaty would not provide a second layer of IP law. The rights and protections, which the new treaty would provide, are within the context of related rights that are distinct from the context of copyright. A possible solution to remove any concern on the possible contradiction of the new broadcasting treaty with authors copyright would be to include copyright safeguard or non-prejudice clause in the new treaty. Article 1(2) of the WPPT and Article 1(2) of the WIPO Beijing Treaty are examples of such a solution has been used in the past.

Part two

Possibility of recognition of new rights

In part one we identified the two principal approaches taken in the WIPO SCCR negotiations in relation to the preparation of a draft treaty on the protection of broadcasting organizations. We found that proponents of both approaches realized there is an urgent need to update the rights and protection given to broadcasting organizations against the piracy and unauthorized exploitation of their broadcasts. Despite the fact that there are large agreements amongst

[725] WIPO Document SCCR/ 17/Info/1, Informal paper prepared by the chairman of the Standing Committee on Copyright and Related Rights (SCCR) according to the decision of the SCCR at its 16th session of November 3, 2008, para 22.
[726] Ibid.

WIPO Member States that broadcast piracy has become a major problem, they have been unable to reach consensus on how to address the growing broadcast piracy.
The differences on the interpretation of the decision made by the WIPO General Assembly in 2006 and 'signal-based' approach caused differences regarding the scope of rights and protection to be given to broadcasting organizations. In fact, the scope of rights and protections addresses the kind, level and nature of individual rights and protections to be given broadcasting organizations. In addition, another unresolved difference among Member States, which impeded the efforts to reach consensus on the new draft treaty, is in regards to the stage or stages that the new treaty would or should protect the broadcast signal. There are three separate stages; pre-broadcast stage, during broadcast stage (simultaneous) and post-broadcast stage (non-simultaneous) and broadcast piracy exists in all three stages in different forms.
Broadcast piracy is a global challenge that needs global solutions. In addition to this, broadcasting activities have become international in their nature. Therefore, in proposing new intellectual property rights and protection to broadcasting organizations, differences in national legal traditions should be regarded and presenting international harmonized solutions should be aimed for. These all require that, in order to adopt any new WIPO broadcasters treaty, Member States should either agree on the core stage of broadcast piracy i.e. protection of broadcasting organizations' in relation to simultaneous retransmissions of broadcast signals to the public, leaving the two other stages of broadcast piracy to be left unresolved or entirely to be left to national legislation, or the Member States have to adopt an approach that would not represent any of the national approaches and establish international norms in regards to all three stages of broadcast piracy. The latter solution will only succeed if individual rights and protections to be given to broadcasters for each stage of broadcast piracy can be drafted in a flexible manner and adopted by all members in accordance with their own legal and cultural perspective. In this approach, each right and protection needs to be considered separately in this research. For, there are different levels of agreement or consensus on each right and protection. If there were a high level of consensus on a particular right or protection, for example in regards to the piracy at during-broadcast stage (only simultaneous retransmissions), the new treaty has to provide a mandatory right or protection for broadcasting organizations. In regards the other rights and protections, the new treaty may provide non-mandatory rights and protections with optional clauses - of course it can envisage the principle of reciprocity- keep flexibility and gives relative freedom to the contracting parties to give effective and appropriate rights and protections in their respective legislation.
Accordingly, in this Part we intend to consider the individual right as proposed in several draft proposals and that have been discussed by Member States during the last fifteen years. We aim to find how differences on the above issues can be bridged and to propose possible solutions to set up new or updated rights and protection to broadcasting organizations to enable them to prevent all three stages of broadcast piracy. In this regard, any solution should recommend balanced rights and protections in the digital environment for traditional broadcasters; though avoiding any negative influence on other rights holders or prejudicing public interests. As it is the current tendency of Member States, we also deem the new treaty as a stand-alone treaty, which would be complementary to the Rome Convention and can take into account other relevant treaties in this area such as the Brussels Satellite Convention, WPPT, and the TRIPS Agreement.

I. Right of fixation of broadcast

In the context of copyright and related rights the term 'fixation' refers to the 'first' capturing, recording or embodying of copyrighted works, performance and broadcast into any kind of tangible[727] (material) or intangible[728] and sufficiently stable form from which it could be perceived or be used for further reproduction or communication to the public. Fixation can also be known as the 'first fixation' of a work, performance or of a broadcast; and any further recording or copying of a fixation is considered as its reproduction and not 'fixation of a fixation'.

One commentator interpreted 'fixation' as "the first embodiment of a fleeting broadcasting transmission."[729] Another commentator considered the fixation of broadcast as "a precondition for its, increasingly profitable, secondary exploitation[730] that constitutes basis for any subsequent unauthorized making copies or reproduction of broadcast and its sale and distribution to the public or even to insert it in whole or in part into a multimedia production or an audiovisual service."[731] Therefore, broadcasters are given the right of fixation of their broadcast in the Rome Convention[732] and in the European Agreement on the Protection of Television Broadcasts (1960)[733] to control subsequent uses of fixations made from their broadcasts. The act of embodiment or storing and the means that are used for fixation or embodiment is not technology-specific in any existing copyright and related rights treaty. The act of fixation could be direct or indirect, whole or in part, tangible or intangible electronic storage device or memories.

Technically the 'recording' and 'reproduction' of a work is itself a kind of fixation, but recording, is used as synonym for 'fixation and reproduction' in the Berne Convention. The Berne Convention does not define fixation but recognizes the right to record of literary and artistic works impliedly where it provides for authors the exclusive right of authorizing reproduction of works.[734] The Rome Convention also does not define fixation. It grants a right of fixation to performing artists with regards to 'unfixed (live) performances' in the

---

[727] For example on CD, DVD and videotape.

[728] For example in a computer memory.

[729] Nordemann, W., Vinck, K., Meyer, G., & Hertin, P. W. (1990). *International Copyright and Neighboring Rights Law : commentary with special emphasis on the European Community.* Weinheim: VCH Verlagsgesellschaft, Commentary Rome Convention, Article 13, para 3.

[730] Helberger, N. (1999). *Neighboring rights protection of broadcasting organization: Current problems and possible lines of action.* Strasbourg: Council of Europe, Doc. No. MM-S- PR (1999) def, p. 5.

[731] Ibid.

[732] Article 13 (b) of the Rome Convention.

[733] Article 1 (1)(d) of the European Agreement for the Protection of Television Broadcasts reads:
"Broadcasting organizations constituted in the territory and under the laws of a Party to this Agreement or transmitting from such territory shall enjoy, in respect of all their television broadcasts:
d. Any fixation of such broadcasts or still photographs thereof, and any reproduction of such a fixation.
However Article 3 (1) (d) of this Agreement permits to make reservation application of right of fixation of broadcast in regard the still photograph and reads as follows:
"Parties to this Agreement, by making a declaration as provided in Article 10, and in respect of their own territory, may:
d. Withhold the protection provided for in sub-paragraphs 1.d and e of Article 1, in respect of still photographs or reproductions of such photographs"

[734] The Berne Convention, Article 9 provided that:
(1) Authors of literary and artistic works protected by this Convention shall have the exclusive right of authorizing the reproduction of these works, in any manner or form.
…
(3) Any sound or visual recording shall be considered as a reproduction for the purposes of this Convention.

form of the 'possibility of preventing' other to fix it[735] and to the broadcasting organizations with regard to their own broadcasts in the form of 'right to authorize or prohibit' fixation of their broadcast.[736] Whereas recording in 1961 was the sole means of fixation of a live performance or a live broadcast, it should be considered that fixation in this instance be used as a synonym for recording.

It was the WPPT that first defined 'fixation' in the context of international copyright and related rights and granted performers the exclusive right of authorizing the fixation of their unfixed performances.[737] It defines fixation as "the embodiment of sounds, or of the representations thereof, from which they can be perceived, reproduced or communicated through a device."[738] Indeed the WPPT does not limit fixation merely to the usual physical recording, rather it deems fixation any 'embodiment' of unfixed performances and presented 'fixation' as the basis of reproduction and subsequent communication. This definition is presented with the technologically neutral approach required in the digital environment. However, it should also be noted that due to the definition of fixation in Article 2(c), the right to authorize fixation of unfixed performances under Article 6(ii) WPPT does not extend to all fixations, rather it only covers sound or audio fixations on phonograms.

Similar to unfixed performances, live broadcast signals are vulnerable to being technically fixed and subsequently exploited by pirates. Unauthorized fixation of live broadcast signals is also the basis for other forms of broadcast piracy. It "can take physical form, such as unauthorized recordings of broadcasts on video tapes, DVDs or USB sticks"[739] and any other new forms and means of embodiments of broadcast signals.[740]

This is the reason that the Rome Convention assigned the right of fixation to broadcasting organizations in the early stages of the development of the recording industry. Moreover, this right is very vital for original broadcasters in their rebroadcasting to audiences who were not able to watch a program during its original broadcast. If broadcasters were not granted the right of fixation of their broadcast signals, other third parties and commercial pirates would have the ability to use unauthorized fixations as the basis for other unauthorized exploitation of broadcast. Therefore broadcasters should be given the right of fixation for their broadcast signal in the new broadcaster's treaty and in similar manner in the Rome Convention but in a broader technologically neutral sense in order to protect them from increasingly sophisticated

---

[735] The Rome Convention, Article 7(b):
The protection provided for performers by this Convention shall include the possibility of preventing:
…. *(b)* The fixation, without their consent, of their unfixed performance;
The TRIPS Agreement followed the same approach in its Article 14.1 regarding right of fixation for performer artists.

[736] Article 13(b): Broadcasting organizations shall enjoy the right to authorize or prohibit:
(b) The fixation of their broadcasts;
Article 14(3) of TRIPS Agreement also provides an optional right to prohibit fixation of broadcasts without authorization of broadcasting organizations.

[737] WPPT, Article 6(ii).

[738] WPPT, Article 2(c).

[739] World Intellectual Property Organization. (n.d.). *Protection of broadcasting organizations*. Retrieved February 9, 2014, from www.wipo.int: http://www.wipo.int/pressroom/en/briefs/broadcasting.html

[740] Under E.U. Directive 2001/29 (Article 2(e), broadcasting organizations have a right to authorize or prohibit fixations of their broadcasts. Here, fixation and reproduction probably have the same meaning, although in its strictly speaking, 'fixation' should be used purely for 'live broadcasts' and 'reproduction' for 'pre-recorded programs' that can be broadcast only through a recording medium. See: Tafforeau, P. (2013, July). Online music and assessment, a decade after the entry into force of the INFOSOC Directive of 22 May 2001. *Revue Internationale Du Droit D'Auteur* , p. 18.

piracy techniques representing huge losses to broadcasters legitimate interests. Besides, there is a great deal of broadcast content, for example sports and live shows that are not protected as works or performances, and broadcasters should be given right of fixation and post-fixation rights in these instances. In many countries, for example Iran, it is the usual practice of broadcasting organizations to fix (record) the entire broadcasts for their rebroadcasts, make them available through on-demand services and their physical reproduction in CD, DVD, videotapes and any other storage devices for sale and commercial distribution to the public.
Nevertheless, discussions on the new draft treaty have focused on whether or not broadcasters should be granted this right, which has to follow a signal-based approach as previously discussed. Delegations presented opposing views by stating on the one hand that IP rights are for intellectual creativity whereas signals are not creative, being transient and electronically produced carrier waves. Signals cannot exist in fixed forms and any protection related to fixation or post-fixation activities is protecting something that did not exist after being perceived by audiences. What is fixed is the content they carry, which is already owned by someone else. In addition to this, a new treaty with an anti-signal piracy function does not requires giving an intellectual property right to broadcasters on fixation of signals and other post fixation rights; if it did then the treaty would create a new layer of intellectual property rights on the top of copyright that would potentially bring harm both consumers and copyright holders.[741]

In response to the above concerns by stating that not only can broadcast signals containing content be captured, fixed and reproduced after broadcast,[742] there are no contradiction between rights of authors and broadcaster's neighboring rights over their signals. Since, copyright and related rights are independent from each other and each has different subject matter or object of protection. In addition to this, broadcasters were granted neighboring rights over their broadcast signals not for existence of creativity in their signal but for their investment, and entrepreneurial efforts in the production and dissemination of program-carrying signals. It is the reason that all existing treaties on protection of neighboring rights have a copyright safeguard or non-prejudice clauses. For example the Rome Convention (Article 1), the WPPT (Article 1(2)), and the Beijing Treaty (Article 1(2)) all contain a provision that protection granted under these treaties shall leave intact and shall in no way affect the protection of copyright in literary and artistic works. Consequently, no provision within any of the treaties may be interpreted as prejudicing such protection. Besides, it is always the bilateral agreement between broadcaster and copyright/content owner that determines or authorizes a broadcaster to make a fixation or record of its broadcast. Therefore, if the broadcast content is a work protected under copyright, it is subject to agreement or authorization made by the owner of copyright, broadcasters may fix its broadcast for subsequent uses or exploitations e.g. to use it in their rebroadcast, making available activities, on-demand services, sale and distribution of recording of their broadcast in the forms of DVD, CD and any other storage devices.
Despite opposition to the right of fixation and other post-fixation rights, all above realities have resulted in a proposed 'right of fixation' in many draft proposals submitted by member

[741] Interventions made by the Computer and Communication Industry Association (CCIA), Internet Society and Knowledge Ecology International (KEI) in the WIPO General Assembly See: WIPO Document WO/GA/41/18, Report of the forty-first (twenty-first extraordinary) session of the WIPO General Assembly (October 2012) of October 9, 2012, para 142-3.
[742] The Chairman of the SCCR explained, "The notion of fixation was normally used when the signal was captured and the content was stored in a form from which it could be retrieved, possibly through a device." See: WIPO Document SCCR/ 5/6, Report of the fifth session of the Standing Committee on Copyright and Related Rights of March 1, 2005, para 72.

States to the SCCR between 1998 and 2014. [743] In these proposals attempts were made, to define fixation all of which were subject to minor differences.[744] It seems that there are other important reasons that necessitate the provision of the right to make fixation of broadcast and defining fixation in the draft treaty. The first reason is that the concept of right of fixation in the Rome Convention does not cover fixation of still photograph from broadcast but rather is assigned to the national law of its contracting parties. Given the state of current technology, which allows the capture of still pictures from a broadcast with a high resolution, this has gained economic importance in the audiovisual market.[745]
In this regard, the Record of the Rome Diplomatic Conference states that there was a proposal suggesting that the prohibition against the fixation of television broadcasts include the right to prevent the making of a still picture. The Conference, although agreed to extend the right to prohibit against fixing a whole broadcast to parts of a broadcast, but it refused to make a decision on whether or not a still picture of a television broadcast was to be regarded as a part of a broadcast. Accordingly, it has been decided to leave this matter to the national

[743] For example see:
- WIPO Document SCCR/2/5, Proposal submitted by the Switzerland of April 6, 1999, Article 7 on right of fixation:
"Broadcasting organizations shall enjoy the exclusive right to authorize the fixation in whole or in part, direct or indirect, of their broadcasts on phonograms, videograms or other data carriers."
This proposal covers the making of a still photograph from an individual image in a broadcast and also covers both the direct fixation of a broadcast and a fixation on the basis of a simultaneous rebroadcast. See, WIPO Document SCCR/2/5, Submission by the Switzerland, comments on the Article 7.

- WIPO Document SCCR/6/2, Proposal submitted by the European Community and its Member States of October 3, 2001, Article 4 on the right of fixation:
"Broadcasting organizations shall enjoy the exclusive right to authorize or prohibit the fixation of their broadcasts."

- WIPO Document SCCR/15/2, Revised draft basic proposal for the WIPO treaty on the protection of broadcasting organizations, prepared by the Chair of the Standing Committee on Copyright and Related Rights in cooperation with the Secretariat of July 31, 2006, Article 11 on right of fixation:
"Broadcasting organizations shall enjoy the exclusive right of authorizing the fixation of their broadcasts." This draft is *mutatis mutandis* Article 6(ii) of the WPPT.

Also the following proposals contain right of fixation of broadcast:
- WIPO Document SCCR /23/6, Proposal submitted by the Delegation of South Africa and Mexico of November 28, 2011.
- WIPO Document SCCR/24/10, Working document for a treaty on the protection of broadcasting organizations, adopted by the SCCR of September 21, 2012.
- WIPO Document SCCR /27/2 Rev, Working document for a treaty on the protection of broadcasting organizations prepared by the Secretariat of March 25, 2014.
- WIPO Document SCCR /27/6, Proposal on a treaty on the protection of broadcasting organizations submitted by Armenia, Azerbaijan, Belarus, Kazakhstan, Kyrgyzstan, Russian Federation, Tajikistan, Turkmenistan, Ukraine and Uzbekistan of April 21, 2014.

[744] Almost in all of the different proposals submitted to the SCCR for example in WIPO Document SCCR/23/6, Proposal on treaty on the protection of broadcasting and cablecasting organizations, Joint submission by South Africa and Mexico, Article 2(f); WIPO Document SCCR/27/6, Proposal on treaty on the protection of broadcasting and cablecasting organizations, Joint submission by Armenia, Azerbaijan, Belarus, Kazakhstan, Article 2(d); WIPO doc SCCR/24/10 Corr., Working document for a treaty on the protection of broadcasting organizations adopted by the SCCR ,Article 5; and WIPO Document SCCR/27/2 Rev., Working document for a treaty on the protection of broadcasting organizations prepared by the WIPO Secretariat, Article 5 the "fixation" is defined as:
"Fixation means the embodiment of sounds or of images or of images and sounds or of the representations thereof, from which they can be perceived, reproduced or communicated through a device."

[745] WIPO Document SCCR/2/6, Submissions from non-governmental organizations, proposal for a draft WIPO broadcaster's treaty of April 7, 1999, p. 13.

laws of Contracting States.[746] The second reason that requires including the new right to make fixation of broadcast in the new treaty is that the right of fixation of broadcast should be adopted to new information and communication technologies in the digital age. Currently, unauthorized fixation of broadcast carries either directly from the original broadcast, or indirectly through authorized or unauthorized simultaneous rebroadcast or simultaneous retransmission of broadcast over computer networks (simulcast). Accordingly, the scope of the right of fixation should not only cover making direct fixation from the original broadcast or rebroadcast, but also cover making indirect fixation from any third party's authorized or unauthorized retransmission of broadcast in any transmission system or distribution platforms.

This concept of the right to make fixation of broadcast is being accepted in some national legislations and welcomed by the broadcasting industry so long as to do not infringe on any other rights in the underlying broadcast content. [747]

Consequently, the economic significance of fixation of the broadcast justifies granting an updated 'right of fixation of broadcast' to the broadcasting organizations in the new broadcaster's treaty. The best solution would be to draft the right using the model that was adopted in the WPPT Article 6(ii) on performers exclusive right to authorize fixation of their unfixed performances. However, inclusion of the elements that exist in the proposal submitted by the Delegation of Switzerland in the definition of 'fixation', would add more clarity.

This right should be designed in a technologically neutral approach in terms of means and method of the embodiment or storage of a broadcast in a stable medium or format, capable of covering any fixation of the broadcast either in its entirety or in part, fixation from direct

---

[746] International Labour Organization, United Nations Educational, scientific and Cultural Organization, and the United International Bureau for the Protection of Intellectual Property. (1968). *Records of the Diplomatic Conference on the International Protection of Performers, Producers of Phonograms and Broadcasting Organizations* . Ceuterick: Louvain, p. 50.

[747] For example the Copyright Act of 9 September 1965 of the Germany (Federal Law Gazette Part I, p. 1273), as last amended by Article 83 of the Act of 17 December 2008 (Federal Law Gazette Part I, p. 2586):
Article 87 Broadcasting organization
(1) The broadcasting organization has the exclusive right to
2. Make video or audio recordings of its broadcast, to take photographs of its broadcast, as well as to reproduce and distribute the video and audio recordings or photographs, with the exception of rental right,
- Or the Swiss Federal Act on Copyright and Related Rights (1992):
Art. 37 Rights of broadcasting organizations
A broadcasting organization has the exclusive right:
c. To fix its broadcasts on blank media and to reproduce such fixations;

- In the European Copyright law the Directive 2006/115/EC of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property provides that:
Article 7. Fixation right:
2. Member States shall provide for broadcasting organizations the exclusive right to authorize or prohibit the fixation of their broadcasts, whether these broadcasts are transmitted by wire or over the air, including by cable or satellite.
Finally the Copyright Act of Japan (Act No. 48 of May 6, 1970, as last amended by Act No. 65 of December 3, 2010) reads that:
Section 4. Rights of Broadcasting Organizations
Article 98.
Broadcasting organizations shall have the exclusive rights to make sound or visual recordings of their broadcasts or those diffused by wire from such broadcasts, and to reproduce by means of photography or other similar processes the sounds or images incorporated in these broadcasts.

broadcast or indirectly from simultaneous or delayed rebroadcast even from retransmissions of broadcast over any distribution platforms. The nature of the right ought to be an exclusive right to authorize fixation of broadcasts. For only such a right can protect broadcaster's legitimate efforts and investments in an effective and appropriate manner. However, in case of disagreement amongst WIPO Member States on the nature of the right, the possible solution is the adoption of the WPPT model (Article 6. ii) as a principle with possibility to provide an optional 'right to prohibit fixation of broadcasts' without authorization of broadcasting organizations, which is recognized by Article 14(3) of TRIPS Agreement. Therefore, the following draft language is recommended for right of fixation, with also the adoption of the principle of reciprocity amongst contracting parties:

1. Broadcasting organizations shall enjoy the exclusive right to authorize or prohibit fixation of their broadcast.
2. A contracting party may, through a notification deposited with the Director General of WIPO, declare that instead of the exclusive right of authorizing fixation of their broadcast, it will provide protection for the broadcasting organizations through prohibition of fixation of broadcast without the consent of the broadcasting organizations.
3. The protection provided for in paragraph (1) may be claimed in a Contracting Party only if legislation in the Contracting Party to which the broadcasting organizations belongs so permits, and to the extent permitted by the Contracting Party where this protection is claimed.

II. Right of reproduction of fixation of broadcast

Technically, "reproduction is in fact the fixation of a fixation."[748] Forty two years after adoption of the Rome Convention, the WIPO Glossary of Copyright and Related Rights Terms has defined 'reproduction' as "a [new] fixation of the work or object of related rights sufficiently stable in a way that the work or object of related rights may be perceived, [further] reproduced and communicated on the basis thereof". Storage of works in an electronic (computer) memory is also reproduction, since it fully corresponds to this concept[749]. It seems that the above-definition is considerably affected by Article 9(1) of the Berne Convention, which provides that "[the] owners of copyright must enjoy an exclusive right to authorize the reproduction of their works in any manner or form."[750] But the Rome Convention has defined reproduction as "the making of a copy or copies of a fixation"[751] that corresponds to level of recording industry and means and forms of reproduction which existed at that time. The Rome Convention grants the right of reproduction to performers, producers of phonograms and broadcasting organizations with different scope of protection and covering different acts of reproduction.[752]

---

[748] Tafforeau, P. (2013, July). Online music and assessment, a decade after the entry into force of the INFOSOC Directive of 22 May 2001. *Revue Internationale Du Droit D'Auteur* , p.14.
[749] *Guide to the Copyright and Related rights Treaties Administered by WIPO and Glossary of Copyright and Related Rights Terms* (Vol. 891(E)). (2003). Geneva: World Intellectual Property Organization, p. 307.
[750] Since 'under Article 9.1 of the TRIPS Agreement and under Article 1(4) of the WCT, the compliance, inter alia, with Article 9 of the Berne Convention is an obligation, the same concept of "reproduction" is applicable – with the same scope of the right of reproduction – under those instruments as under the Berne Convention'. See: *Guide to the Copyright and Related rights Treaties Administered by WIPO and Glossary of Copyright and Related Rights Terms* (Vol. 891(E)). (2003). Geneva: World Intellectual Property Organization, p. 308.
[751] See: The Rome Convention, Article 3(e).
[752] The Rome Convention also grants the right of reproduction to the performers and producers of phonograms:

It seems that the Rome Convention accepted the same concept of right of reproduction -as it is in the Berne Convention- only for the producers of phonograms by adding direct or indirect reproduction in its Article 10. In Article 13(c) it grants the right to authorize or prohibit the reproduction of fixations made from broadcast to the broadcasting organizations only in two instances:

> *Firstly*, where fixation is made without the consent of broadcasting organizations; and
>
> *Secondly*, where fixation is made for permitted exceptions and specific limitations (in Article 15) but the reproduction is made for other purposes different from limitations and exceptions. [753]

In the five decades since the Rome Convention, the recording industry has changed and modernized. "Before the digital age, copying (such as the use of a cassette recorder to make copies of music played over the radio) posed little threat to the market for such recordings because they were highly imperfect and took considerable time to create".[754] In the digital age however, the reproduction and manipulation of fixation of broadcasts has been facilitated and been made easier. The ways and means of reproduction have increased. Consequently, this modernization has created ambiguities and legal uncertainties in regards to the definition of copying, reproduction of fixation of broadcast and scope of acts that the right of reproduction cover. The result of this has caused the aforementioned provision of the Rome Convention on the right of reproduction of fixed broadcast to run the risk of becoming irrelevant.

In addition, unauthorized physical and digital reproduction of the fixation of broadcasts and their commercial exploitation constitute major forms of broadcast piracy, which jeopardizes the legitimate interests of both content owners and broadcasters. The WPPT only resolved these ambiguities and legal uncertainties regarding performer's and phonogram producer's right of reproduction[755] in a *mutatis mutandis* manner in Article 9(1) of the Berne Convention, granting them exclusive right of reproduction.

Article 7. The protection provided for performers by this Convention shall include the possibility of preventing:
(c) the reproduction, without their consent, of a fixation of their performance:
(i) if the original fixation itself was made without their consent;
(ii) if the reproduction is made for purposes different from those for which the performers gave their consent;
(iii) if the original fixation was made in accordance with the provisions of Article 15, and the reproduction is made for purposes different from those referred to in those provisions.

Article 10. Producers of phonograms shall enjoy the right to authorize or prohibit the direct or indirect reproduction of their phonograms.

[753] The Rome Convention, Article13:
Broadcasting organizations shall enjoy the right to authorize or prohibit:
(c) the reproduction:
(i) of fixations, made without their consent, of their broadcasts;
(ii) of fixations, made in accordance with the provisions of Article 15, of their broadcasts, if the reproduction is made for purposes different from those referred to in those provisions;

[754] Heymann, L. (2006). Inducement as Contributory Copyright Infringement: Metro-Goldwyn-Mayer Studio Inc. v. Grokste, Ltd. *International Review of Intellectual Property and Competition Law , 37* (1), p. 31.

[755] See WPPT:
Article 7. Performers shall enjoy the exclusive right of authorizing the direct or indirect reproduction of their performances fixed in phonograms, in any manner or form.
Article 11. Producers of phonograms shall enjoy the exclusive right of authorizing the direct or indirect reproduction of their phonograms, in any manner or form.
(There is an Agreed statement concerning Articles 7, 11 that the reproduction rights, as set out in these Articles fully applies in the digital environment, in particular to the use of performances and phonograms in digital form. It is understood that the storage of a protected performance or phonogram in digital form in an electronic medium constitutes a reproduction within the meaning of these Articles.)

However, in the 1996 WIPO Diplomatic Conference the needs of broadcasting organizations were put aside with unresolved challenges regarding the unauthorized reproduction of fixation of their broadcasts. But to give an appropriate and effective protection in the WIPO new broadcaster's treaty, the scope of acts covered by the right of reproduction of fixations of broadcasts and any other protected subject matter should be defined with legal certainty and in conformity with the new forms and means of reproduction.

1. Reproduction and storing in the digital transmission

The reproduction and storage of copyright and related rights subject matter are not always in physical objects such as tapes, CD, DVD or Flash Memories. On the Internet and during the digital transmission of content over computer networks numerous reproductions are created and stored, with each copy differing from one another. Technical specification of each reproduction and storage methods deserve to be precisely analyzed in each jurisdiction according to legal criteria laid down in national legislation in order to make a judgment as to whether the right of reproduction is infringed or not. In addition to this, as the technology of digital transmission evolves it would affect legislators to make an assessment on the efficiency of the right of reproduction.
Reproduction in the digital transmission of content began with downloading. There is no doubt on the applicability of the right of reproduction in regards to downloads because by downloading a digital file containing transmitted content, that file is being copied and subsequently stored in the permanent memory of the user's computer. Downloading is gradually being replaced by the streaming of content, be that live streaming or on-demand steaming. Whether the right of reproduction is applicable to streaming depends on different elements, which varies according to national legislation[756]. These different elements include, different acts of storage occurs in different memories of the user's computer for example in Random Access Memory (RAM),[757] buffering process[758] and caching.[759]

[756] For example in EU law, under Article 2 of the Information Society Directive (2001/29/EC) provides that 'Member States shall provide for the exclusive right to authorize or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part for authors, performers, phonogram producers, producers of the first fixations of films and broadcasting organizations. Yet, in its Article 5 mentions applicability of limitations and exceptions on the right of reproduction in certain conditions that are clearly explained in the judgment made by the European Court of Justice in Infopaq International A/S v. Danske Dagblades Forening (Case C-302/10). According to paragraph 25 of the decision of the ECJ 'under Article 5(1) of Directive 2001/29, an act of reproduction is exempted from the reproduction right provided for in Article 2 thereof provided that it fulfils five conditions, namely, where the act is temporary; it is transient or incidental; it is an integral and essential part of a technological process; its sole purpose is to enable a transmission in a network between third parties by an intermediary or a lawful use of a work or protected subject-matter; and the act has no independent economic significance.

[757] Unlike Hard disc of the computer, RAM is temporary memory for temporary storing of data.
[758] Buffer is a volatile memory of the computer is used for streaming to compensate for variability in data flow. Buffer is a sort of waiting room for data to be read by a media player or by other application. As an ancillary or subsidiary to streaming, buffering is an act of temporary storage in the temporary memory. Borghi, M. (2011). Chasing Copyright Infringement in the Streaming Landscape. *International Review of Intellectual Property and Competition Law , 42* (3), p. 325 and 328.
[759] According to Borghi ' a cach is a temporary storage location for data that need to be accessed repeatedly and quickly. Typically, cach copies are saved into a hidden folder of the home computer called "temporary internet files". Depending on the settings of the operating system automatically cancel older data to replace fresh ones once the folder is full. Borghi, M. (2011). Chasing Copyright Infringement in the Streaming Landscape. *International Review of Intellectual Property and Competition Law , 42* (3), p. 325 and 328.

Therefore, it is being said that "its [streaming] assessment through the lenses of copyright is still unsettled"[760] and it is subject to different national case law. However, to verify infringement of the right of reproduction with regard to a protected subject matter it is necessary to prove that it is being copied and stored in such a way that could be perceived, reproduced and communicated. As the effect of digital networking technologies is seen in the loss of control of copyright holders over the reproduction and dissemination of their works,[761] the same effect would apply on broadcasting organizations with regard to fixation of their broadcast. "Since digital technology facilitates the making of copies at almost no marginal cost."[762]

2. Analysis of discussions and proposals at WIPO

During numerous WIPO SCCR meetings,[763] the necessity of granting the right of reproduction of fixation of broadcast to the broadcasting organizations has been discussed. Many WIPO Member States have submitted different proposals on the concept and scope of the application of this right. The right of reproduction, although like other post-fixation rights is faced with observations raised by proponents of strict sense of signal-based approach, but it seems that this right is not being opposed *per se*. Instead there are differences as to the nature and scope of application of the right.
As to the nature of the right there are three main approaches among WIPO Member States:

i. Granting an unqualified intellectual property-type exclusive right (WPPT model)
ii. Granting a defensive protection or right to prohibit supplemented by a possibility to recourse to effective legal remedies in respect of breach of this prohibition (Rome model)
iii. Combination of the two above with opt-in clause.

The Document SCCR/15/2 (Article 12) includes all proposals that represent above approaches in three alternatives.

Alternative N
Broadcasting organizations shall enjoy the exclusive right of authorizing the direct or indirect reproduction, in any manner or form, of fixations of their broadcasts.

This Alternative follows *mutatis mutandis* Articles 7 and 11 of the WPPT and grants the right of reproduction as an unqualified intellectual property-type exclusive right.[764]

Alternative O
(1) Broadcasting organizations shall have the "right to prohibit" the reproduction of fixations of their broadcasts other than those referred to in paragraph (2).
(2) Broadcasting organizations shall enjoy the "exclusive right of authorizing" the reproduction of their broadcasts from fixations made pursuant to Article 17 (limitations and exceptions) when such reproduction would not be permitted by that Article or otherwise made without their authorization.

---

[760] Borghi, M. (2011). Chasing Copyright Infringement in the Streaming Landscape. *International Review of Intellectual Property and Competition Law , 42* (3), p. 316.
[761] Drier, T. (2013). Online and its effect on the "Goods" versus "Services" distinction. *International Review of Intellectual Property and Competition Law , 44* (2), p. 137.
[762] Ibid.
[763] It was discussed in Sixth, Eights, Ninth, Eleventh, Twelfth, Fortieth, Fiftieth and Seventieth Sessions of the WIPO Standing Committee on Copyright and Related Rights
[764] WIPO Document SCCR/15/2, Revised draft basic proposal for the WIPO treaty on the protection of broadcasting organizations, prepared by the Chair of the Standing Committee on Copyright and Related Rights in cooperation with the Secretariat of July 31, 2006, p. 46.

In this Alternative protection against the reproduction of fixation of broadcast is divided in two categories. First, as a general clause it is a right to prohibit with the exception of those specified in paragraph (2). Second, it is the provision of paragraph (2) that follows Article 13(c)(i) and (ii) of the Rome Convention. It provides an "exclusive right of authorizing" the reproduction of broadcasts from fixations made pursuant to Article 17 (i.e. limitation and exceptions and when such reproduction would not be permitted by that Article), as well as from any other fixations made without the consent of a broadcasting organizations.[765]

Alternative HH

(1) Broadcasting organizations shall enjoy the exclusive right of authorizing the direct or indirect reproduction, in any manner or form, of fixations of their broadcasts.
(2) Any Contracting Party may, in a notification deposited with the Director General of WIPO, declare that it will establish for the broadcasting organizations, instead of the exclusive right of authorizing provided for in paragraph (1), the following protection:
(i) Broadcasting organizations shall enjoy the exclusive right of authorizing the reproduction of their broadcasts from fixations made pursuant to Article 17 when such reproduction would not be permitted by that Article or otherwise made without their authorization, and
(ii) Reproduction, without the consent of the broadcasting organizations, of fixations of their broadcasts other than those referred to in subparagraph (i) shall be prohibited.

This Alternative provides the right of reproduction as an unqualified intellectual property-type exclusive right in the paragraph (1). But in paragraph (2) it offers to Contracting Parties a possibility to opt in to another formula of the right of reproduction.[766]

In this formula protection against reproduction is divided in two categories. First, in paragraph (2)(i) which corresponds to Article 13(c)(i) and (ii) of the Rome Convention and provides an "exclusive right of authorizing" the reproduction in specified cases including reproduction of broadcasts from fixations made pursuant to Article 17 (i.e. limitations and exceptions when such reproduction would not be permitted by that Article), as well as from any other fixations made without the consent of a broadcasting organization. Second, in paragraph (2)(ii) which provides to Contracting Parties an obligation to prohibit the reproduction of fixations of the broadcasts, other than those specified in paragraph (2)(i), in cases where the broadcasting organization has not consented such reproduction.[767] In this case broadcasting organizations shall have recourse to effective legal remedies in respect of breach of this prohibition mentioned in Article 24.[768]

After the 15th SCCR session, discussion on how to formulate the right of reproduction continued. In the Document SCCR/24/10 Corr, which is currently the single working document of the Committee, it sought to propose other alternatives on the right of

[765] Ibid.
[766] Ibid, 48.
[767] Ibid.
[768] Ibid, Article 24.
Article 24. Provisions on Enforcement of Rights
(1) Contracting Parties undertake to adopt, in accordance with their legal systems, the measures necessary to ensure the application of this Treaty.
(2) Contracting Parties shall ensure that enforcement procedures are available under their law so as to permit effective action against any act of infringement of rights or violation of any prohibition covered by this Treaty, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements.

reproduction of fixation of broadcast[769]. In Alternative A to Article 9, which is supported by proponents of signal-based approach in its strict sense, there is not right of reproduction in the list of rights. But Alternative B to this Article provides the right of reproduction, which it seems that it is a new formulation, combined all Alternatives in Document SCCR/15/2 analyzed above. According to this new formulation, as a general clause, broadcasting organizations shall enjoy the exclusive right to authorize the direct or indirect reproduction, in any manner or form, of fixations of their broadcasts. But it shall be a matter for domestic law of the Contracting Party where protection of this right is claimed "to determine the conditions under which it may be exercised", provided that such protection is 'adequate and effective'. In addition, any Contracting Party may, in a notification deposited with the Director General of WIPO, declare that it will establish protection for broadcasting organizations, instead of the exclusive right of authorizing reproduction by providing a 'right to prohibit'.

3. Proposal on the right of reproduction

The WIPO sponsored studies indicate that the broadcasting organizations rightly complain against unauthorized physical and digital reproduction of fixation of their broadcasts.[770] This unauthorized exploitation of fixation of broadcasts constitutes one of the major forms of broadcast piracy in both developed and developing countries. Unauthorized reproduction of fixation of broadcasts corresponds to infringement of the author's, performer's or phonogram producer's exclusive right of reproduction. The experiences of WPPT with its 92 Contracting Parties and more recently the Beijing Treaty has shown that updating the right of reproduction of objects of related rights would never contradict an author's exclusive right of reproduction. A broadcaster's right of reproduction is recognized in the Rome Convention. The new WIPO broadcaster's treaty may remove uncertainties around concept of the right and update it to be compatible with the digital environment and new reproduction technologies. The relevant Article in the new treaty may not succeed to update broadcaster's reproduction right unless the following major elements of the right of reproduction are taken into account:

---

[769] Document SCCR/24/10/ Corr.

Alternative B for Article 9 [paragraphs (1) to (4)]

(1) Broadcasting organizations shall enjoy the exclusive right to authorize:

i. the right of fixation of their broadcasts;

ii. the direct or indirect reproduction, in any manner or form, of fixations of their broadcasts;

iii. the retransmission of their broadcasts by any means, including rebroadcasting, retransmission by wire, and retransmission over computer networks;

iv. the communication to the public of their broadcasts;

v. the making available to the public of the original and copies of fixations of their broadcasts in such a way that members of the public may access them from a place and at a time individually chosen by them;

vi. the transmission by any means for the reception by the public of their broadcasts following fixation of such broadcasts;

vii. the making available to the public of the original and copies of fixations of their broadcasts, through sale or other transfer of ownership.

(2) With respect to the acts under subparagraphs (1)(ii) and (iii), in this article, it shall be a matter for domestic law of the Contracting Party where protection of this right is claimed to determine the conditions under which it may be exercised, provided that such protection is adequate and effective.

(3) Any Contracting Party may, in a notification deposited with the Director General of WIPO, declare that it will establish protection for broadcasting organizations, instead of the exclusive right of authorizing provided for in subparagraphs (1) (ii), (iv), (v), (vi), and (vii), by providing a right to prohibit.

(4) Contracting Parties shall provide adequate and effective legal protection in relation to their signals prior to broadcasting. The means of the protection granted by this paragraph shall be governed by the legislation of the country where protection is claimed.

[770] Document SCCR/20/2/Rev "Study on the Socioeconomic Dimension of the Unauthorized Use of Signals - Part II: Unauthorized Access to Broadcast Content - Cause and Effects: A Global Overview, prepared by Screen Digest, London, para 37-46. (Available at: www.wipo.int/meetings/en/doc_details.jsp?doc_id=132819, last visited February, 2014.

Firstly, broadcaster's right of reproduction should be extended to all fixations of their broadcasts. It should cover circumstances when the fixation was not consented and when fixation was consented by broadcaster as just because authorization is made by a broadcaster to make fixation of its broadcast does not imply the authorization if its subsequent reproduction.

Secondly, the right should be drafted in such a way that covers all 'direct and indirect' reproduction of fixation of broadcast in any manner or forms. Usually "when a copy protected content is made, some device, software, or other product must be used in the endeavor, whether a cassette recorder, a video tape recorder, or software that enables digital copies"[771]. Therefore, the method, manner, means and form of the reproduction of fixation of a broadcast must be irrelevant. Accordingly, it should be drafted to apply to new forms and means of reproduction. Just as "digitization by scanning or uploading, through which protected subject matter is transferred to a computer server (and thus to its memory, in its hard disk)"[772] is infringement of the author's right of reproduction', broadcasters also should be given the same right of reproduction in regards to fixations of their broadcast. Through an updated and a comprehensive reproduction right, all common unauthorized reproduction would be subject to the broadcaster's reproduction right, for example; uploading fixation of broadcasts to personal pages on social networking sites (such as Facebook, Twitter), blogs, and user-generated websites such as YouTube. This is because technically offering fixations of broadcasts in the above instances also entails prior reproduction by the service provider. Besides, before users can access fixation of broadcasts it has to be reproduced on a server of operator of service and sent to the user for watching or listening through streaming, downloading on the user's device.

Thirdly, the broadcaster's reproduction right must be fully applicable in a digital environment. It should not matter whether or not the copy is in a tangible or physical form e.g. Tapes, CD and DVD that may be physically distributed; or it is in an intangible form and is placed on the RAM (random access memory) of a personal computer or on a computer network. Even storage of fixation of a broadcast in digital form in an electronic medium constitutes its reproduction.[773]

Fourthly, similarly to works and other objects of related rights, it should be irrelevant whether the copy of the fixation of a broadcast may be perceived directly or only through a device.

Fifthly, the duration or continuity of the new fixation or copy be it permanent or temporary must be considered irrelevant. What matters is whether new copies or fixations are capable of being perceived, reproduced or communicated? However, it should be acknowledged that through the internet and the digital transmission of content over computer networks, numerous copies of the content may be made in terms of its technical concept through downloading, buffering in streaming transmission, and storage of content in catch files and Random Access Memory (RAM) of personal computers. But the technical concept of copying is different from its legal concept; any copying in the technical concept is not

[771] Heymann, L. (2006). Inducement as Contributory Copyright Infringement: Metro-Goldwyn-Mayer Studio Inc. v. Grokste, Ltd. *International Review of Intellectual Property and Competition Law , 37* (1), p. 32.
[772] Tafforeau, P. (2013, July). Online music and assessment, a decade after the entry into force of the INFOSOC Directive of 22 May 2001. *Revue Internationale Du Droit D'Auteur* , p. 4.
[773] This concept is recognized for performers and phonogram producers through Agreed Statement to Article 7 and 11 of WPPT.

infringement of right of reproduction. To be infringement of the right of reproduction, copying requires conditions that national legislation determines conditions under which the right of reproduction may be exercised in the digital transmission and the conditions in one country inevitably vary from conditions in another.

Therefore, as a solution for unauthorized reproductions of fixation of broadcasts, we propose broadcasting organizations be protected through granting right of reproduction as an unqualified IP-type exclusive right. The concept and the scope of application of the right should follow *mutatis mutandis* the right of reproduction granted to performers and phonogram producers in Articles 7 and 11 of WPPT. But determination of conditions under which the right may be exercised should be left as a matter for domestic law of the Contracting Party where protection of this right is claimed, provided that such protection is "adequate and effective".

The proposed draft for inclusion in the new treaty is as follows:

Broadcasting organizations shall enjoy the exclusive right of authorizing the direct or indirect reproduction, in any manner or form, of fixations of their broadcasts. It shall be a matter for domestic law of the Contracting Party where protection of this right is claimed to determine the conditions under which it may be exercised, provided that such protection is adequate and effective.

III. Right of distribution of fixation of broadcast

Except the Phonogram Convention,[774] none of the international copyright and related rights instruments has defined 'distribution'. Nevertheless, in the context of copyright and related rights, generally "distribution" means making available or putting into circulation the original or copies of a work or an object of related rights to the public. It has both a broad and narrow concept in national legislation and in international instruments. In its broader concept, it covers both the transfer of 'ownership' and 'possession' of the original and copies of a work or an object of related rights to the public. This broader concept also covers sales, rental and lending and any other transfer of 'ownership' and 'possession'. But it also has a narrow concept, which only covers the transfer of 'ownership' to the public of the original or copies of a work or an object of related rights that is also the first distribution of copies of works.[775]

The history of the right of distribution as 'an unqualified IP-type exclusive right' is based on the Berne Convention that for the first time granted 'exclusive right of distribution' to the authors of literary and artistic works.[776] In addition to the Berne Convention, neither the

[774] The Phonograms Convention, Article 1(d): " Distribution means any act by which duplicates of a phonogram are offered, directly or indirectly, to the general public or any section thereof."

[775] For example the WPPT, Articles 8 and 12; also the WCT, Article 6. Both treaties recognized separate right of rental, which only covers transfer of "possession" of works, performances fixed in phonograms and phonograms.

[776] The Berne Convention, Article 14(1)(i):

'Authors of literary or artistic works shall have the exclusive right of authorizing the cinematographic adaptation and reproduction of these works, and the "distribution" of the works thus adapted or reproduced.'

Article 14bis(1):

'Without prejudice to the copyright in any work, which may have been adapted or reproduced, a cinematographic work shall be protected as an original work. The owner of copyright in a cinematographic

Phonograms Convention nor the Rome Convention nor even the TRIPS Agreement grants the right of distribution to any neighboring rights holders.[777]

It was left to the WIPO Internet Treaties that not only reaffirmed and updated the right of distribution for authors,[778] but also granted a new exclusive right of distribution to performers and producers of phonograms.[779]
In fact the right of distribution in the Berne Convention, WCT and WPPT includes the exclusive right to control distribution of work, performances fixed in phonograms and phonograms incorporated in a material medium namely an item of goods such as tapes, CD, DVD that are tangible articles. It does not extend to provision of works and objects of related rights in the on-line services.[780] Therefore, this right would exhaust if the original or physical copies of protected subject matters sold by the right holders or with his consent.

---

work shall enjoy the same rights as the author of an original work, including the rights referred to in the preceding Article (Article 14(1)(i), which includes exclusive right of distribution).'
An implicit right of such first distribution may be deduced, as an inseparable corollary, from the right of reproduction provided by Article 9 of the Convention. See: *Guide to the Copyright and Related rights Treaties Administered by WIPO and Glossary of Copyright and Related Rights Terms* (Vol. 891(E)). (2003). Geneva: World Intellectual Property Organization, p. 283.

[777] The Phonogram Convention only obligates the Contracting States to "protect producers of phonograms who are nationals of other Contracting States against the making of duplicates without the consent of the producer and against the importation of such duplicates, provided that any such making or importation is for the purpose of distribution to the public, and against the distribution of such duplicates to the public." The TRIPS Agreement only provides for a right of rental with respect of certain categories of works, a right, which may be regarded as a sub-right of a general right of distribution. For further see: *Guide to the Berne convention for the protection of literary and artistic works (paris Act, 1971)*. (1978). Geneva: World intellectual property organization, p. 283-4.

[778] The WCT, Article 6 Right of Distribution:
(1) Authors of literary and artistic works shall enjoy the exclusive right of authorizing the making available to the public of the original and copies of their works through sale or other transfer of ownership.
(2) Nothing in this Treaty shall affect the freedom of Contracting Parties to determine the conditions, if any, under which the exhaustion of the right in paragraph (1) applies after the first sale or other transfer of ownership of the original or a copy of the work with the authorization of the author.
Agreed statement concerning Articles 6 and 7: As used in these Articles, the expressions "copies" and "original and copies," being subject to the right of distribution and the right of rental under the said Articles, refer exclusively to fixed copies that can be put into circulation as tangible objects.

[779] The WPPT,
Articles 8. Right of Distribution
(1) Performers shall enjoy the exclusive right of authorizing the making available to the public of the original and copies of their performances fixed in phonograms through sale or other transfer of ownership.
(2) Nothing in this Treaty shall affect the freedom of Contracting Parties to determine the conditions, if any, under which the exhaustion of the right in paragraph (1) applies after the first sale or other transfer of ownership of the original or a copy of the fixed performance with the authorization of the performer.
Article 12. Right of Distribution
(1) Producers of phonograms shall enjoy the exclusive right of authorizing the making available to the public of the original and copies of their phonograms through sale or other transfer of ownership.
(2) Nothing in this Treaty shall affect the freedom of Contracting Parties to determine the conditions, if any, under which the exhaustion of the right in paragraph (1) applies after the first sale or other transfer of ownership of the original or a copy of the phonogram with the authorization of the producer of the phonogram.10
Agreed statement concerning Articles 2(e), 8, 9, 12, and 13: As used in these Articles, the expressions "copies" and "original and copies," being subject to the right of distribution and the right of rental under the said Articles, refer exclusively to fixed copies that can be put into circulation as tangible objects.

[780] Making available of works and objects of related rights through online services is subject to the exclusive right of communication to the public (with regard to the works in the Berne Convention and WCT) and to the exclusive right to make available to the public (with regard the performances fixed in phonograms and phonograms in the WPPT), which the question of exhaustion does not arise.

1. Analysis of proposals and discussions at WIPO

During the second session of the SCCR in May 1999, the Delegation of Switzerland made the first proposal on the broadcaster's exclusive right of distribution. Basically, The Delegation of Switzerland submitted its proposal as a Protocol on the Protection of the Rights of Broadcasting Organizations under the WIPO Performances and Phonograms Treaty.[781] Therefore, Article 9 on the right of distribution is *mutatis mutandis* Article 8 and 12 of the WPPT. Indeed, the Swiss proposal reflects Article 37(d) of the Swiss Copyright and Related Rights Act, which like many other civil law countries grants exclusive right of distribution of fixation of broadcast. For these countries that recognize broadcaster's neighboring rights, the rationale of broadcaster's neighboring rights including a new right of distribution is the same rationale for performers and phonogram producers.

The Delegation of the European Community describing EC legal framework on the protection of broadcasting organizations emphasized the necessity of updating protections given to broadcasting organizations through a set of exclusive rights including the right of distribution of fixation of broadcast. The Delegation stressed that "the same stance has been followed at the Community level; with directive 92/100 on the rental and lending right and on certain rights related to copyright in the field of intellectual property, with directive 93/83 regarding the co-ordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission, as well as with directive 93/98 harmonizing the term of protection of copyright and certain related rights, all granting exclusive rights to broadcasting organizations."[782] The Delegation of the European Community proposed the right of distribution its first proposal in treaty language[783] and referred to the necessity of existence of this right in next SCCR Sessions[784].

The approach of the Switzerland and the European Community on a set of new exclusive rights including that of the right of distribution was welcomed by other countries,[785] non-governmental organizations[786] but mainly by the broadcasting organizations themselves and their regional unions in both that and the following SCCR sessions.[787]

---

[781] WIPO Document SCCR/2/5, Proposal made by the delegation of Switzerland for a Protocol on the Protection of the Rights of Broadcasting Organizations Under the WIPO Performances and Phonograms Treaty of April 6, 1999, p.11; In the 3rd SCCR session, the Swiss proposal was reaffirmed by the Delegation of Argentina in its proposal. See: WIPO Document SCCR/3/4, Proposal submitted by Argentina of July 29, 1999

[782] Currently right of distribution is mentioned in Article 9 of the Directive 2006/115/EC of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (codified version)

[783] WIPO Document SCCR/6/2, Proposal submitted by the European Community and its Member States of October 3, 2001, Article 9.

[784] See for example WIPO Document SCCR/6/4, Report of the sixth session of the Standing Committee on Copyright and Related Rights of December 20, 2001, para 19

[785] For example see the intervention made by the Delegation of Japan in the Fortieth SCCR session regarding the right of communication to the public and the right of distribution; See: WIPO Document SCCR/ 14/7, Report of the fourteenth session of the Standing Committee on Copyright and Related Rights of May 1, 2007, para 160. And also see the intervention made by the Delegation of Switzerland in the Eighth SCCR session, WIPO Document SCCR/ 8/9, Report of the eighth session of the Standing Committee on Copyright and Related Rights of November 8, 2002, para 99. The Delegation of Switzerland emphasized that experience had shown that some right of distribution had to be granted to broadcasters in order to enable them to fight piracy efficiently. It recalled that the right of distribution in the context of the WPPT had also been considered to be of great help in the fight against piracy.

[786] See for example Intervention made by the representative of the German Association for Intellectual Property and Copyright Law (GRUR) in the Seventieth session of SCCR; WIPO Document SCCR/17/5, Report of the seventeenth session of the Standing Committee on Copyright and Related Rights of March 25, 2009, para 112

[787] See: Interventions made by the representatives of the Association of Commercial Television in Europe (ACT); the European Broadcasting Union (EBU) and the Asia Pacific Broadcasting Union (ABU) in the Sixth

However, there are other countries that as well as opposing post-fixation rights oppose the granting of the right of distribution to the broadcasting organizations. These countries, along with the content rights holders groups, are not in agreement with the right of distribution and advocate the removal of the right of distribution and any other post-fixation rights from the text of the draft treaty. The Delegation of India interprets anti-signal piracy function of the new proposed treaty in a very strict sense. The Delegation said they "saw no justification for granting broadcasters rights of reproduction, distribution or transmission following fixation and making available of fixed broadcasts, because those rights went beyond the trail of protection against piracy of signals and are post-fixation rights. Those rights should be deleted from the basic text, and the scope of application should be extended only to the protection against piracy of signals."[788]

In addition to this opposition, rights owners organizations also came together to make a coalition since the second SCCR session in May 1991, and raised their common position on the challenges and negative effects that the new treaty might have. Although they acknowledged that a new treaty was needed to fight against signal piracy, they felt that this should not be done at the expense of other rights holders of broadcast content. During the last decade, the right holders' organizations have continued strong opposition towards granting an extra exclusive IP-Type right in relation to fixation of broadcasts. They say the sole objective of the new treaty should be the fight against piracy, and the rights granted by the 1961 Rome Convention addressed this issue. Broadcaster's protection is based on investment in the production of immaterial signals. Thus, the scope of the treaty and the process of preparation of the text of the treaty depend upon a clear focus on that objective. It should not extend the scope of activities of broadcasters and permit them to develop new services to the detriment of other rights holders. The scope and beneficiaries of the new treaty had to be clearly defined to avoid any destabilization of existing business models that enable content producers to market their works. Therefore, they questioned the appropriateness of granting broadcasting organizations a right of distribution because such right exceeds signal protection.[789]

The rights holders' organizations mentioned further opposition to the granting of a new right of distribution and other post-fixation rights to broadcasting organizations. They said the new treaty should safeguard the interests of other rights holders and maintain the balance between broadcasting organizations and the owners of content. Therefore, they favored limiting the rights accorded to broadcasting organizations to cases where those same rights were also

---

SCCR session, WIPO Document SCCR/6/4, Report of the sixth session of the Standing Committee on Copyright and Related Rights of December 20, 2001, para 28, 30 and 137.

[788] See: Intervention made by the Delegation of India in Fortieth session of the SCCR, WIPO Document SCCR/14/7, Report of the fourteenth session of the Standing Committee on Copyright and Related Rights of May 1, 2007, para 176; also see the intervention that this Delegation made in Fiftieth session of the SCCR opposing granting the right of distribution; WIPO Document SCCR/15/6, Report of the fifteenth session of the Standing Committee on Copyright and Related Rights of May 15, 2007, para 24.

[789] See: Intervention made by the representative of the International Federation of Film Producers (FIAPF) in the Eleventh SCCR session, WIPO Document SCCR/11/4, Report of the eleventh session of the Standing Committee on Copyright and Related Rights of May 1, 2007, para 89; also see Intervention made by representative of the International Organization of Performing Artists (GIART) in the Twelfth SCCR session, WIPO Document SCCR/12/4, Report of the twelfth session of the Standing Committee on Copyright and Related Rights of March 1, 2005, para 211. (The representative stated that regarding the scope of protection; it was necessary to distinguish between the signal and the content protection. The rights of distribution and making available should be excluded from the treaty, as protection should not go beyond the rights granted in the Rome Convention.)

granted to content owners, for example the right of distribution.[790] Furthermore, it is noted that it was not rational that various categories of beneficiaries of copyright and related rights should necessarily benefit from equivalent rights, because the nature of the beneficiaries and their function within the audiovisual economy is not the same. What was stated almost with perfect consensus from all sides was that broadcasters needed to be able to protect their signals against illicit use. Accordingly, the list of rights should be limited to those strictly required to protect signals and not the right of distribution or making available to the public, which are unrelated to the real activities of broadcasting organizations.[791]

Finally, according to the rights holders' organizations the post-fixation rights included in the treaty proposals, such as the right of distribution, rental and making available rights are linked to content and not to the signal. The rights granted to broadcasters, particularly the right of distribution would interfere with the economic rights enjoyed by other existing rights holders. Broadcaster's right of distribution would pertain to the rights protecting content and effectively give broadcasters the means to benefit from the commercial exploitation of the content–as separate from the signal. It would effectively extend the protection of broadcasting organizations beyond what was required to fight piracy. While the rights of reproduction and distribution of the fixed signal are not necessary either as broadcasters could simply license the reproduction and distribution of the broadcast content under standard commercial license from those who owned the rights in question. In addition to this, without being licensed by content owners, giving the right of distribution to broadcasters would be a further distribution of signals and content to parties for whom reception was not intended or licensed.[792]

2. Proposal on the new right of distribution

The proponents of the new broadcaster's treaty seek to update existing broadcaster's neighboring rights or give them new neighboring rights and protections. The subject matter of protection for broadcasters is their broadcast signals, which are separate from other rights vested in the broadcast content. However, it was necessary to make clarification to the opponents of the right of distribution that their concerns are understood and that the new right of distribution would not contradict or prejudice the interests of content right holders. In this regard, the proponents made some clarifications to their proposals to assuage concerns of

[790] See: Intervention made by the representative of the International Federation of Producers of Phonograms (IFPI) in the Eleventh session of the SCCR: WIPO Document SCCR/11/4, Report of the eleventh session of the Standing Committee on Copyright and Related Rights of May 1, 2007, para 93. Also see intervention made by The Representative of the Independent Film and Television Alliance (IFTA) in the Twelfth session of the SCCR: WIPO Document SCCR/12/4, Report of the twelfth session of the Standing Committee on Copyright and Related Rights of March 1, 2005, para 188 (He stated the Berne Convention protected the subsequent distribution of works and the text of any treaty to protect broadcasting organizations should not diminish the rights of copyright owners.

[791] See: Intervention made by the representative of the International Federation of Film Producers Associations (FIAPF) in the Twelfth session of the SCCR: WIPO Document SCCR/12/4, Report of the twelfth session of the Standing Committee on Copyright and Related Rights of March 1, 2005, para195.

[792] See interventions made by the representatives of the International Music Managers Forum (IMMF) and the American Film Marketing Association (AFMA) in the Tenth session of the SCCR: WIPO Document SCCR/10/5, Report of the tenth session of the Standing Committee on Copyright and Related Rights of January 31, 2004, para 49 and 51; also see interventions made by the representative of the International Federation of Phonogram Producers (IFPI), the International Federation of Actors (FIA) and the International Federation of Film Producers Associations (FIAPF) in the Eightieth session of the SCCR: WIPO Document SCCR/ 8/9, Report of the eighth session of the Standing Committee on Copyright and Related Rights of November 8, 2002, para 49,93 and 97.

other content rights holders. Therefore, certain Delegations, such as the USA acknowledged that the proposals from Switzerland, Argentina and Japan and the various broadcasters' unions that addressed the protection of the broadcast signal in no way intended to affect or abrogate the copyright protection of any works incorporated in those signals. This is a sound principle and would address the concerns of the rights holders whose creative efforts were included in a broadcast signal.[793]

To solve the above concerns, in the draft text of article on broadcasters' right of distribution several opinions expressed and several alternatives proposed by the respective Delegations. The first idea was the inclusion of copyright safeguard clause as it is in the Rome Convention and WPPT and the Beijing Treaty that protection granted under the new broadcasters' treaty shall leave intact and shall in no way affect the protection of copyright in literary and artistic works. Consequently, no provision of the new treaty may be interpreted as prejudicing such protection. This opinion was approved by consensus in the Committee. However, a copyright safeguard clause was not sufficient to remove all concerns and further solutions were sought. Whereas the rights holders organizations worried about extension of broadcaster's new right of distribution to their licensing rights over exploitation of content, the question was raised as to whether it could be solved through discussion and elaboration on the nature of the new proposed right of distribution? In addition, there was no doubt that if the broadcasting organizations were not authorized or licensed to any post-broadcast uses of the content, their new right of distribution would make no sense. Since the exercise of the broadcaster's right of distribution to the public, of the fixation of their broadcast is subject to its license agreement with the content right holders. Accordingly, several approaches were presented as to the potential nature of the new right of distribution. Although the proponents of the exclusive right of distribution viewed that providing a new exclusive right to authorize distribution of fixation of broadcasts would not limit distribution and licensing rights of other right holders in contents, as it was the case with performers and phonogram producers exclusive right of distribution in Articles 8 and 12 of the WPPT, the Delegations of India and USA as well as the rights holders' organizations suggested other supplementary solutions. In the Ninth session of the SCCR in Geneva, the Delegation of the USA shared the concern expressed by the Delegation of India, regarding the differentiation between signal and content[794] when granting rights to broadcasters. Thus, it proposed broadcaster's rights be granted in two different natures: (i) rights to authorize or prohibit; and (ii) more limited rights to prevent or to prohibit, which the latter could be the nature of the right to making available to the public of unauthorized fixations, the reproduction of unauthorized fixations and the distribution to the public and importation of reproduction of unauthorized fixations[795]. On the reasoning of this solution, the Delegation of the USA stated, "the idea of establishing rights "to prohibit" had been taken from Article 14.3 of the TRIPS Agreement. Unlike general exclusive rights, those rights could not be exploited or licensed. They only granted the ability to prevent certain activities."[796]

Later on, the discussion on the nature of the new rights to be granted to broadcasting organizations continued in the next SCCR sessions. In the 11th session rights holders'

[793] WIPO Document SCCR/ 5/6, Report of the fifth session of the Standing Committee on Copyright and Related Rights of March 1, 2005, para 27.
[794] See the intervention made by the Delegation of India in WIPO Document SCCR/ 9/11, Report of the ninth session of the Standing Committee on Copyright and Related Rights of September 1, 2003, Report of the 9th SCCR session, para 54.
[795] WIPO Document SCCR/ 9/11, Report of the ninth session of the Standing Committee on Copyright and Related Rights of September 1, 2003, para 54.
[796] Ibid, para 54.

organizations stated that "as the position expressed by many governments the treaty should explore alternative ways to protect against signal piracy, rather than to provide an extended catalogue of exclusive rights. The catalogue of rights could not go beyond the rights enjoyed by content rights holders. The rights of making available and the right of distribution were not required for the fight against signal piracy and would only be used by broadcasters to broaden their existing range of activities and to claim additional rights over the content contained in the broadcast."[797] But deletions of post-fixation rights such as the right of distribution were not agreed by the SCCR. Therefore, in the 15th SCCR session, the Chairman of the Committee stated that "in the area of post-fixation rights, some Member States had requested those rights to be regrouped as rights to prohibit, which would allow Member States to provide adequate and effective protection in the cases of non-authorized acts, such as reproduction, distribution, use of pre-broadcast signals, done without the authorization of the broadcasting organizations."[798]

From the first session of the SCCR in 1998 up until its 15th session in September 2006, the Committee received numerous textual proposals on the right of distribution. Based on the decision of the Committee, its Chairman, in cooperation with the WIPO Secretariat prepared a 'Revised Draft Basic Proposal for the WIPO Treaty on the Protection of Broadcasting Organizations' distributed as Document SCCR/15/2. Article 13 of this document provided all textual proposals on the right of distribution in alternative options, which as follows:

> **1. Alternative P**
> (1) Broadcasting organizations shall enjoy the exclusive right of authorizing the making available to the public of the original and copies of fixations of their broadcasts, through sale or other transfer of ownership.
> (2) Nothing in this treaty shall affect the freedom of Contracting Parties to determine the conditions, if any, under which the exhaustion of the right in paragraph (1) applies after the first sale or other transfer of ownership of the original or a copy of the fixation of the broadcast with the authorization of the broadcasting organization.

The operative elements of this Alternative P follow *mutatis mutandis* the corresponding provisions of Articles 8 and 12 of the WPPT and almost all broadcasting unions support this Alternative.

> Alternative Q
> Broadcasting organizations shall have the right to prohibit the distribution to the public and importation of reproductions of unauthorized fixations of their broadcasts.

This Alternative simply grants broadcasting organizations a right to prohibit the distribution to the public and the importation of reproductions of unauthorized fixations of their broadcasts.

> Alternative II

[797] Intervention made by representative of the International Federation of Producers of Phonograms (IFPI) in the Eleventh session of the SCCR, WIPO Document SCCR/11/4, Report of the eleventh session of the Standing Committee on Copyright and Related Rights of May 1, 2007, para 93.
[798] WIPO Document SCCR/15/6, Report of the fifteenth session of the Standing Committee on Copyright and Related Rights of May 15, 2007, para 62. Although it should be noted that some supporters of the public interest groups even opposed to Granting broadcasting organizations a right to prohibit distribution of content. In their view it would hamper the access to knowledge and information. See: Intervention made by the representative of Public Knowledge (PK) in the Second Special Session of the Committee in June 2007, WIPO Document SCCR/S2/5, Report of the second special session of the Standing Committee on Copyright and Related Rights of August 31, 2007, para 75.

(1) Broadcasting organizations shall enjoy the exclusive right of authorizing the making available to the public of the original and copies of fixations of their broadcasts, through sale or other transfer of ownership.
(2) Nothing in this Treaty shall affect the freedom of Contracting Parties to determine the conditions, if any, under which the exhaustion of the right in paragraph (1) applies after the first sale or other transfer of ownership of the original or a copy of the fixation of the broadcast with the authorization of the broadcasting organization.
(3) Any Contracting Party may, in a notification deposited with the Director General of WIPO, declare that it will establish protection for the broadcasting organizations, instead of the exclusive right of authorizing provided for in paragraph (1), by providing that the distribution to the public and importation, without the consent of the broadcasting organizations, of reproductions of unauthorized fixations of their broadcasts, shall be prohibited.

This Alternative combines the approaches of Alternatives P and Q, and provides for a two-tier level of protection.[799] Paragraph (1) provides the right of distribution as an unqualified IP-Type exclusive right and follows *mutatis mutandis* the corresponding provisions of Articles 8 and 12 of the WPPT. Paragraph (2) leaves it up to the Contracting Parties to determine the conditions for exhaustion of the right of distribution in their national legislation. Finally, the provisions of paragraph (3) offer the Contracting Parties an option, by a notification to grant broadcasting organizations protection through a prohibition. According to Article 24 of the draft,[800] broadcasting organizations shall have recourse to effective legal remedies in respect of breach of this prohibition.
Since more than a decade ago, the broadcaster's right of distribution with regard to fixation of their broadcasts has entered into national legislation on copyright and related rights. This new broadcaster's IP-Type right however is not an old right like broadcaster's right of reproduction, but it is experienced in many national jurisdictions and also in regional spheres like European Community and its Member States. In those jurisdictions that broadcasters are granted new right of distribution, there is no contradiction with the right of distribution of other right owners reported. However, although there are some disparities amongst different national legislation on the nature, scope of protection and finally conditions, in which the exhaustion of the broadcaster's right of distribution would apply, but these disparities are minimal. Currently due to implementation of the European Council Directive 92/100/EEC of 19 November 1992 in its Member States, broadcasting organizations are granted the new exclusive right of distribution to the public of fixation of their broadcast through making available these objects, including copies thereof, to the public by sale or otherwise.[801]
Another example of national legislation that granted new right of distribution to the broadcasting organization is the Swiss Federal Act on Copyright and Related Rights. According to Article 37 (d) of the Swiss law a broadcasting organization has the exclusive

[799] WIPO Document SCCR/15/2, Revised draft basic proposal for the WIPO treaty on the protection of broadcasting organizations, prepared by the Chair of the Standing Committee on Copyright and Related Rights in cooperation with the Secretariat of July 31, 2006, para 13. 05.
[800] Article 24. Provisions on Enforcement of Rights:
(1) Contracting Parties undertake to adopt, in accordance with their legal systems, the measures necessary to ensure the application of this Treaty.
(2) Contracting Parties shall ensure that enforcement procedures are available under their law so as to permit effective action against any act of infringement of rights or violation of any prohibition covered by this Treaty, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements.
[801] The European Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (See Article 9). Also see: Article 9 of the Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (codified version) published in Official Journal of the European Union (L 376/28 dated 27.12.2006).

right to offer, transfer or otherwise distribute copies of the fixations of its broadcast.[802] The Indian Copyright Act, which was amended in 2012, also recognized broadcasters' right to distribute audio and video recording of their broadcast. It is remarkable that Indian Copyright Act granted broadcasting organizations a special right known as "broadcast reproduction right" in respect of its broadcasts. Any person who, without the license of the owner of the right sells or gives on commercial rental or offer for sale or for such rental, any such sound or visual recording of the broadcast or any substantial part thereof be deemed to have infringed the broadcast reproduction right.[803] Indeed Indian law recognized broadcasters' distribution right but subjected its application to the license or authorization of other right owners in the broadcast content that is not too far from the concept of broadcaster's neighboring or related rights, because in the legal tradition with neighboring rights, broadcasting organization could not exercise its exclusive right to authorize distribution of fixation of its broadcast unless being authorized or licensed by owners of the underlying contents. In conclusion it seems that the best solution to broadcaster's distribution right is *mutatis mutandis* Articles 8 and 12 of the WPPT, but Alternative II in Article 13 Document SCCR/15/2 with its flexible formula could be an acceptable text on broadcaster's right of distribution of fixation of broadcasts.

IV. Right of rebroadcast

Rebroadcasting is, in a literal sense, the retransmitting of a broadcast signal as a new and independent broadcast.
In practice, it is the act of either simultaneous, near simultaneous, deferred [delayed] and non-simultaneous broadcasting to the public of a broadcasted program. Someone who carries out this rebroadcasting could be the original broadcaster themselves or another broadcasting organization. If the original broadcaster did not authorize the re-broadcasting, then the person(s) who carried it out would have committed an unauthorized rebroadcasting. In terms of broadcast transmission technology or signal distribution platform, it is not important whether that rebroadcasting occurs on the same broadcasting technology or platform which the original broadcast was transmitted.

In the modern world, almost all broadcasting activities and services are of a cross-border nature.
Broadcast signals, particularly those from satellite broadcasts and terrestrial broadcasts can be accessed, received, fixed (recorded) in neighboring countries, for example by result of deliberate interception of broadcast signals or through unintended spillover that is overflowing of broadcast signals into a neighboring country. The act of rebroadcasting can be carried out simultaneously, near simultaneously, deferred [delayed] and non-simultaneously by other broadcasting organizations in the same or in the different jurisdictions. If the unauthorized re-broadcaster is located in the same jurisdiction as the original broadcaster is, there exist fewer problems as under most national legislation the broadcasting organizations are given protection against unauthorized rebroadcasting. However, the problem arises in situations where the original broadcaster and unauthorized re-broadcaster are located within different jurisdictions. In this case there is not currently a complete and effective international protection for broadcasting organizations unless two countries involved have concluded a bilateral agreement to confer equal treatment, rights and protections to broadcasting organizations that are the national of other contracting party.

[802] Article 37(d), the Swiss Federal Act of October 9, 1992 on Copyright and Related Rights (as amended)
[803] Article 37 o the Indian Copyright Act (as amended in 2012).

Another problem associated with the 'cross-border unauthorized rebroadcasting' is the difficulties of timely identification. In major cases of 'cross-border unauthorized rebroadcasting' the reception area (footprint) is intentionally geographically limited by the unauthorized re-broadcaster to be within its the national border. Even in many instances reception area is limited to specific province or region within a given country and it makes very difficult the timely identification of the unauthorized rebroadcasting.

Hence, this cross-border unauthorized rebroadcasting is being recognized as one of the major methods of broadcast piracy. This method is both one of the simplest methods of broadcast piracy as well as being one of the most economically detrimental to broadcasting organizations. The damages of unauthorized rebroadcasting are not limited only to broadcasters however. They also extend to the legitimate interests of owners of the underlying broadcast content, since authors of literary and artistic works, performing artists, phonogram producers and owners of other broadcast rights (e.g. sport organizations) often grant their broadcast right to the original broadcasters only based on limited geographic exclusivity. In addition to this, in unauthorized rebroadcasting, a re-broadcaster may rebroadcast the broadcasted program with or without altering the original broadcast. For example, it may remove the original broadcaster's advertisement and replaces with its own. In either case it deprives both content owners and original broadcasters of their legitimate interests and revenues.

Unauthorized rebroadcasting to the public could take place in one of two ways in terms of the time of rebroadcasting. It may be simultaneous (or near simultaneous) with the original broadcasting. In this instance, the original live program-carrying signals are rebroadcasted simultaneously or near simultaneously to the public without any delay or after a delay of only a few seconds. Alternatively it could also take place non-simultaneously. This means that it happens after the original broadcasting finished. In the non-simultaneous rebroadcast, it is necessary that the original broadcast signals first to be fixed, recorded and stored on a medium then being used for rebroadcasting to the public at a later time.

Furthermore, to protect broadcasting organizations against unauthorized rebroadcasting by the new broadcaster's treaty, two different situations should also be taken into account.

> *i.* The situation where an unauthorized re-broadcaster, like other members of the public, may legally access or receive for example to a free to air broadcast signal; and merely rebroadcast it without authorization of the original broadcaster.
>
> *ii.* The situation where an unauthorized re-broadcaster already has committed interception acts including unauthorized access to, and/or unauthorized reception of the broadcast or pre-broadcast signals.

In the first case it would suffice if the original broadcaster were given rights and protection against unauthorized rebroadcasting. But in the latter case, mere access to or reception of broadcast signal and any other signal interception acts, which was not consented by the original broadcaster, constitutes separate unauthorized acts that are not currently governed by any international instrument. In these instances no member of the public is allowed to access or receive the broadcast or pre-broadcast signals. For example, in instances which broadcast signals are not transmitted free to air and/or they are in the form of encoded signals that intended to be accessed, received and perceived only by subscribed audiences or by audiences in a limited geographical area. Or in the pre-broadcast signal, which intends for

reception by a particular receiver or another station of the original broadcaster itself. Therefore, in the latter situations, the case is not an unauthorized rebroadcasting only; rather it is an unauthorized 'access' and/or 'reception' of broadcast or pre-broadcast signals that the original broadcasting organization needs to be granted other complementary protection, for example the protection of pre-broadcast signal and protection of technological protection measures where used by the original broadcaster.

1. Contradiction between copyright and related rights

During different SCCR sessions, concerns were raised by various delegations that by providing a package or list of exclusive rights including a right of rebroadcasting for broadcasting organizations there would be a contradiction with the exclusive right of rebroadcast of authors and performers artists and phonogram producers.[804] Since Article 11(bis)(ii) of the Berne Convention, Article 13(a) of the Rome Convention, Article 8 of the WCT, Article 6 (i) of the WPPT and Article 11 of the Beijing Treaty provide 'right of rebroadcast' for authors of literary and artistic works and owners of subject matters of related rights.

Opponents stated that in a new broadcaster's treaty there would be no need to provide a list of rights including the right of rebroadcast for broadcasting organizations, because they broadcast many different program items, which are created and owned by authors, performed by performer artists and fixed by phonogram producers. However, in certain cases broadcasters produce their own program items they would possibly enjoy copyright in their productions. Thus, providing the right of rebroadcast for organizations that have only rights over the transmitted signals not the content, would contradict with the right to rebroadcast of authors and other owners of related rights.

As a response to the opposition views mentioned above, it could be argued that firstly, although in a limited manner, a right of rebroadcast currently exists in Article 13(a) of the Rome Convention for the protection of broadcasting organizations. This right not only is being recognized in 93 Member States to the Rome Convention; but also exists in legislations of other countries including Iran that are not yet a contracting party to the Rome Convention but similarly protects broadcaster's right to rebroadcast.[805] In these countries there was not reported any contradiction or overlapping between broadcasting organizations and authors and other right owners in broadcast content. Secondly, in the legislation of other countries for example, the US, broadcaster's related rights are not recognized in the US copyright law but broadcasters right of rebroadcast is covered under broad concept of 'retransmission rights' provided by the US Communication Act.[806] Therefore, as there is not any contradiction in national legislations between content owners and broadcasters on the right of rebroadcast, there would not be any contradiction also if broadcasters are given such a legitimate and indispensable right in the new broadcaster's treaty. Finally, the existing international intellectual property law recognizes the classification of protected subject matter

[804] For example see intervention made by the delegation of the USA in: WIPO Document SCCR/25/3, Report of the twenty-fifth session of the Standing Committee on Copyright and Related Rights of January 23, 2013. Report of the twelfth session of SCCR, para 80.

[805] Article 3 of the Act of translation and reproduction of books and publication and audio works (1974) of Iran

[806] Title 47 USC section 325 (Communication law):

…Nor shall any broadcasting station rebroadcast the program or any part thereof of another broadcasting station without the express authority of the originating station.

in copyright (author's rights) and related rights (neighboring rights) and each governed by a relevant treaty. In addition to this, as a principle and in the form of safeguarding clauses, in all related rights treaties it is acknowledged that protection conferred to the owners of related rights shall leave intact and shall in no way affect the protection of copyright in literary and artistic works; and the provisions of the related rights treaties may not be interpreted as prejudicing such protection.[807] Similarly, protection of performers, artists and phonogram producers would not be in contradiction with protection of broadcasting organizations since each has its own separate subject matter of protection. The neighboring rights of performers exist in respect of their performances; whereas phonogram producers' and broadcasters' exist in their phonograms and their broadcast.
Furthermore, the issue of the 'right of rebroadcast' deserves to be legally analyzed. Depending on who conducts rebroadcasting to the public and what is underlying content of rebroadcast, 'right of rebroadcast' is associated with the different legal matters. These matters in turn are subject of contract law, copyright law and/or neighboring rights or a combination of all.

If the re-broadcaster is the original broadcaster itself, as there is not any third party to intervene, then it is only the contract concluded between broadcaster and the content owner that governs the rebroadcasting. In this case, the contract and the law behind it determine whether rebroadcasting by the original broadcaster is permitted or licensed by author and/or other content owners. Logically, a broadcaster would not deserve to have 'exclusive right of rebroadcast' if it is not given or licensed such a right by author or content owner. On the contrary, the original broadcaster should at least have the right to prohibit/prevent the rebroadcasting of its broadcast signals by other broadcasting organization even if the original broadcaster is not licensed to do so; or even if the content owner has consented other broadcasters to rebroadcast the broadcast signals of the original broadcaster.

Therefore, unless otherwise agreed between the content owner and original broadcaster, the content owner cannot authorize any other broadcasting organization to rebroadcast the broadcast signal without the consent of the original broadcaster. Since it is the original broadcaster and not content owner who own its broadcast signal. This matter does not impede the owner of content or copyright to authorize any other broadcasting organization to broadcast the work or content merely on the basis of original or other copies of the works rather copy or reproduction of former broadcast. Obviously, other broadcasting organizations may convert the works into their own electronic transmittable signals by its own facilities then use it for their own original broadcast purposes.

Accordingly, an unauthorized re-broadcaster would face with two claimants including the content owner and the original broadcasting organization. The content owner can exercise their rights, since they own the content or underlying work and have exclusive 'right of rebroadcast' under the copyright law. The original broadcaster is also a claimant, since it has converted the content into electronic transmittable signal and broadcasted. Therefore, it has neighboring rights over its broadcast signals.

Identification of unauthorized rebroadcast signals is an important element to enforce broadcaster's right of rebroadcast. Today, through technological means e.g. water marking and encryption of broadcast signals it becomes possible to prove whether re-broadcaster – in both of simultaneous and non-simultaneous rebroadcasting – used broadcast signals of the

[807] Article 1 of the Rome Convention, Article 1(2) of the WPPT and Article 1(2) of the Beijing Treaty.

another [original] broadcaster or not. In a dispute between the original broadcasting organization (claimant) and the given re-broadcaster (respondent), the respondent may defend themselves by claiming the unauthorized rebroadcast was not taken from the broadcast signal of the claimant. Accordingly, the respondent may claim that he took the broadcast signals of another broadcasting organization (claimant) or what it broadcasted was based on his legal or illegal access to original work or to another physical copy of the work. In the latter case, the burden of proof rests on the claimant. The claimant (original broadcaster) must prove to the court that the respondent has used its broadcast signals and in fact what the respondent has broadcasted was taken from its broadcast signals. If the claimant fails to prove his claim, then his claim would be rejected and it is only the owner of copyright or the owner of content who can exercise his/her right against perpetrator of unauthorized broadcast of the work or content.

On the other hand, there are further possibilities for a claim. Namely in cases when the original broadcaster has broadcasted content not protected under copyright or related rights; or it was a work of copyright or related rights which currently falls in the public domain. In both cases, the original broadcaster has neighboring or related rights to its broadcast signals. Since, in these cases the program content is not protected under the copyright law or related rights (performers artists or phonogram producers) or it exists in the public domain, but the re-broadcaster has made unauthorized exploitation of the original broadcaster's signals and therefore infringed its neighboring rights. The original broadcasting organization has neighboring rights over its broadcast signals regardless of whether the content of the broadcast is a protected copyright work; an object of related rights, in public domain or is a non-protected content.

2. Nature and scope of right in the international instruments

The Berne Convention mentioned rebroadcasting only once, and did so without presenting any definition. According to the Berne Convention "authors of literary and artistic works shall enjoy the 'exclusive right' of authorizing any communication to the public by wire or by 'rebroadcasting' of the broadcast of the work, when this communication is made by an organization other than the original one."[808] The second part of this Article confers right of rebroadcast in the form of an exclusive right to authors of all literary and artistic works. Accordingly, it could be interpreted broadly to be to for the benefit of authors. It includes all simultaneous and non-simultaneous rebroadcasting of the literary and artistic works. Nevertheless, authors may exercise the exclusive right of rebroadcasting under the Berne Convention if two conditions are met;(1) the act of rebroadcasting should be carried out by a broadcasting organization other than the original broadcasting organization; and (2) rebroadcasting should be intended for the reception of public.

In the Rome Convention, the nature and the notion of right of rebroadcast is different from what was recognized for authors in the Berne Convention. Article 3(g) and Article 13 of the Rome Convention concerned the right of rebroadcasting. Article 3(g) firstly defines rebroadcasting as "rebroadcasting means the 'simultaneous' broadcasting by one broadcasting organization of the broadcast of another broadcasting organization" and secondly Article 13(a) of that convention provides that broadcasting organizations shall enjoy 'the right to authorize or prohibit' the rebroadcasting of their broadcasts.

[808] Article 11bis(1)(ii) of the Berne Convention.

Similarly to the Berne Convention, under the Rome Convention broadcasting organizations could exercise their 'right of rebroadcast' only in instances that another broadcasting organizations attempts rebroadcasting of its broadcast signals 'to the public'; but unlike the Berne Convention, the scope of the right under the Rome Convention is limited only to the 'simultaneous' rebroadcasting through 'wireless means'. Since 'rebroadcasting' itself is an independent broadcasting and follows the notion of broadcasting that is defined as "transmission through wireless means."[809]

The WCT has no new provision regarding the right of rebroadcast. Since as it is mentioned in its Article 1 of this Treaty, it is adopted as being supplementary to the Berne Convention. WCT is a special agreement of the parties to the Berne Union within the meaning of Article 20 of the Convention. Therefore based on Article 8 of WCT an author's right of rebroadcast is still covered by Article 11bis(1)(ii). Accordingly Article 8 of WCT on the right of communication to the public does not cover the right of rebroadcast of authors of literary and artistic works. The WPPT, which is concerned with the rights of performers artists and phonogram producers, explicitly does not mention the right of rebroadcasting in its provisions, but it is evident that the 'right of rebroadcasting' is covered by its Article 6, since in practice any rebroadcasting itself is an independent and separate broadcasting. For this logical reason, in the Diplomatic Conference of the WIPO Internet treaties nobody requested to clearly mention the issue of 'rebroadcast' as an exclusive right of performer artists. Hence, the nature of a performer's right of rebroadcast in WPPT is an exclusive right of authorizing a rebroadcast of their unfixed performances. With regards to the notion of rebroadcasting and its scope of application in WPPT, similarly to the Berne and the Rome Conventions, WPPT has recognized this right only against any wireless rebroadcasting of performer's unfixed performances; but due to the technological improvements, WPPT has extended the scope of rebroadcasting to rebroadcasting by satellite and rebroadcasting of encrypted signals where the means for decrypting are provided to the public by the re-broadcaster or with their consent.[810]

3. Proposal on the right of rebroadcast

As discussed above, unauthorized cross-border rebroadcasting might be conducted either simultaneously [including near simultaneously] with the original broadcasting, or non-simultaneously or at a later time. The latter being conducted based on fixed (pre-recorded) broadcasted signals. Various national legislations though provide protection for broadcasting organizations through different legal mechanisms against unauthorized rebroadcasting, but they cannot be extraterritorially exercised or be reinforced against unauthorized re-broadcasters in another jurisdiction.

Despite this, the Rome Convention grants the right to authorize or prohibit only 'simultaneous rebroadcasting' to broadcasting organizations in a narrowed sense.[811] Therefore, in the WIPO Manila Symposium (1997) which considered the issue of updating the rights of broadcasting organizations, participants from different stakeholders and governmental delegations discussed unauthorized rebroadcasts and realized that a broadcaster's right of rebroadcast as it is in the Rome Convention is not responsive to the

[809] Rome Convention, Article 3(f).
[810] WPPT, Article 2(f).
[811] Rome Convention, Article 13(a).

new methods of unauthorized rebroadcasting of broadcasted signals. Broadcasters also echoed the calls for WIPO and its Member States, due to the requirements of digital age and new technologies of the signal distribution, to grant them an updated right of rebroadcast which should at least include increasing protection against unauthorized non-simultaneous or delayed rebroadcasting of their broadcast signal.[812]

Therefore, since 1998 the SCCR has discussed 'right of rebroadcast' during its negotiations towards preparation of WIPO draft treaty on protection of broadcasting organizations. The issue of granting a new 'right of rebroadcast' to the broadcasting organizations was agreed in essence by WIPO Member States; but different views were presented during last 15 years on the nature and scope of this right. On the nature of this right there are two prevalent approaches in SCCR. Based on a defensive approach, broadcasters ought to be protected against unauthorized rebroadcasting through the right to prohibit unauthorized rebroadcasting of their broadcast. Proponents of this approach include the USA, India and Brazil, all who asserted that this nature of rights is in conformity with the signal-based approach and anti-piracy functioning of the new treaty. Accordingly, the right of rebroadcasting could be applied in a defensive manner as a right to prohibit rebroadcasting/retransmission.[813]

However, according to a positive economic approach, which is advocated by many contracting parties to the Rome Convention and other countries including Iran, broadcasting organizations should be granted an exclusive right to authorize rebroadcast /retransmission of their broadcast signals.[814]

---

[812] World Intellectual Property Organization (WIPO). (1998). *WIPO world symposium on broadcasting, new communication technologies and intellectual property*. Geneva: World Intellectual Property Organization, pp. 67-82.

[813] WIPO Document SCCR/15/6, Report of the fifteenth session of the Standing Committee on Copyright and Related Rights of May 15, 2007, para 69 (Intervention of the delegation of the Brazil)

[814] For example Article 4 of the Swiss proposal and its explanatory note provides that:

Article 4

Right of Retransmission

Broadcasting organizations shall enjoy the exclusive right to authorize the retransmission of their broadcasts in any manner or form whatsoever.

See: WIPO Document SCCR/2/5, Proposal made by the delegation of Switzerland for a Protocol on the Protection of the Rights of Broadcasting Organizations Under the WIPO Performances and Phonograms Treaty of April 6, 1999

[Note: This Article is drafted in a sufficiently broad manner to include at the same time— in particular— rebroadcasting, cable distribution and distribution of carrier signals. Moreover, it covers both simultaneous and recorded retransmission.]

Also See: WIPO Document SCCR/15/2, Revised draft basic proposal for the WIPO treaty on the protection of broadcasting organizations, prepared by the Chair of the Standing Committee on Copyright and Related Rights in cooperation with the Secretariat of July 31, 2006

Article 9. "Broadcasting organizations shall enjoy the exclusive right of authorizing the retransmission of their broadcasts by any means, including rebroadcasting, retransmission by wire, and retransmission over computer networks." In the explanatory comments to this Article 9 on right of retransmission it is mentioned that the expression 'exclusive right of authorizing' has been used, for the sake of consistency with the language of the WPPT and the WCT. See: WIPO Document SCCR/15/2, Revised draft basic proposal for the WIPO treaty on the protection of broadcasting organizations, prepared by the Chair of the Standing Committee on Copyright and Related Rights in cooperation with the Secretariat of July 31, 2006, para 9.01.

Finally see: WIPO Document SCCR/24/10 CORR, Working document for a treaty on the protection of broadcasting organizations, adopted by the SCCR of March 6, 2013, Article 9.

On the scope of the right, by reviewing different proposals submitted by WIPO Member States and their discussions during SCCR sessions we can conclude that there are two major approaches on the scope of this right. Under the first approach, the right could be covered by the provision of a broad technologically neutral retransmission right. Since technically rebroadcasting is a kind of retransmission of broadcast signal and there is no need to have a separate right of rebroadcast in the new treaty.[815] This approach is well reflected in the document SCCR/15/2, which, in the treaty language was much debated in the SCCR. Under this document the notion of retransmission, "embraces all forms of retransmission by any means, *i.e.* by wire or wireless means, including combined means and it covers rebroadcasting, retransmission by wire or cable, and retransmission over computer networks."[816] In its Article 9 on the right of retransmission the document provided that "broadcasting organizations shall enjoy the exclusive right of authorizing the retransmission of their broadcasts by any means, including rebroadcasting, retransmission by wire, and retransmission over computer networks". Recently, Article 9 of document SCCR/24/10 Corr. (currently the single working document of the SCCR) introduces two alternatives on broad retransmission right. In Alternative A (1)i "broadcasting organizations shall enjoy the exclusive right to authorize the retransmission of their broadcast signals to the public, by any means". Similarly, Alternative B (1)iii of this Article provides that "broadcasting organizations shall enjoy the exclusive right to authorize the retransmission of their broadcasts by any means, including rebroadcasting, retransmission by wire, and retransmission over computer networks."

The second approach states that provision of the separate right of rebroadcast in the new treaty is necessary. Although rebroadcasting is a form of retransmission of broadcast signals, it has major differences with other forms of unauthorized retransmission. In addition to this, the existing international instruments namely; the Berne Convention, the Rome Convention, WPPT and WCT, recognized the right of rebroadcast only in situations that the re-broadcaster is another broadcasting organization other than original broadcasting organization and rebroadcasting done through wireless means of transmission. Furthermore, unauthorized rebroadcasting must be intended for public reception. Therefore delegations like India would prefer not to change the present concept of right of rebroadcast in the existing international copyright and related rights treaties. However there is disagreement in regards to the scope of the right of rebroadcast and whether it should be broadened to cover deferred or non-simultaneous rebroadcast of broadcast signals. Proponents of this approach expressed other reasons for the necessity of separate right of rebroadcast instead of a broad right of retransmission. It is their view that the scope of the new treaty should not extend to Internet retransmission or any other computer network, since it would then overlap with the issue of webcasting, an issue that the SCCR decided to discuss at a later stage. Certain Member States including India and Japan are of the view that this right should not extend to rebroadcasting and retransmission via the Internet or any other computer network. In their view, such an extension would violate the mandate of WIPO General Assembly in 2006-7, which stated

[815] This approached followed in proposal made by the delegation of the Switzerland in its proposal. See WIPO Document SCCR/2/5, Proposal made by the delegation of Switzerland for a Protocol on the Protection of the Rights of Broadcasting Organizations Under the WIPO Performances and Phonograms Treaty of April 6, 1999, Article 4.

[816] WIPO Document SCCR/15/2, Revised draft basic proposal for the WIPO treaty on the protection of broadcasting organizations, prepared by the Chair of the Standing Committee on Copyright and Related Rights in cooperation with the Secretariat of July 31, 2006, para 5.07.

that the new treaty should be confined to traditional broadcasting.[817] This approach is also reflected in the document SCCR/24/10 Corr. In its Article 5, the Alternative to paragraph d reads "rebroadcast means the simultaneous transmission for the reception by the public of a broadcast or a cablecast by any other person than the original broadcasting organization." Notably, this alternative is comparable with the notion of rebroadcasting in the Rome Convention, since it narrowed the scope of the right only to the simultaneous rebroadcast.

Consequently, WIPO Member States are faced with two forms of proposed drafts on the right of rebroadcast, either under a separate article of right of rebroadcast or under broad right of retransmission.

If the SCCR is to finally address rebroadcasting separately in the new treaty and determine how to update or reformulate the right of rebroadcast for broadcasting organizations, all existing realities of the broadcasting industry and unauthorized rebroadcasting activities has to be analyzed and revisited. It seems that in an attempt to update the right of rebroadcasting through a new international treaty it will be necessary to take into account all existing realities particularly all current unauthorized methods of multi-territorial rebroadcasting. To reduce different views on the scope of right of rebroadcasting and to reach consensus on this issue in WIPO negotiation, establishing a minimum extent of application of the right should be followed. Flexibility should be observed and increasing or granting additional protection with regard rebroadcasting in the national laws should also be permitted. To this end, the right of rebroadcasting could be drafted in such a way that whilst it would cover both simultaneous and non-simultaneous rebroadcasting of broadcast signals to the public through wire and wireless means, it would be confined only to instances that a broadcasting organization other than the original broadcaster is involved in unauthorized rebroadcasting and other legal and real persons who are engaged in a broadcast and/or rebroadcast-like activity be excluded. Otherwise the right of rebroadcast will overlap with the new right of retransmission.

V. Right of retransmission to the public

Technically the retransmission of a broadcast signal is an independent act of transmitting a broadcast signal. It covers a broad range of activities and includes different methods of transmission and numerous signal transmission platforms. It covers all 'retransmissions through wireless means' e.g. terrestrial, satellite and mobile rebroadcasting to the public, as well as 'retransmissions by wire or cable', and 'retransmission through the Internet and any other computer networks e.g. file sharing websites, p2p and social networks'. All above-mentioned retransmissions could be simultaneous (including rebroadcasting), near simultaneous, deferred and non-simultaneous, could be intended for public[818] or private reception[819] and a retransmitter could be any person or entity other than the original broadcaster. Apart from several legal observations that resulted from variations in national laws and legal traditions, it is an undeniable reality of the worldwide broadcasting industry that broadcasting organizations are losing their reasonable and legitimate interests in all of the above-mentioned methods of unauthorized retransmissions.

[817] For example intervention made by the Delegation of the India in 25th session of SCCR regarding right-based approach. See: WIPO Document SCCR/25/3, Report of the twenty-fifth session of the Standing Committee on Copyright and Related Rights of January 23, 2013, para 84.
[818] Point to multi points (one to few).
[819] Point to point (one to one).

Broadcasting organizations have serious concerns about the unauthorized retransmission of their broadcasts over wireless, wire/cable communication systems as well as over the Internet and other computer networks. Most importantly, there are large-scale instances of unauthorized live retransmission of broadcast signals and fixed or recorded broadcast signal over the Internet. Live retransmission of broadcast signals is readily accessible to anybody who has access to the Internet. Anyone can upload a fixed broadcast signal on websites or on social media networks, and as a result anyone who has access to the Internet can download, watch, store or even reproduce them on any medium. In this regard, broadcasting organizations are belatedly suffering the same fate that authors, performers and phonogram producers have done so in the past, though the three latter groups have been protected by WCT and WPPT since 1996. The technologies being used for unauthorized retransmissions of broadcast signals are more advanced than those being used by broadcasting organizations to identify and control piracy of their broadcasts. Nevertheless, current technologies such as digital thumb printing and watermarking allow broadcasters to identify, and in many cases to accurately track what is being used in a retransmission, which is taken from a live or fixed broadcast signal. On the other hand, for broadcasting organizations there is not a major difference between unauthorized retransmissions of their live broadcast signal and fixed broadcast signal because what is the object of protection, i.e. protection of their neighboring rights vests in both.

Consequently, it is evident that the right of retransmission of broadcasting organizations should be recognized as a new international norm for the protection of broadcasting organizations. They need to be protected against all forms of unauthorized retransmissions caused by the globalization of communication systems and networks. However, it should be acknowledged that despite of the submission of numerous proposals on the right of retransmission and long-term discussions on this right, from 1998 to 2013, in the SCCR no agreement has yet been achieved. This failure to come to an agreement has been caused in part by disparities in the national copyright and related rights legislations on the definition of broadcasting, rebroadcasting, transmission, retransmission, scope of rights of rebroadcasting and retransmission and the nature of these rights either as an exclusive IP right or in a specific defensive or preventive protection. Indeed, although it seems that there are major similarities among different draft articles on the right of retransmission, the main reason for the failure of achievement thus far is the disagreement over the definitions of retransmission and its scope of protection, which each proposal provide.

Recognizing a new ‘right of retransmission’ could be justified by several reasons. The first major reason is that the convergence of information and communication technology and parallel emergence of the digital technology has caused new means for the piracy of broadcast signals. As a result of this piracy acts may be conducted through new retransmission forms that are not dealt with under the existing international instruments. The Rome Convention only recognizes the right of simultaneous and wireless rebroadcasting of broadcast signals to the public. Besides, that convention narrows the right to rebroadcast to instances involving only another broadcasting organization, which conducts unauthorized retransmission of broadcast signals of the original broadcaster, and not individual persons.

The second reason which necessitates the conferring of a new right of retransmission is that in addition to the cases in which other broadcasting organizations get involved in unauthorized rebroadcasting, there are new players that have entered into content distribution market which are not considered broadcasting organizations under national laws. These new

players have shaped new content distribution markets and changed the landscape of the copyright, related rights and broadcasting industry. Among them, there are various media and technology providers, for example; cable service providers, mobile operators, online service providers, software providers, social online networks, directories and portals, P2P networks administrators, computer equipment manufacturers (CE), webcasters, user generated service providers and individuals that are involved in content distribution to public. These new players, in a similar way to what is happening for copyrighted works, also retransmit broadcast signals without being authorized by its original broadcaster. Pirates retransmit (simultaneously or non-simultaneously) on a commercial basis and earn considerable incomes via subscription and/or advertising. Currently unauthorized retransmission activities constitute a major form of broadcast piracy.

Consequently, the unauthorized retransmission of broadcast signals has come on the table in the international forums. After detailed discussions regarding the unauthorized retransmission of broadcasts in the fourth panel discussion of the Manila Symposium,[820] broadcasting organizations requested[821] that they be safeguarded and provided with appropriate protections against unauthorized retransmissions of their broadcasts. This request is well reflected in the position taken by representative of the Association for Commercial Television in Europe (ACT) that there is no difference from the viewpoint of broadcasting organizations in which platform or signal distribution system they broadcast or unauthorized retransmissions carry out. For broadcasters the most important point is their right to control or their ability to authorize or prohibit rebroadcasting and retransmissions of their broadcast without their permission.[822]

During the SCCR, several draft proposals were presented on the right of retransmission of broadcast in treaty language.[823] The majority of these proposals was very broadly drafted and

[820] World Intellectual Property Organization (WIPO). (1998). *WIPO world symposium on broadcasting, new communication technologies and intellectual property*. Geneva: World Intellectual Property Organization, pp. 67-82.
[821] Ibid, p. 76.
[822] Ibid.
[823] For example: Proposal made by the delegation of Switzerland for a Protocol on the Protection of the Rights of Broadcasting Organizations Under the WIPO Performances and Phonograms Treaty, Document SCCR/2/5, Article 4; WIPO Document SCCR/3/4, Proposal submitted by Argentina of July 29, 1999, Article 5; WIPO Document SCCR/6/2, Proposal submitted by the European Community and its Member States of October 3, 2001, Article 6; WIPO Document SCCR/7/7, Proposal submitted by the Eastern Republic of Uruguay of April 17, 2002, Article 7; WIPO Document SCCR/8/4, Proposal submitted by Honduras of August 28, 2002, Article 5; WIPO Document SCCR/8/7, Proposal submitted by the United States of America of October 21, 2002, Articles 2 and 5; WIPO Document SCCR/11/2, Proposal submitted by Singapore of December 26, 2003, Article 8; WIPO Document SCCR/11/3, Consolidated text for a treaty on the protection of broadcasting organizations prepared by the Chairman of the Standing Committee on Copyright and Related Rights in cooperation with the Secretariat of February 9, 2004, Article 6; WIPO Document SCCR/12/2 Rev.2, Second revised consolidated text for a treaty on the protection of broadcasting organizations prepared by the Chairman of the Standing Committee on Copyright and Related Rights in cooperation with the Secretariat of May 2, 2005, Article 6; WIPO Document SCCR/14/2, Draft basic proposal for the WIPO treaty on the protection of broadcasting organizations including a non-mandatory Appendix on the protection in relation to webcasting prepared by the Chair of the Standing Committee on Copyright and Related Rights in cooperation with the Secretariat of February 8, 2006, Article 6; WIPO Document SCCR/15/2, Revised draft basic proposal for the WIPO treaty on the protection of broadcasting organizations, prepared by the Chair of the Standing Committee on Copyright and Related Rights in cooperation with the Secretariat of July 31, 2006, Article 9; WIPO Document SCCR /23/6, Proposal submitted by the Delegation of South Africa and Mexico of November 28, 2011, Articles 2 and 6; WIPO Document SCCR/24/3, Proposal submitted by Japan on Renewal version of the Revised Draft Basic Proposal for the WIPO treaty on the protection of broadcasting organizations (SCCR/15/2rev) of June 7, 2012, Article 6; WIPO Document SCCR /24/5, Proposal submitted by the Delegation of South Africa and Mexico of

included reference to the right of re-broadcasting in the sense of the Rome Convention. For example the Delegation of Switzerland proposed a single right of retransmission in a broad sense, noting the proposal was deliberately drafted like that to include at the same time. Rebroadcasting, cable distribution and distribution of carrier signals. Moreover, it covers both simultaneous and recorded retransmission.[824]

However, similar to the discussions on the right of rebroadcasting, the right of retransmission also faces major disagreements from amongst WIPO Member States in terms of its scope of protection and the nature of the right. These unresolved matters mostly mirror existing approaches in national laws, which include:

> *i.* Whether the scope of the right of retransmission extended to retransmissions over computer networks (or Internet),
> *ii.* Whether the right of retransmission cover near-simultaneous, deferred and non- simultaneous retransmission; and;
> *iii.* Whether the right of retransmission of broadcasters applied against any persons who conducts unauthorized retransmission by any means and whatsoever – not necessarily against another broadcasting organization - who retransmit broadcasts without being authorized by the original broadcasting organizations.

On the first challenge, i.e. the extension of the right to any computer networks particularly the Internet, there are two major approaches regarding different aspects of the right of retransmission amongst Member States, which have been frequently discussed at SCCR sessions. The first approach advocates the recognition of a broad concept of a retransmission right in a new broadcaster's treaty. According to this approach, broadcasting organizations would have effective protection against all forms of unauthorized retransmission to the public by any person(s). Proponents of this approach argue that all unauthorized public retransmission of broadcast signals should be banned; since there is no distinction between different forms, means and media of retransmission. It is not logical that broadcasting organizations be protected only against specific methods or media of unauthorized retransmission by specific persons. Hence, based on experiences in their respective national jurisdictions, proponents proposed admission of a broad concept of retransmission right including rebroadcasting in the new treaty[825]. In terms of means or media of retransmission, such a broad concept should be based on the technological neutrality and it would not matter who is perpetrator of an unauthorized retransmission would be. Otherwise, provision of the

---

July 2, 2012, Article 2; WIPO Document SCCR/24/10 CORR., Working document for a treaty on the protection of broadcasting organizations, adopted by the SCCR of March 6, 2013, Articles 5 and 9.

[824] WIPO Document SCCR/2/5, Proposal made by the delegation of Switzerland for a Protocol on the protection of the rights of broadcasting organizations under the WIPO Performances and Phonograms Treaty of April 6, 1999:
Article 4. Right of Retransmission
Broadcasting organizations shall enjoy the exclusive right to authorize the retransmission of their broadcasts in any manner or form whatsoever.

[825] See for example:
WIPO Document SCCR/2/5, Proposal made by the delegation of Switzerland for a Protocol on the protection of the rights of broadcasting organizations under the WIPO Performances and Phonograms Treaty of April 6, Article 4; WIPO Document SCCR/3/4, Proposal submitted by Argentina of July 29, 1999, Article 6; WIPO Document SCCR/8/7, Proposal submitted by the United States of America of October 21, 2002, Articles 2 and 5; WIPO Document SCCR/24/10 CORR., Working document for a treaty on the protection of broadcasting organizations, adopted by the SCCR of March 6, 2013, Articles 5 and 9; and WIPO Document SCCR /24/5, Proposal submitted by the Delegation of South Africa and Mexico of July 2, 2012, Article 2.

new right of retransmission in the new treaty will make no sense.[826] Since pirates often have a ready-made defense to escape prosecution by saying that they retransmitted broadcast signal through methods and distribution platforms that are not covered by the new right in the new treaty. Therefore, the Delegation of Australia stated, "to deny broadcasters the protection against Internet retransmission was tantamount to diminishing their ability to carry out their role in the digital environment."[827]

The second approach is the opposition to assigning a broad right of retransmission in the new treaty. Under this approach, it would suffice if the new treaty could update right of rebroadcast stated in the Rome Convention. During different SCCR sessions, proponents of this approach argued that conferring a broad right of retransmission would extend the scope of the treaty to the webcasting organization and any other persons who carried out broadcast-like activities and that it is still premature for this area to be dealt with in an international context.[828] In addition to this, this extension would potentially add webcasters to the beneficiaries of the new treaty, which would, in turn, represent a violation of the WIPO General Assembly's clear mandate in 2006 and 2007. Proponents of the first approach counter this argument by stating that since only the rights of traditional broadcasters would be covered under the treaty, webcasters would not be included and the mandate therefore not violated.[829] In fact, the scope of protection of the new treaty would not cover other organizations that have broadcast-like activities. In another words, only traditional broadcasters would enjoy protection against unauthorized retransmission over the web and over any other retransmission platforms. It would not amount to granting separate protection to other persons who would use the signal and engage in retransmission activities.[830]

In line with the above considerations, before the fifteenth SCCR session efforts were made to combine different proposals on the rights of rebroadcast and right of retransmission into a broader retransmission right. The conclusion of these efforts was reflected in the document SCCR/15/2,[831] which constituted the basis of further negotiations in the fifteenth SCCR and its subsequent sessions.

In the fifteenth session of the SCCR, some doubts were raised by certain Delegations including Iran and India[832] who disagreed with the broad right of retransmission over any

[826] WIPO Document SCCR/ 17/Info/1, Informal paper prepared by the chairman of the Standing Committee on Copyright and Related Rights (SCCR) according to the decision of the SCCR at its 16th session of November 3, 2008, para 27.
[827] WIPO Document SCCR/17/5, Report of the seventeenth session of the Standing Committee on Copyright and Related Rights of March 25, 2009, para 94.
[828] WIPO Document SCCR/17/INF/1, Informal paper on the WIPO Treaty on the Protection of Broadcasting Organizations prepared by the Chairman of the Standing Committee on Copyright And Related Rights of November 3, 2008, para 28.
[829] WIPO Document SCCR/15/6, Report of the fifteenth session of the Standing Committee on Copyright and Related Rights of May 15, 2007, para 16.
[830] Ibid; Also see: WIPO Document SCCR/17/INF/1, Informal paper on the WIPO Treaty on the Protection of Broadcasting Organizations prepared by the Chairman of the Standing Committee on Copyright And Related Rights of November 3, 2008, para 26.
[831] WIPO Document SCCR/15/2, Revised draft basic proposal for the WIPO treaty on the protection of broadcasting organizations, prepared by the Chair of the Standing Committee on Copyright and Related Rights in cooperation with the Secretariat of July 31, 2006; Article 9 on 'right of retransmission' and Article 14 on right of 'transmission following fixation'). Article 9 reads 'broadcasting organizations shall enjoy the exclusive right of authorizing the retransmission of their broadcasts by any means, including rebroadcasting, retransmission by wire, and retransmission over computer networks'.
[832] WIPO Document SCCR/15/6, Report of the fifteenth session of the Standing Committee on Copyright and Related Rights of May 15, 2007, para 25 and 26 (intervention made by the delegation of India and Iran)

computer networks. The Chair of the committee tried to clarify the matter and convince those Delegations that "transmissions over computer networks could be found in the operative clauses on the protection of traditional broadcasters as acts against which the traditional broadcasters had the possibility to exercise their rights."[833] According to the Chair, one example of that situation could be when a traditional broadcaster in one country whose reception area covered a part of another country due to the overlap of reception areas or spill over. In such a case a webcaster could pick up the signal from the air and retransmit the rest of the country or rest of the world where the original broadcaster did not have any coverage. The original broadcaster should have the possibility to protect its broadcast signals by preventing retransmission over computer networks in any other reception area. That would not bring that retransmission over the web within the scope of protection of the treaty, but would place the retransmission over the web as a defensive element in the operative clauses on the protection of traditional broadcasting organizations.[834]

The second considerable challenge, which still exists among the WIPO Member States is whether the right of retransmission should be extended to near-simultaneous, deferred (delayed) and non- simultaneous retransmission or not. There is a view that the extension of the right to deferred and non- simultaneous retransmissions would entail adhering the right-based approach in drafting of the new treaty. Proponents of this view state that the SCCR must be obliged to fulfill the mandate passed down from the WIPO GA in 2006 and 2007. Based on the mandate, the new treaty should have to aim to protect broadcast signal (signal-based approach) from being pirated. Adherence a treaty with an anti-piracy function would require limiting the protection of signals (electronic pulse) to the duration of its transmission from point of origin to point of destination. Signals disappear after being received in the point of destination. Accordingly, it could cover transmission of the signal and its fixation but should not relate to any subsequent uses of the signal after it is being fixed, or its protection involve any post fixation rights. In this regard protection of signal can logically only relate to its simultaneous retransmission and potentially its subsequent fixation. After fixation there is no longer a signal, but it is the content or a "fixation of the broadcast content".[835] Therefore, some delegations, mostly from non-Rome Convention countries have argued that the objective of the treaty under preparation should be to establish a protection of the broadcast signal, enabling the broadcasting organizations to prevent piracy of that signal.[836]

Furthermore, proponents of the signal-based approach -in its restricted sense- believe that extension of the right of retransmission particularly to the non-simultaneous retransmission would lead to a rights based approach in the drafting of the new treaty. Since basically any non-simultaneous retransmission happens based on fixation of a broadcast or pre-recorded broadcast. Indeed after signal being received and fixed, what is at hand is a copy or reproduction of content or underlying work not the originally sent signal. A signal as an electromagnetic phenomenon could not be fixed or reproduced. It would disappear as soon as it arrives to targeted area. Consequently, granting any protection to a signal after its being fixed or recorded would overlap or contradict with the rights of authors or other content owners. Therefore, protection beyond the fixation is not necessary for the effective

[833] Ibid, para 27.
[834] WIPO Document SCCR/15/6, Report of the fifteenth session of the Standing Committee on Copyright and Related Rights of May 15, 2007, para 27.
[835] WIPO Document SCCR/17/INF/1, Informal paper on the WIPO Treaty on the Protection of Broadcasting Organizations prepared by the Chairman of the Standing Committee on Copyright And Related Rights of November 3, 2008, para 23.
[836] Ibid, para 23.

protection of the broadcasting organizations. In addition, if the new treaty provides any protection beyond fixation it would create a secondary or new layer of intellectual property rights in the content which "risks making the access to the broadcast content more difficult."[837]

In response to the proponents of the signal-based approach in its more restricted sense, "other delegations have taken the view that post-fixation rights are, indeed, necessary in order for the protection of the broadcasting organizations to be effective."[838] The majority of WIPO Member States, however had differences and favored extension of the right of retransmission to near simultaneous, deferred and non-simultaneous retransmissions. In their view a "signal-based protection" only means that it is the assembly of the broadcast content and the transmission of it that causes the protection, as opposed to the protection of the transmitted content.[839] Thus, establishing new post fixation rights e.g. an enforceable right of deferred retransmission and right of making available for broadcasting organizations is indispensable. Post fixation rights for example the right of reproduction of fixations of the broadcast is already recognized under both the Rome Convention and the TRIPS Agreement and there was not reported to be any contradiction between the rights of broadcasters from one side and the rights of authors and other content owners from the other side.

The third challenge is in regard to the possible extension of application of the right against any persons – not necessarily a broadcasting organization - who retransmit broadcast signal without being authorized to do so by the original broadcasting organizations. The Rome Convention gives protection to broadcasting organizations in regard to the rebroadcasting only instances where perpetrator of unauthorized rebroadcasting is another broadcasting organization. Since in 1961 it was only other broadcasting organizations who were able to commit unauthorized rebroadcasting and it was not predicted that due to widespread development and availability of technological means one day anybody can do unauthorized rebroadcasting or retransmission. During SCCR negotiations on new broadcaster treaty, the majority of proposals however with some minor, differences, have favored the extension of both right of rebroadcasting and right of retransmission to be applied against any persons who engages in unauthorized rebroadcasting and unauthorized retransmission.

During the SCCR negotiations between 1998 and 2013 several proposals were submitted by Member States, which proposed recognition of a broad right of retransmission in the new treaty. Many Delegations[840] advocated granting a broad 'right of retransmission' to control all unauthorized rebroadcasting and any other unauthorized retransmissions by any means and by any person(s). Proponents of this method said through this recognition it would not be necessary to have another separate right of rebroadcasting in the new treaty. It seems that this approach is very similar to the Berne Convention, which follows the same concept of retransmission.[841] According to Article 11bis(1)(ii) authors of literary and artistic works shall enjoy the exclusive right of authorizing any communication to the public by wire or by *rebroadcasting* of the broadcast of the work, when this communication is made by an organization other than the original one. The broad language used in this Article covers the wireless, wired, simultaneous, deferred and non-simultaneous rebroadcasting or

[837] Ibid, para 24.
[838] Ibid, para 25.
[839] Ibid.
[840] See footnote no. 829.
[841] WIPO Document SCCR/15/2, Revised draft basic proposal for the WIPO treaty on the protection of broadcasting organizations, prepared by the Chair of the Standing Committee on Copyright and Related Rights in cooperation with the Secretariat of July 31, 2006, para 5.07.

retransmission of the broadcast of the work. Therefore, proponents of this approach believe that broadcasting organizations need to be granted a new retransmission right, which is similar to the protection to the authors of literary and artistic works, and would enable broadcasters to "control any form of retransmission of their broadcasted programs in other media or content distribution markets that competing with them."[842]

The proposal made by the Delegation of Switzerland in the second session of the SCCR was the first proposal that suggested a broad concept of the right of retransmission. Article 4 of the Swiss proposal on Right of Retransmission reads:

"Broadcasting organizations shall enjoy the exclusive right to authorize the retransmission of their broadcasts in any manner or form whatsoever."[843]

The Swiss proposal is influenced by a similar provision in its national law, which was accepted in its Federal Act on Copyright and Related of 9 October 1992 (Status as of 1 January 2011). Article 37 of the Act grants broadcasting organizations exclusive right to retransmit its broadcast.[844] The Swiss proposal is an inclusive one and covers traditional right of rebroadcasting conferred in the Rome Convention, retransmission by wire or cable and retransmission over computer networks and Internet. In addition it covers both simultaneous, near simultaneous, deferred and non-simultaneous rebroadcasting and retransmissions by any person.

Later, in the sixth session of the SCCR held in November 2001, the Delegation of the European Community submitted its second submission. Article 6 of this proposal on the right of retransmission reads:

"Broadcasting organizations shall enjoy the exclusive right to authorize or prohibit the retransmission, by wire or wireless means, whether simultaneous or based on fixations, of their broadcasts."[845]

This proposal of the European Community is less inclusive than the Swiss proposal as based on the definition of broadcasting in the Article 1bis of this proposal;[846] the right of retransmission does not cover 'retransmission over computer networks and Internet'. It shows that the European Community and its Member States from the beginning of the process did not intend for the right of retransmission to be extended to retransmission of broadcast signals or fixation of broadcast signal over computer networks and Internet.

---

[842] Hugenholtz, Bernt; Mireille van Eechoud; Stef van Gompel; Guibault, Lucie; Helberger, Natali; Rossini, Mara; Steijger, Lennert; Dufft, Nicole and Bohn, Philipp, *The Recasting of Copyright & Related Rights for the Knowledge Economy,* Institute for Information Law University of Amsterdam, The Netherlands, November 2006, p. 279.

[843] WIPO Document SCCR/2/5, Proposal made by the delegation of Switzerland for a Protocol on the Protection of the Rights of Broadcasting Organizations Under the WIPO Performances and Phonograms Treaty of April 6, 1999, Article 4.

[844] Although the Act does not define retransmission but from Article 10(e) of the Act that refers to the right of authors, it is clear that exclusive right of retransmission includes any retransmission by any means. Article 10(e) reads:

'To retransmit works by means of technical equipment, the provider of which is not the original broadcasting organization, in particular including by wire.'

[845] WIPO Document SCCR/6/2, Proposal submitted by the European Community and its Member States of October 3, 2001.

[846] It reads:

'For the purposes of this Treaty, "broadcasting" means the transmission by wire or over the air, including by cable or satellite, for public reception of sounds or of images and sounds or of the representations thereof; transmission of encrypted signals is "broadcasting" where the means for decrypting are provided to the public by the broadcasting organization or with its consent. The mere retransmission by cable of broadcasts of a broadcasting organization or the making available of fixations of broadcasts as set out in Article 7 shall not constitute broadcasting.'

The same approach, though with minor drafting changes or differences in the nature of right of retransmission, was followed in other proposals submitted in following SCCR sessions, for example in the proposal made by the delegation of Uruguay.[847]

One of the most interesting points is that the broadcasting industry has used new technological achievements in its information and communication systems, the unauthorized retransmitting of live broadcast signals or its fixation has also benefited from these achievements and has become widespread over computer networks and Internet. In addition to this, broadcasting organizations began to use, as one of their new business models simulcast (live transmission of their broadcast signals) and deferred (delayed) casting - including making available of their fixed broadcast - in the computer networks and Internet. This fact caused a change of opinion within the European Community's Member States, and led to a revision in the definition of 'broadcasting' which they already proposed in their second submission i.e. SCCR/6/2 (Article 6). Consequently, the European Community in its third proposal on the issue of protection of rights of the broadcasting organizations, which is included in Document SCCR/10/3Corr proposed the following definition of the 'broadcasting':

"For the purposes of this Treaty, broadcasting means the transmission by wire or over the air, including by cable or satellite, for public reception of sounds or of images and sounds or of the representations thereof; transmission of encrypted signals is broadcasting where the means for decrypting are provided to the public by the broadcasting organization or with its consent. The mere retransmission by cable of broadcasts of a broadcasting organization or the making available of fixations of broadcasts as set out in Article 7 shall not constitute broadcasting. However, the simultaneous and unchanged retransmission on computer networks of its broadcast by a broadcasting organization is granted the protection provided under this Treaty, as if it were broadcasting."

The new approach of the European Community and its Member States [though it has extended the protection only to the simultaneous retransmission over computer networks], accepted the narrow approach of the Delegation of Switzerland, which was already proposed in the second SCCR. It was also welcomed by the joint proposal of the Delegations of South Africa and Mexico[848] whose proposal was included as an alternative option in the single working document[849] adopted in the twenty-fourth SCCR session.

Notably, based on the definition of retransmission, the joint proposal made by South Africa-Mexico and the above SCCR's single working document (document SCCR/24/10Corr), the proposed right of retransmission encompassed the traditional right of rebroadcasting conferred in the Rome Convention, retransmission by wire or cable and retransmission over computer networks and the Internet. Article 2(e) of the joint proposal of South Africa

[847] WIPO Document SCCR/7/7, Proposal submitted by the Eastern Republic of Uruguay of April 17, 2002, Article 7:
'Broadcasting organizations shall enjoy the exclusive right to authorize retransmission, by wire or wireless means, whether simultaneous or based their broadcast.'

[848] WIPO Document SCCR /24/5, Proposal submitted by the Delegation of South Africa and Mexico of July 2, 2012. Article 2(e) 'the retransmission means "the transmission by any means by any person other than the original broadcasting organization for reception by the public, whether simultaneous or delayed'.

[849] WIPO Document SCCR/24/10 CORR, Working document for a treaty on the protection of broadcasting organizations, adopted by the SCCR of March 6, 2013:
Article 5. The retransmission means 'the transmission by any means by any person other than the original broadcasting organization for reception by the public, whether simultaneous or delayed'.

and Mexico[850], which is repeated in the single working documents of the SCCR (document SCCR/24/10Corr, Article 5) defines retransmission as follows:

"The retransmission means "the transmission by any means by any person other than the original broadcasting organization for reception by the public, whether simultaneous or delayed."

Nevertheless, the disputes between WIPO Member States continued on the scope of the rights of broadcasting organizations particularly in terms of protection of the right of retransmission and its extension over computer networks and Internet. Delegations from developing countries like Brazil, Egypt, Iran, India and Bangladesh frequently opposed the extension of the new proposed rights for broadcasting organizations to the computer networks and Internet. In the opinion of these named delegations transmission over Internet and computer networks could not be considered broadcasting and the inclusion of any element of webcasting and the Internet in the new treaty would jeopardize public interests, access to information and would be at the expense of other right holders. In addition it was stated, "adding new layers of intellectual property protection to the digital environment could seriously obstruct the free flow of information and scuttle efforts to set up new arrangements for promoting innovation and creativity."[851] Therefore, they requested to put aside these elements from the draft treaty and for them to be considered at a later stage by SCCR.[852]

i. Position of the Delegation of India

In the 2012 General Assembly of WIPO, the Delegation of India opposed the inclusion of any element of webcasting under the framework of the broadcasting treaty and disagreed with any attempt to update the earlier mandate of the WIPO General Assembly (2006-7) for retransmission over any other platforms because these activities were not broadcasting in the 'traditional sense'.[853]During the twenty-fifth SCCR on November 23, 2012 the Delegation of India expressed their views on the mandate the General Assembly's decisions in 2006 and 2007, though their position had become more flexible. The Delegation expressed the view that "they are flexible in supporting the issue of unauthorized live transmission of signal over the computer networks because this is causing a lot of economic loss to the broadcasting organizations"[854]; but the Delegation reiterated and emphasized that "this [position] should not be understood that any webcasting or simulcast by the broadcasting organization should be allowed in this treaty."[855]

ii. Position of the Delegation of the European Community

Corresponding to the views expressed by the opponents of extension of rights of broadcasting organizations to computer networks and digital environment, there is opinion of the European Community expressed in the twelfth SCCR session. The Delegation of the European

[850] WIPO Document SCCR /24/5, Proposal submitted by the Delegation of South Africa and Mexico of July 2, 2012 .

[851] WIPO Document SCCR/12/4, Report of the twelfth session of the Standing Committee on Copyright and Related Rights of March 1, 2005; See Interventions made by the delegations of Iran, para 38; Egypt, para 35 and Brazil, para 36.

[852] Ibid, Interventions made by the delegation of Brazil, para 36.

[853] WIPO Document WO/GA/41/18, Report of the forty-first (twenty-first extraordinary) session of the WIPO General Assembly (October 2012) of October 9, 2012, para 119.

[854] WIPO Document SCCR/25/3, Report of the twenty-fifth session of the Standing Committee on Copyright and Related Rights of January 23, 2013, intervention made by the delegation of India, para 84.

[855] Ibid.

Community believed that the webcasting organizations should not be one of the beneficiaries of any new treaty, as they belonged to another category of organizations. However, it found it logical that broadcasting organizations be conferred protection for the simultaneous and unchanged webcasting of their own broadcasts in the current digital environment[856]. The Delegation stressed that the new broadcaster's treaty "should not be limited to updating the Rome Convention, but should also contain sufficient Rome-plus elements."[857]

iii. Position of the Delegation of the USA

However, the Delegation of the United States first went further than the European Community and stated in the twelfth session of the SCCR that it would be necessary to include webcasting organizations in the scope of protection of the proposed treaty since protecting intellectual property and other legitimate interests creates a crucial incentive for all communicators; and there is no reason to exclude this category of public communicator i.e. webcasting organizations by reason of the technological means by which the communication took place.[858] Notably, after the decision of WIPO GA in 2006 and 2007, the US Delegation supported updating the protection for broadcasting organizations under the terms of the 2007 General Assembly mandate, which called for work on a signal-based approach to provide protection for the activities of broadcasting organizations in the traditional sense. Having the same view as European Community, during the 2012 WIPO General Assembly, the USA delegation also stressed that "such a protection should be narrow in scope aiming at the unauthorized retransmission of broadcast signals to the public over platforms such as free over-the-air broadcasts as well as over the Internet."[859]

Along with the flexibility expressed by the Delegation of India in the twenty-fifth SCCR, other Member States, including Iran also took a new position particularly towards accepting protection of traditional broadcasting organizations with technologically neutral approach. During the 2012 WIPO General Assembly the Delegation of Iran took the position that "the new treaty should provide appropriate and effective protection for broadcasting organizations against any form of signal piracy on all distribution platforms, which they use for their signal transmission to the public."[860]

All the above developments show that though the beneficiaries of the new treaty remain broadcasting and cable casting organizations in the traditional sense, but after more than ten years, the majority of the WIPO Member States at least agreed to give protection to broadcasting organizations against retransmission of their broadcast signals over the computer networks, Internet and digital environment. But still there are differences on the level, extent and the nature of the right of retransmission that still need to be negotiated and solved.

The differences on the level and extent of the right of retransmission include questions as to whether the new right should apply only unauthorized simultaneous retransmission of broadcaster's live signals or whether it should also apply to deferred (delayed) and non-

[856] WIPO Document SCCR/12/4, Report of the twelfth session of the Standing Committee on Copyright and Related Rights of March 1, 2005, para 42.
[857] Ibid.
[858] Ibid, para 49.
[859] WIPO Document WO/GA/41/18, Report of the forty-first (twenty-first extraordinary) session of the WIPO General Assembly (October 2012) of October 9, 2012, para 122.
[860] Ibid, para 118.

simultaneous retransmission of fixed broadcast signals? What should be the nature of the proposed right of retransmission? Should it be an exclusive IP-type right or as a specific defensive nature or manner; e.g. right to prohibit or prevent retransmission? Does it necessarily have to have equal treatment with all forms of retransmission and to draft a single right of retransmission or depending type of unauthorized retransmission or would it be better to be drafted into separate rights of retransmission? Finally how the right of retransmission would be conferred to broadcasting organizations to overcome widespread disparities in different national legislations?

The fact that the different answers might be given in each national jurisdiction to the above questions inevitably complicates matters. Regarding the simultaneous and delayed/deferred retransmission, there are countries that protect broadcasting organizations against one or both forms of simultaneous and delayed retransmission; and against one or several signal distribution platforms including or without computer networks and Internet. There are countries e.g. Switzerland and Iran that follow a technologically neutral approach and give rights or protection to broadcasting organizations against all signal distribution platforms and against simultaneous, near simultaneous, deferred and non-simultaneous retransmission. The latter is also proposed in the joint proposal of South Africa and Mexico to the SCCR.[861]

1. Nature of the new right of retransmission

The nature of the new right of retransmission is another disputed issue in the SCCR. It is affected by the discussions on the objectives of the new treaty. Those delegations for example Switzerland and the European Community that are in favor of establishing the objectives of the new treaty to update the rights and protections provided by the Rome Convention [Rome-plus feature], propose the new right of retransmission be drafted as a new exclusive IP right. Conversely, those countries that emphasize on the anti-signal piracy objectives of the new treaty propose that the new treaty, instead of granting an exclusive IP type right of retransmission, should protect broadcasting organizations against signal piracy through establishing a preventive or prohibition system of protection. Another important element, which has caused dispute on the nature of the new right of retransmission, is the variations that exist in the national legislations. For example in the Swiss copyright law broadcasting organizations are granted protection against unauthorized retransmissions through an exclusive IP right of retransmission[862] but in US law they are protected through prohibiting of unauthorized retransmission with civil and criminal sanctions.[863] Or in the Canadian copyright law, "retransmitter who might wish to use the Internet, would not be able to obtain a compulsory license from the Copyright Board unless Internet retransmitter negotiate with each of the copyright rights holders in order to obtain authorizations to retransmit its works over the Internet." [864]

Therefore, the majority of the contracting parties to the Rome Convention in particular the European Community and Switzerland propose the nature of the right of retransmission to be

---

[861] WIPO Document SCCR /24/5, Proposal submitted by the Delegation of South Africa and Mexico of July 2, 2012.

[862] WIPO Document SCCR/2/5, Proposal made by the delegation of Switzerland for a Protocol on the Protection of the Rights of Broadcasting Organizations Under the WIPO Performances and Phonograms Treaty of April 6, 1999, Article 4.

[863] See: 18 U.S. Code § 2511, Section 1,4 and 5 on criminal and civil sanctions.

[864] Armstrong, R. (2010). *Broadcasting Policy in Canada.* University of Toronto Press, p. 201. (In the Canadian copyright law cable and satellite retransmissions of broadcasting signals benefit from the compulsory license regime)

as an 'exclusive right of authorizing'. They argued that the expression 'exclusive right of authorizing' has been used in their proposals, for the sake of consistency with the language of the WPPT and the WCT.[865] The Delegation of the European Community, in defending the exclusive IP-type nature of the new rights stated "the nature of the rights accorded to the broadcasting organizations should be in line with the Rome Convention, which granted to them rights of an exclusive nature. The protection of broadcasters by means of exclusive rights had been well established at the European Union level since 1992, and a level of protection limited to a right of prohibition would be a major step backwards."[866] However, as stated above, in the view of some of the other delegations this right should be applied in a defensive manner as a 'right to prohibit' rebroadcasting/retransmission[867] to provide possibility of preventing unauthorized retransmission to the broadcasting organizations. For example the Delegation of India stated, "The framework of the proposed treaty, protection of broadcasting organizations, is based on the signal-based approach in the traditional sense. Therefore, India opposes inclusion of any elements, which are akin to rights-based approach"[868] and "it did not support any rights overlying the rights of the content providers in the form of exclusive rights and stressed that the protection of broadcasters should be limited to the signals prior to and during transmission."[869]

3. Proposal on the new right of retransmission

Broadcasting organizations need to be granted a new right of retransmission especially due to the requirements of the digital environment, convergence of communication and information technology and vast distribution of broadcast signals over the Internet and other computer networks. To this end, finding a way to overcome the global problem of unauthorized retransmission would be an ideal solution. Any international norm setting has to aim to attain a reasonable level of harmonization in national laws and in a manner that could eventually remove the major concerns of broadcasting organizations regarding all unauthorized retransmission activities. The exclusion of certain forms of unauthorized transmissions, or retransmission mediums and signal distribution platforms, from the scope of protection of the new right would make it meaningless. Therefore, to overcome unauthorized retransmissions caused by increasing technological developments, a technologically neutral approach to address unauthorized retransmissions by any means, any persons and in any form should be adopted.

There is no uniformity however, in national legislations for the protection of broadcasting organizations either in regards to the scope of the new right, or to the nature of it.
Thus, similar to the circumstances that existed in the Diplomatic Conference of the Rome Convention (1961), agreement by the WIPO member states to set minimum standard of protection for right of retransmission is essential. Any new treaty should permit contracting parties to maintain adequate flexibility to adopt their own appropriate solutions and

[865] WIPO Document SCCR/2/5, Proposal made by the delegation of Switzerland for a Protocol on the Protection of the Rights of Broadcasting Organizations Under the WIPO Performances and Phonograms Treaty of April 6, 1999, note on the Article 4.
[866] WIPO Document SCCR/12/4, Report of the twelfth session of the Standing Committee on Copyright and Related Rights of March 1, 2005, para 42.
[867] WIPO Document SCCR/15/6, Report of the fifteenth session of the Standing Committee on Copyright and Related Rights of May 15, 2007, para 69 (Intervention made by the delegation of the Brazil).
[868] WIPO Document SCCR/25/3, Report of the twenty-fifth session of the Standing Committee on Copyright and Related Rights of January 23, 2013, para 84.
[869] WIPO Document SCCR/17/5, Report of the seventeenth session of the Standing Committee on Copyright and Related Rights of March 25, 200, para 84.

mechanisms to prevent unauthorized retransmission of broadcast signals in their individual jurisdictions.

Furthermore, apart from the pre-existing disagreements between Member States on the level, extent and nature of the new right of retransmission, it seems that this issue primarily depends on the clarification of the scope of application of the treaty, since one of the major forms of retransmission of broadcast signals is retransmission over computer networks. Otherwise, due to the existing level of consensus the right of retransmission only covers wireless and cable retransmission, the new right of retransmission could not cover protection of broadcasting organization against unauthorized retransmission of their signal over computer networks unless the new treaty covers broadcast signals transmitted over the computer network. In other words, it should be agreed and stipulated that broadcast signals transmitted over computer networks are included within the scope of application of the treaty. Such an inclusion should be in a way that "brings the retransmission through the Internet within the scope of the treaty, but only as an operation against which the broadcaster would enjoy protection."[870] It should not mean that third parties or web retransmitting entities would be granted any protection under the new treaty.

Consequently, due to the disparities, which exist in the national laws and positions taken by the delegations, it is hoped that a possible consensus on the issue of rebroadcasting and retransmission can eventually be reached, provided that the delegations are able to agree on the scope of application of the new treaty. This scope would potentially extend to the transmission of broadcast signal over computer networks, and the existing disparities could be solved either through providing two separate rights i.e. right of rebroadcasting and right of retransmission; or through providing a single broad right of retransmission.

a. Differentiation of the right to rebroadcast and right of retransmission

Based on this alternative, depending on the level of importance of the traditional rebroadcasting and other retransmission from one hand, and simultaneous and non-simultaneous character of rebroadcasting and retransmission on the other, two different articles could be drafted for inclusion in the new treaty.[871] Since, firstly, on the traditional rebroadcasting there is much consensus among delegations, rather on the other retransmissions. Secondly, different treatment could be made against simultaneous and non-simultaneous transmission under separate rights, as the level of consensus that exists on the simultaneous and non-simultaneous rebroadcasting and retransmission is different. Accordingly:
The article on the right of rebroadcasting could be drafted as it is discussed before in this Chapter. This right would be extended to the cable (wire) rebroadcast and non-simultaneous rebroadcasting that fills the gaps that exist in the Rome Convention in these regards. Within

[870] WIPO Document SCCR/17/INF/1, Informal paper on the WIPO Treaty on the Protection of Broadcasting Organizations prepared by the Chairman of the Standing Committee on Copyright And Related Rights of November 3, 2008, para 26.
[871] Differentiation between the right of rebroadcasting and retransmission, however with different sense, was also proposed in one of the USA proposals. Article 5 of the Document SCCR/8/7 provided that:
Broadcasting, cablecasting and webcasting organizations shall enjoy the exclusive right of authorizing:
(a) The rebroadcasting of their broadcasts, cablecasts or webcasts;
(b) The computer network retransmission of their broadcasts, cablecasts or webcasts;
(c) The cable retransmission of their broadcasts, cablecasts or webcasts;
(d) The deferred transmission by wire or wireless means, including by means of a computer network, of their broadcasts, cablecasts or webcasts from fixations of their broadcasts, cablecasts or webcasts;

this right, broadcasters' rights against each of the simultaneous and non-simultaneous rebroadcasting would have their own specific nature. Synoptically, broadcasters could be given 'exclusive right of authorizing' simultaneous rebroadcasting of their broadcasts through wireless and cable (wire) means. In addition to this, they could also be given "a defensive or preventive protection" against non-simultaneous unauthorized rebroadcasting of their broadcast.

In regards to the right of retransmission over computer networks and Internet it could also be divided into simultaneous (including near simultaneous and deferred retransmission) and non-simultaneous retransmissions and be protected with different nature. Broadcasting organizations would be conferred the exclusive right of authorizing simultaneous retransmission of their broadcast over computer networks, and recognize the right to prevent or prohibit non-simultaneous unauthorized retransmission of broadcast over computer networks. The latter is based on the unauthorized retransmission of the fixation of the broadcast.

We may summarize the above solution to the following:

i. Broadcasters exclusive right to authorize simultaneous rebroadcasting of their broadcasts (Rome-plus element, exclusive IP-type right)
ii. Broadcasters right to prevent/prohibit non-simultaneous rebroadcast of their broadcasts (defensive protection)

iii. Broadcasters exclusive right to authorize simultaneous retransmission (including near simultaneous and deferred retransmission) of their broadcasts over computer networks (Rome-plus element, exclusive IP-type right)
iv. Broadcasters right to prevent/prohibit non-simultaneous retransmission of their broadcasts over computer networks (defensive protection)

***b.* Single broad right of retransmission**

The ideal solution to assuage the concerns of the broadcasting organizations in regard to unauthorized retransmissions (including rebroadcasting in the framework of the existing international copyright and related rights) is the adoption of the proposal submitted by the Delegation of Switzerland in the second SCCR session.[872] According to this proposal, recognizing a new, single, broadly constructed exclusive right to authorize retransmission for broadcasting organizations would provide both the objectives of the new treaty to update the rights of broadcasting organizations and empower the anti-signal piracy function of the new treaty. Many other delegations have endorsed the Swiss proposal in later SCCR sessions, though it has not yet been accepted by consensus for the reasons discussed previously.

It seems that due to the fact that there is a great diversity of national legislation on the level, extent and nature of the right of retransmission. The way to overcome this problem is through the recognition of a single, broadly constructed right of retransmission but leaving the level, extent and the nature of the new right to the national legislation of the country where the protection against unauthorized retransmission is claimed. In addition to this, the new treaty could establish a principle of reciprocity as provided by Article 14ter (2) of Berne

[872] WIPO Document SCCR/2/5, Proposal made by the delegation of Switzerland for a Protocol on the Protection of the Rights of Broadcasting Organizations Under the WIPO Performances and Phonograms Treaty, note on the Article 4:

Convention on the '*droit de suite'* in works of arts and manuscripts.[873] Therefore, we propose the following proposal on the right of retransmission in the new broadcaster's treaty:

'Broadcasting organizations shall enjoy protection for retransmission of their broadcast by any means and by any persons. This protection may be claimed by a contracting party only if legislation in the contracting party to which the broadcasting organizations belongs so permits, and to the extent permitted by the contracting party where this protection is claimed. The extent, level and nature of right and/or protection, which the treaty grants to broadcasting organizations, shall be matters for determination by the national legislation of the contracting party where protection is claimed.'

VI. Right of communication to the public

The 'right to communication to the public' is one of the oldest intellectual property rights to be recognized in almost all national legislations and in relevant international copyright and related rights treaties. Despite apparent simplicity in its meaning, not only 'communication' and 'public' but also 'the right of communication to the public' has a complex nature. There is ambiguity in its definition, scope of protection and its interpretation in the context of copyright and related rights. Except for WPPT (in Article 2.g), no other international instrument has defined "communication to the public". It has different concepts in different copyright and related rights treaties. There is not any complete example of similarity in the concept of communication to the public in any two existing treaties.

In the context of national legislations, based on the definition of the communication to the public in individual legislation, the notion and scope of application of the right of communication to the public in a national legislation is different from one another. Accordingly, "there has been much debate and many judicial decisions as to their meaning."[874]

In order to be able to clarify the general notion of 'communication to the public' in the context of copyright and related rights, at the outset, without referring to any particular treaty, it is necessary to ascertain general concepts of 'communication' and 'public'. 'Communication' generally means transmission and conveyance of information and data from a point (point of origin) to another point (point and/or multipoint of destination). Therefore, technically, it is based on the system of transmission of data/information from one to one, and/or from one to many. In its general sense, it also includes dissemination and broadcasting. Some commentators discussed 'communication' in its more technical term, stating that in any communication "there will be a point from which the object of communication is sent, an area through which it is conveyed and a point where it arrives.

[873] Berne Convention, Article 14ter reads:
(1) The author, or after his death the persons or institutions authorized by national legislation, shall, with respect to original works of art and original manuscripts of writers and composers, enjoy the inalienable right to an interest in any sale of the work subsequent to the first transfer by the author of the work.
(2) The protection provided by the preceding paragraph may be claimed in a country of the Union only if legislation in the country to which the author belongs so permits, and to the extent permitted by the country where this protection is claimed.
(3) The procedure for collection and the amounts shall be matters for determination by national legislation.

[874] Sterling, J. (2003). *World Copyright law: protection of authors' works, performances, phonograms, films, video, broadcasts, and published editions in national, international and regional law* (2nd ed.). London: Sweet and Maxwell, No. 4.07.

Thus there are three elements in communication: sending, conveyance and reception of the object or signal."[875]

The 'public' in the context of copyright and related rights has a general concept. Based on the existing relevant treaties, WIPO defines it as " a group consisting of a substantial number of persons outside the normal circle of a family and it closest social acquaintances."[876] Other commentators stated that the opposite of 'public' is 'private'. The dividing line between them is not always easy to draw and the relevant conventions contain no specific guidance in this regard.[877] It is not important that the public or group actually gathered in one physical or virtual place. However, "the availability of works or objects of related rights for the group suffices."[878] In addition to this, the actual reception of what was transmitted by the intended audiences is not a condition for the completion of the communication or it is not a part of it.[879]

However, based on the existing copyright and related rights treaties 'communication to the public' in the WIPO publication it is defined:

> "It means the transmission, by wire or by wireless means, of the images or sounds, or both, of a work or of an object of related rights, making it possible for the images and/or sounds to be perceived by persons at a place or places the distance of which from the place where the transmission is started is such that, without the transmission, the images or sounds, or both would not be perceivable at the said place or places, irrespective of whether the said persons can perceive the images and/or sounds at the same place and at the same time, or at different places and at different times."[880]

Based on the above-mentioned concept of the 'communication' and 'public', the "communication to the public" has a narrow sense and also a broader one in the international copyright and related rights. In its narrow sense, it includes only broadcasting (together any other wireless transmission) and wired transmission to the public (cable originated-program) that both of them are communication or transmission from one place to another. In this sense, which is followed by the Berne Convention[881] and also the Rome Convention[882], communication to the public does not extend to the 'public performance'. Since, communication to the public by wired means and broadcasting "involves the transmission of works to the public which-in contrast with public performance- is not present at the place from where the transmission is made".[883] But in its broader sense 'communication to the public' involves the transmission of works and objects of related rights to the public which are not present at the place from where the transmission originate; and to transmission of works and objects of related rights to the public, which are present at the same place where the communication originates. In this sense 'communication to the public' extends to 'public performance'. The main example of this broader sense of 'communication to the public' as Mihaly Ficsor rightly stated is the Article 12 of the Rome Convention. He indicates that

---

[875] Ibid.

[876] *Guide to the Copyright and Related rights Treaties Administered by WIPO and Glossary of Copyright and Related Rights Terms* (Vol. 891(E)). (2003). Geneva: World Intellectual Property Organization, p. 306.

[877] Rickeston, S. (1987). *The Berne Convention for the protection of literary and artistic works: 1886-1986.* Lodon, UK: University of London. P.704, para 12.02.

[878] *Guide to the Copyright and Related rights Treaties Administered by WIPO and Glossary of Copyright and Related Rights Terms* (Vol. 891(E)). (2003). Geneva: World Intellectual Property Organization, p. 306.

[879] Ibid.

[880] *Guide to the Copyright and Related rights Treaties Administered by WIPO and Glossary of Copyright and Related Rights Terms* (Vol. 891(E)). (2003). Geneva: World Intellectual Property Organization. pp. 275-276.

[881] Berne Convention, Articles 11bis (1)(i), Articles 11(1)(ii), 11bis(2), 11ter(1)(ii) and 14(1)(ii) and 14(bis)(1).

[882] Rome Convention, Article 7.1(a) regarding the minimum rights of performer artists.

[883] Ficsor, M. (2002). *The Law of Copyright and the Internet, The 1996 WIPO Treaties, their Interpretation and Implementation* . Oxford, UK: Oxford University Press. P. 156, para 4.18.

Article 12 of the Rome Convention on the communication to the public of phonograms is used in its broad sense and includes all three possible ways of communication to the public; by wireless means to the public at a different place; by wired means to such a public in different place, and directly to the public present in the same place where the communication originate or at a place at least open to the public for example restaurants, discotheques, big shops etc.[884] and finally due to the expansion of its concept in WCT, the communication to the public includes interactive making available of the works to the public in such a way that members of the public may access these works from a place and at a time individually chosen by them.[885] Therefore, "it is irrelevant whether the members of the public capable of receiving the works or objects of related rights may receive them at the same place or at different places, and at the same time or at different times."[886]
Consequently, the history or the origin of the right of communication to the public comes from the invention and beginning of the electromagnetic signal transmission and radio communication. Indeed when radio was invented; broadcasting organizations were mainly public broadcasters and were communicating free to air broadcast to the public broadcasting copyrighted works or their performances. Accordingly, the aim of all copyright and related rights treaties is to provide the right of communication to the public was providing efficient protections to authors of literary and artistic works and owners of related rights against unauthorized exploitation of their creation by new forms of communication. For example both the WCT and WPPT have aimed to address the new forms of communication offered by the Internet.[887] It was just in light of the developments in the communication technologies and new methods of misappropriation of the contents that the notion of the right to communication to the public has developed and conceptually revolutionized depending the context in which it is concerned i.e. copyright or related rights.

Considering the above-mentioned facts and realities, we can continue our discussion on the broadcasters' right of communication to the public by analyzing and answering the following questions:

What is the concept of right of communication to the public in the main international copyright and related rights treaties i.e. the Berne Convention, the Rome Convention, WCT and WPPT?
Whether there is necessity and/or possibility to provide new right of communication to the public to broadcasting organizations?
If answer to the above-question is affirmative, then which concept and with which scope of application the new broadcaster's treaty should proceed to establish the right to communication to the public?
Is it rational that the new treaty adopts the model of right of communication to the public in the current international instrument?
What are the latest discussions on this issue in WIPO Member States' negotiation in its Standing Committee on Copyright and Related Rights?

1. Communication to the public in the international instruments

[884] Ibid. p. 162, para 4.26.
[885] WCT, Article 8.
[886] *Guide to the Copyright and Related rights Treaties Administered by WIPO and Glossary of Copyright and Related Rights Terms* (Vol. 891(E)). (2003). Geneva: World Intellectual Property Organization. p. 306
[887] Ross, A., & Livingstone, C. (2012). Communication to the public; Part I. *Intertainment law review ,* No. 23 (6), p. 170.

The Berne Convention was the first international instrument that recognized the right of communication to the public for authors. This right entered into the Berne Convention in its Rome revision in 1928 after the invention and widespread use of radio and TV. Due to the fact that in 1928, broadcasting was in its infancy[888] the right was revised again and completed in the Brussels revision of the Berne Convention in 1948. Thereafter, neither Stockholm revision nor Paris revision made any changes to the right to communication to the public.

The Berne Convention has very complex provisions on the right of communication to the public. The Convention recognized different concepts of the right to communication to the public for the different categories of literary and artistic works. However, the Convention recognized an exclusive right of broadcasting and other wireless communication to the public for authors of all literary artistic work[889] but it also provided some other forms of communication to the public as a right only for authors of certain categories of works.

In general the provisions of the Berne Convention on the right of communication to the public covers four distinct forms of communication to the public. They are exclusive right of authorizing (a) broadcasting (traditional radio and/or TV) as obvious and typical kind of wireless communication to the public of the works and other forms of communication to the public by wireless means[890]; (b) rebroadcasting (wireless) or any other communication (simultaneous and unchanged retransmission) to the public by wire (cable retransmission) of broadcast by organization other than the original broadcasting organization (so-called secondary uses of broadcast of works)[891]; (c) public communication by loud speaker or any other analogous instruments which make the broadcast of a work audible or visible, or audible and visible in places accessible to the public; and in this sense it is similar to public performance of works;[892] and finally public performance and communication to the public with wired means (cable-originated program) for certain categories of works.[893]

---

[888] Guide to the Berne convention for the protection of literary and artistic works (paris Act, 1971) (1978) p. 66.

[889] Berne Convention.
Article 11bis:
(1) Authors of literary and artistic works shall enjoy the exclusive right of authorizing:
(i)The broadcasting of their works or the communication thereof[889] to the public by any other means of wireless diffusion of signs, sounds or images;
(ii) Any communication to the public by wire or by rebroadcasting of the broadcast of the work, when this communication is made by an organization other than the original one;
(iii) The public communication by loudspeaker or any other analogous instrument *transmitting*, by signs, sounds or images, the broadcast of the work.

[890] Berne Convention, Article 11 bis (1)(i). To see the history of development of this Article in revision conferences of the Berne Convention see: Ficsor, M. (2002). *The Law of Copyright and the Internet, The 1996 WIPO Treaties, their Interpretation and Implementation* . Oxford, UK: Oxford University Press. P. 158; And Rickeston, S. (1987). *The Berne Convention for the protection of literary and artistic works: 1886-1986.* Lodon, UK: University of London. P.439, para 8.76.

[891] Ibid, Article 11 bis (1)(ii) as mentioned above.

[892] Ibid, Article 11 bis (1)(iii) as mentioned above.

[893] Articles 11:
(1) Authors of dramatic, dramatic-musical and musical works shall enjoy the exclusive right of authorizing:
(ii) Any communication to the public of the performance of their works.
Article 11*ter*:
(1) Authors of literary works shall enjoy the exclusive right of authorizing:
(ii) Any communication to the public of the recitation of their works.
And Article 14:
(1) Authors of literary or artistic works shall have the exclusive right of authorizing:
(i) the cinematographic adaptation and reproduction of these works, and the distribution of the works thus adapted or reproduced;

In addition to this, communication to the public in the Berne Convention sense in terms of presence or remoteness of the concerned public is divided into three main groups. They are firstly, communication to the public by wireless means (typically broadcasting)[894] and also by wired means to the public, which it is not present at place where communication originates or in another say the public is not at the same place of origination of the communication;[895] secondly, communication to the public, which carries in presence of the public or at least carries in places open to the public[896] and finally, certain cases of public performances, which is concerned to phrase "including such public performance by any means or process" in Article 11(1)(i)[897] and the similar phrase in Article 11ter(1)(ii).[898] The latter is also to the public present at place where the communication originates or at places at least open to the public, but what is publicly communicated or publicly performed is not the performances of the performer artists. Indeed it is the recording of the performances that publicly performed or publicly communicated through any technical means or process.

According to the Berne Convention, in each case of communication to the public there must

---

(ii) the public performance and communication to the public by wire of the works thus adapted or reproduced.
And Article 14*bis*:
(1)Without prejudice to the copyright in any work, which may have been adapted or reproduced, a cinematographic work shall be protected as an original work. The owner of copyright in a cinematographic work shall enjoy the same rights as the author of an original work, including the rights referred to in the preceding Article.

[894] Berne Convention, Article 11bis:
(1) Authors of literary and artistic works shall enjoy the exclusive right of authorizing:
(i)The broadcasting of their works or the communication thereof to the public by any other means of wireless diffusion of signs, sounds or images;

[895] Articles 11(1)(ii):
1) Authors of literary and artistic works shall enjoy the exclusive right of authorizing:
(ii) Any communication to the public by wire or by rebroadcasting of the broadcast of the work, when this communication is made by an organization other than the original one;
Article 11bis(2):
(ii) Any communication to the public by wire or by rebroadcasting of the broadcast of the work, when this communication is made by an organization other than the original one;
Article 11ter:
(1) Authors of literary works shall enjoy the exclusive right of authorizing:
(ii) Any communication to the public of the recitation of their works.
Article 14(1)(ii):
(1) Authors of literary or artistic works shall have the exclusive right of authorizing:
(i) the cinematographic adaptation and reproduction of these works, and the distribution of the works thus adapted or reproduced;
(ii) the public performance and communication to the public by wire of the works thus adapted or reproduced.
Article 14bis:
Without prejudice to the copyright in any work, which may have been adapted or reproduced, a cinematographic work shall be protected as an original work. The owner of copyright in a cinematographic work shall enjoy the same rights as the author of an original work, including the rights referred to in the preceding Article.

[896] Articles 11bis Article 11bis:
(1) Authors of literary and artistic works shall enjoy the exclusive right of authorizing:
(iii) The public communication by loudspeaker or any other analogous instrument *transmitting*, by signs, sounds or images, the broadcast of the work.

[897] Article 11:
(1) Authors of dramatic, dramatic-musical and musical works shall enjoy the exclusive right of authorizing:
(i) The public performance of their works, including such public performance by any means or process;

[898] Article 11ter:
(1) Authors of literary works shall enjoy the exclusive right of authorizing:
(ii) Any communication to the public of the recitation of their works.

be a public element to the operation.[899] Based on the WIPO interpretation of the Berne Convention's provisions though, it is not imperative, it means that the signals must be defused or emission to the public aside from they receives it or not. The direct, one-way and non-interactive transmission to the public is important not their real reception. It is enough that the member of the public would be able to receive the signals by switching on their receivers directly. If a member of the public does not like what they are watching they need only change the channel or switch off altogether.[900]

Regarding 'the public communication by loud speaker or any other analogous instrument transmitting broadcast of the work', which is recognized as a form of communication to the public in Article 11bis(1)(iii), it has the similar nature of the right to 'public performance', since what is involved is the reception of broadcast works and making them available, visible and or audible in the presence of the public or at least in a place open to the public.[901] These methods of public communication to the public particularly publication of radio and TV broadcast is common in public places like restaurants, public halls, large shop centers, hotels and wide screens. The reason behind this protection as an exclusive right to authorize by authors is that through these forms of public communication of broadcast of the works a new public or an additional public were addressed. In addition to this, the license given by the author to a broadcasting organization does not cover any additional uses of the broadcast, which may or may not be for commercial purposes. Otherwise the works are made perceptible to listeners or viewers other than those anticipated by the author when license were given.[902] The author intended that the broadcast of his work cover only direct audiences receiving the signal within the family. Other wider circle or another section of the public was not intended.[903] In this regard, although Article 11bis(1)(iii) of the Bern Convention extended the scope of the exclusive right to authorize of author to the public communication of broadcasts, but public communication is not the same as communication to the public. Since the communication to the public involves the transmission of works to other locations but public communication is normally carried out in a place where the public is or may be present. It means that the reception of the broadcast in a way that it becomes audible and/or visible to those who are present and correspond to the concept of the public.[904] This concept of the public communication as provided by Article 11bis(1)(iii) of the Berne Convention is similar to the concept of the public recitation and public performance provided in the Article 11 ter (1)(i)[905] and Article 14 (1)(ii).
Consequently, under the Berne Convention 'public performance' means presentation of the work to a live audience or communication to an audience present at the place of performance, but the communication of the work to the pubic by transmission, implies a

[899] *Guide to the Berne convention for the protection of literary and artistic works (paris Act, 1971).* (1978). Geneva: World intellectual property organization, p. 67, para 6.
[900] Ibid, p. 66-69, para 1-14.
[901] *Guide to the Copyright and Related rights Treaties Administered by WIPO and Glossary of Copyright and Related Rights Terms* (Vol. 891(E)). (2003). Geneva: World Intellectual Property Organization, p.77, para 12.
[902] *Guide to the Berne convention for the protection of literary and artistic works (paris Act, 1971).* (1978). Geneva: World intellectual property organization, p. 68, para 12.
[903] Ibid, p.69, para 12.
[904] *Guide to the Copyright and Related rights Treaties Administered by WIPO and Glossary of Copyright and Related Rights Terms* (Vol. 891(E)). (2003). Geneva: World Intellectual Property Organization. P. 305.
[905] Article 11ter:
(1) Authors of literary works shall enjoy the exclusive right of authorizing:
(i) The public recitation of their works, including such public recitation by any means or process;

member of public is not present at the place of origin of the communication.[906]

Later on, new information and communication technologies and most importantly the convergence of these two technologies have resulted in new forms of communication of the works and objects of related rights to the public. In turn, the new forms of communication to the public have created new opportunities and challenges to exploit them particularly in the digital networks. This fact has affected not only on the coverage of the old notion of 'public' but also extended it to the virtual world in the provisions of WCT and WPPT. The innovations of the WCT provisions on the communication of works to the public were that it has developed and updated the 'right to communication to public' of the Berne Convention (Paris Act) for authors of different categories of literary and artistic works. Its Article 8 of WCT[907] on the 'right of communication to the public' includes the making available online of the works to the public, and hereby it has made clear that the successive addressing of the public, which is the case for on-demand services is deemed as the public communication.[908] The WCT has not provided the making available online as a separate intellectual property type right of authors.

The WPPT has separated three major forms of 'communication to the public' into the three separate rights:

i. Exclusive right of authorizing the 'broadcasting', which only covers wireless broadcasting to the public including transmission by satellite and wireless transmission of encrypted signal (Article 2(f)[909] and Article 6(i)[910] for performers in regard their unfixed performances)

ii. Exclusive right of authorizing the 'communication to public' over non-wireless medium for example "telephone cables, cables of digital network, or cable designed for retransmission of broadcasts or other cable transmissions"[911] (Article 2(g)[912] and Article 6(i) for performers in regard their unfixed performances)[913] and making of sounds or

---

[906] See Rikeston, S., & Ginsburg, J. C. (2006). *International Copyright and Neighbouring Rights* (Second ed.). Oxford University Press, p. 707.

[907] WCT Article 8:

Without prejudice to the provisions of Articles 11(1)(ii), 11bis(1)(i) and (ii), 11ter(1)(ii), 14(1)(ii) and 14bis(1) of the Berne Convention, authors of literary and artistic works shall enjoy the exclusive right of authorizing any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them.

[908] See Walter, M., & Lewinski, S. v. (2010). *European Copyright Law: A Commentary,* OUP Oxford, p. 978

[909] WPPT Article 2:

(f) 'Broadcasting' means the transmission by wireless means for public reception of sounds or of images and sounds or of the representations thereof; such transmission by satellite is also "broadcasting"; transmission of encrypted signals is "broadcasting" where the means for decrypting are provided to the public by the broadcasting organization or with its consent;

[910] WPPT Article 6:

Performers shall enjoy the exclusive right of authorizing, as regards their performances:

(i) The broadcasting and communication to the public of their unfixed performances except where the performance is already a broadcast performance;

[911] Example quoted from Rikeston, S., & Ginsburg, J. C. (2006). *International Copyright and Neighbouring Rights* (Second ed.). Oxford University Press, p.1246.

[912] WPPT Article 2:

(g) 'Communication to the public' of a performance or a phonogram means the transmission to the public by any medium, otherwise than by broadcasting, of sounds of a performance or the sounds or the representations of sounds fixed in a phonogram. For the purposes of Article 15, "communication to the public" includes making the sounds or representations of sounds fixed in a phonogram audible to the public.

[913] WPPT Article 6:

representations of sounds fixed in a phonogram audible to the public (Article 2(g) and Article 15 for performers and phonogram producers). The latter is similar to 'performance in public'.[914]

iii. Exclusive right of authorizing the 'making available to the public' in regard performances (both fixed and unfixed) and phonograms (Article 6[915] and 10[916] for performers and under Article 14[917] for phonogram producers)[918]

The WPPT has provided the right of broadcasting with a broader concept than the Rome Convention. Within the WPPT, the notion of broadcasting covers satellite transmission and transmission of encrypted signals.[919] It has broadened the concept of 'public' and extended it to the virtual world. Nevertheless, some commentators mentioned that despite the fact that the notion of public is critical to a number of WPPT provisions, for example broadcasting, communication to the public and making available online, it does not provide any definition of the public itself and left this matter for determination by national laws.[920] In the provisions of the TRIPS Agreement, there is only Article 14(1) that gives performing artists the possibility to prevent unauthorized broadcasting and communication to the public of their live performances. Furthermore, the reason why WPPT, in contrast to the WCT, separated the right to making available to the public from the right of communication to the public, it is argued that the right of communication to the public should not be generally granted to the related rights as an exclusive right. The performers and phonogram producers

---

Performers shall enjoy the exclusive right of authorizing, as regards their performances:
(i) The broadcasting and communication to the public of their unfixed performances except where the performance is already a broadcast performance;

[914] As Ficsor pointed out, this part of definition of the communication to the public in the WPPT covers making 'audible a phonogram' in the presence of the public or at least at a place open to the public and this in the case of the Berne Convention qualifies as 'public performance' under Article 11(1)(i) and 11ter(1)(i) or public communication of sounds of a broadcast work under Article 11bis(1)(iii). See, Ficsor, M. (2002). *The Law of Copyright and the Internet, The 1996 WIPO Treaties, their Interpretation and Implementation* . Oxford, UK: Oxford University Press, p. 601.

[915] WPPT Article 6:
Performers shall enjoy the exclusive right of authorizing, as regards their performances:
(i) the broadcasting and communication to the public of their unfixed performances except where the performance is already a broadcast performance; and
(ii) the fixation of their unfixed performances

[916] WPPT Article 10:
Performers shall enjoy the exclusive right of authorizing the making available to the public of their performances fixed in phonograms, 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.

[917] WPPT Article 14:
Producers of phonograms shall enjoy the exclusive right of authorizing the making available to the public of their phonograms, 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.

[918] See, Reinbothe, J., & Lewinski, S. v. (2002). *The WIPO Treaties 1996 The WIPO Copyright Treaty and The WIPO Performances and Phonograms Treaty Commentary and Legal Analysis.* London, UK: Butterworths, p. 267, para 58; Rikeston, S., & Ginsburg, J. C. (2006). *International Copyright and Neighbouring Rights* (Second ed.). Oxford University Press, p.1246.

[919] WPPT Article 2 (f):
'Broadcasting' means the transmission by wireless means for public reception of sounds or of images and sounds or of the representations thereof; such transmission by satellite is also 'broadcasting'; transmission of encrypted signals is 'broadcasting; where the means for decrypting are provided to the public by the broadcasting organization or with its consent;

[920] Rikeston, S., & Ginsburg, J. C. (2006). *International Copyright and Neighbouring Rights* (Second ed.). Oxford University Press, p.1245. He adds that the notion of public covers those members of the public who subscribe to receive the encrypted satellite broadcast and they are within the meaning of public, even if it is a narrow segment of the general public.

do not enjoy an exclusive right of communication to the public where broadcasting organizations carries out such communication, or where the performance is itself a broadcast performance.[921]

Finally, the Rome Convention has also provided the right communication to the public in the two instances. Firstly, it provides the right for producers of phonograms in Article 12 in its broader sense. As Ficsor rightly stated, Article 12 of the Rome Convention on the communication to the public of phonograms includes all three possible ways of communication to the public i.e. by wireless means to the public at a different place; by wired means to such a public in different place, and directly to the public present in the same place where the communication originate or at a place at least open to the public for example restaurants, discotheques, big shops etc.[922] the reason is that Article 12 used 'any communication to the public'. Secondly, Article 13 of the Rome Convention in regards broadcasters right to communication to the public. It reads:

> "Article 13. Broadcasting organizations shall enjoy the right to authorize or prohibit:
> *(d)* 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; it shall be a matter for the domestic law of the State where protection of this right is claimed to determine the conditions under which it may be exercised."

This Article contains only very specific and a narrow definition of "communication to the public, which includes special cases of public performance to an audience present in places where the performance i.e. rendition, displaying and showing of broadcast takes place. In other words, the radio and television broadcast made audible or visible for the members of public present there. This Article limited application of this right only in regard to television broadcasts and only where the public accessed the place against payment of an entrance fee. Some commentators stated that the last sentence of Article 13(d) stating that the domestic law of the State where protection of this right is claimed determines the conditions under which it may be exercised is a reference to the possibility of countries introducing a compulsory license.[923] In addition, according to Article 16(b) of the Convention, it is subject to reservation by the Member States.[924] Nevertheless, if a Member State makes a declaration of reservation to Article 13(d), based on the principle of reciprocity allowed in Article 16(b), other Member States are not obliged to grant the same right to broadcasting organizations whose headquarters are in the state making the declaration.[925]

---

[921] See Walter, M., & Lewinski, S. v. (2010). *European Copyright Law: A Commentary*. OUP Oxford, p. 975

[922] Ficsor, M. (2002). *The Law of Copyright and the Internet, The 1996 WIPO Treaties, their Interpretation and Implementation* . Oxford, UK: Oxford University Press, p. 156; also p. 162.

[923] See Nordemann, W., Vinck, K., Meyer, G., & Hertin, P. W. (1990). *International Copyright and Neighboring Rights Law : commentary with special emphasis on the European Community*. Weinheim: VCH Verlagsgesellschaft, p.320; Stewart, S. M. (1989). *International Copyright and Neighbouring Rights* (Second ed.). Butterworths, p. 248.

[924] The Rome Convention:

Article 16. Reservation

1.Any State, upon becoming party to this Convention, shall be bound by all the obligations and shall enjoy all the benefits thereof. However, a State may at any time, in a notification deposited with the Secretary–General of the United Nations, declare that:

(b) as regards Article 13, it will not apply item (d) of that Article; if a Contracting State makes such a declaration, the other Contracting States shall not be obliged to grant the right referred to in Article 13, item (d*)*, to broadcasting organizations whose headquarters are in that State.

[925] Rikeston, S., & Ginsburg, J. C. (2006). *International Copyright and Neighbouring Rights* (Second ed.). Oxford University Press, No. 19.17, p.1219.

2. Overview of discussions in WIPO

The transmission of copyrighted works and broadcast signals over digital networks and the Internet has resulted in opportunities and challenges for authors, performers, phonogram producers and broadcasting organizations. New forms of communication to the public of protected subject matters communicated them in a particular way to the public. Therefore, legislatures tried to reassess new forms of communication to the public and maintain the balance of rights between user and right owner of the content by amending the existing law and some instances enacting completely new Acts. In fact, the emergence of new forms of communication to the public particularly the making available online of protected content has changed the landscape of copyright and related rights in the national jurisdictions and international context. Since the Berne Convention and the Rome Convention were not ready to face with this situation, therefore individual jurisdictions have laid down new laws or amended existing regulations. In the international context, these challenges were also substantially solved through adoption of WCT and WPPT but protection of broadcasting organizations were included in 1996 WIPO Diplomatic Conference resulted to WCT and WPPT. Above, we discussed how the existing treaties particularly the WCT and WPPT granted new rights or updated the existing rights of authors, performers and phonogram producers in relation to the new forms of communication to the public. In this regard, there are numerous court cases in national jurisdictions that despite not being specifically about broadcaster's related rights over their broadcasts but very interestingly they are based on the broadening the notion of public and expansion in the concept of members of public and the time when they could access to the protected contents. In fact the courts, based on the provisions of WCT and WPPT and their implementation in national law, identified new forms of communication to the public in breach of authors, performers and phonogram producers right. We shall add that individual legislations adopted the provisions of the WCT and WPPT under different titles of intellectual property right for example under broad or specific concept of right of communication to the public, right to performance in public or right of making available online.

Today, broadcast signals, either live or its fixation, are communicated, made available or accessible to the public or made audible and visible in public places by unauthorized third parties. These new methods almost constitute or create another public or something that could be deemed as new publics, which was something never contemplated by the broadcasting organizations and other content owners. The persons or entities creating new public and transmit broadcast signals or make them available to be perceived, audible and visible are commercially exploiting the broadcast signals, which is in conflict with the legitimate interests of broadcasting organizations.

Thus, the WIPO Member States discussed the 'right of communication to the public' during the last 15 years discussions in the SCCR. Evidently, in the majority of proposals, which have been submitted by the Member States there is an article regarding 'rights of communication to the public'. Analysis of these propositions and interventions made by the Member States shows that, not as much as other rights, divergent views on the concept and scope of the right to communication to public exist.

During the negotiation in the SCCR and from numerous proposals received by WIPO Member States, it became clear that the majority of the Member States have a tendency to give broadcasters the right of communication to the public in its sense adopted in the Rome Convention Article 13(d) but in an updated form and without any conditionality. Since, according to the Rome Convention, "the fee payable must be an entrance charge and charges

made for food and drink in a hotel or restaurant where the event is shown on the television screen do not qualify under the Article."[926]

This concept of the right of communication to the public covers a specific form of the communication to the public, the making available of audible and/or visible broadcasts in places open to the public and referring to the special case of 'public performance' to an audience present in the place where the performance (communication), rendition, display or making audible and visible of the broadcast take place. The significance of this aspect of the right to communication to the public is that it is important to strengthen the position of broadcasting organizations in negotiations with the sport organizations and organizers of cultural events. Since, there is a fear that third parties make the sport programs and cultural events available to the public or in the public places open to the public (for payment) or any direct or indirect advantages.[927]

In addition, the proposals on the draft treaty indicate that the Member States would like to cover other forms of communication to the public under other rights or protections in the new broadcaster's treaty that we in turn will discuss them in this research.

The first proposal received by the SCCR was the proposal submitted by a coalition of the world broadcasting unions in the second session of SCCR. This proposal defined 'communication to the public as "the communication to the public of a broadcast means making the broadcast or a fixation thereof audible or visible in places accessible to the public"[928] and provides broadcasters with "the exclusive right to authorize or prohibit the communication to the public of their broadcasts."[929]

The Delegation of Switzerland submitted the second proposal. It proposed a broad right of communication to the public and provided that "broadcasting organizations shall enjoy exclusive right to authorize the communication to the public of their broadcasts in any manner or form whatsoever."[930] These initial proposals, in contrast to Article 13(d) of the Rome Convention, provided a broader concept of communication to the public and did not restrict it to those instances where an entrance fee is required. However, in the same manner as in the Rome Convention, they cover public reception of broadcasts in hotels, restaurants and other public premises of that nature.

Nonetheless, other subsequent proposals particularly proposals submitted by the respective Delegations of the European Community[931] and the USA[932] followed the concept of

---

[926] Stewart, S. M. (1989). *International Copyright and Neighbouring Rights* (Second ed.). Butterworths. p.247

[927] Helberger, N. (1999). *Neighboring rights protection of broadcasting organization: Current problems and possible lines of action.* Strasbourg: Council of Europe, Doc. No. MM-S- PR (1999) def. p. 7; Stewart, S. M. (1989). *International Copyright and Neighbouring Rights* (Second ed.). Butterworths.p.247

[928] WIPO Document SCCR/2/6, Submissions received from non-governmental organizations on the protection of broadcasting organizations of April 7, 1999.

Article 2(f) "communication to the public" of a broadcast means making the broadcast or a fixation thereof audible or visible in places accessible to the public."

[929] Ibid, Article 5. Broadcasting organizations shall enjoy the exclusive right to authorize or prohibit:

(d) The communication to the public of their broadcasts.

[930] WIPO doc SCCR/2/5 Proposal by Switzerland on the protection of broadcasting organizations of April 6, 1999.

Article 5. Right of Communication to the Public

Broadcasting organizations shall enjoy the exclusive right to authorize the communication to the public of their broadcasts in any manner or form whatsoever.

This right corresponds to the right "to make broadcasts perceivable" under Article 37(b) of the Swiss Copyright Law.

[931] WIPO Document SCCR/6/2, Proposal by the European Community and its Member States on the protection of broadcasting organizations of October 3, 2001

Article 8. Right of Communication to the Public

conditionality as was the case in Article 13(d) in terms of 'payment of an entrance fee'. The only exception being that the proposal of the USA named the right that of 'public rendition of broadcast'.

The SCCR negotiations continued on this issue until the fifteenth SCCR session in July 2006. In this session the Chairman of the SCCR, based on the discussions in SCCR, proposed a new proposal on the right of communication to the public. According to this proposal 'communication to the public' was defined as making a broadcast audible or visible, or audible and visible, in places accessible to the public[933] and provided several alternatives in regards to the level and nature of the right.[934] The first alternative is the same as the proposal of the European Community.[935] Under this alternative the right of communication to the public is limited to places accessible to the public against payment of an entrance fee.
But the second alternative is drafted as a combination of the proposal of the European Community (paragraph 1) and the two other separate paragraphs, which formed part of the

---

"Broadcasting organizations shall enjoy the exclusive right to authorize or prohibit the communication to the public of their broadcasts, if such communication is made in places accessible to the public against payment of an entrance fee."

[932] WIPO Document SCCR/8/7, Proposal by the United States of America on protection of broadcasting organizations of October 21, 2002; and WIPO Document SCCR/9/4 Rev, Proposal by the United States of America on protection of broadcasting organizations of May 1, 2003
Article 2(h) "Public rendition" of a broadcast, cablecast or webcast means making the transmission or a fixation of a broadcast, cablecast or webcast audible or visible or audible and visible in places accessible to the public;
Article 5. Specific Protections
Broadcasting, cablecasting and webcasting organizations shall enjoy the exclusive right of authorizing:
(g) (i) The public rendition of their broadcasts, cablecasts or webcasts of sounds and images embodied in audiovisual works in places accessible to the public against payment of an entrance fee; it shall be a matter for the domestic law of the Party where protection of this right is claimed to determine the conditions under which it may be exercised;
(ii) Any Contracting Party may, in a notification deposited with the Director General of WIPO, declare that it will apply the provisions of paragraph (i) only in respect of certain communications, or that it will limit their application in some other way, or that it will not apply these provisions at all. If a Contracting Party makes such a declaration, the other Contracting Parties shall not be obliged to grant the right referred to in paragraph (i) to broadcasting, cablecasting or webcasting organizations whose headquarters are in that State.

[933] WIPO Document SCCR/15/2, Revised draft basic proposal for the WIPO treaty on the protection of broadcasting organizations, prepared by the Chair of the Standing Committee on Copyright and Related Rights in cooperation with the Secretariat of July 31, 2006.
Article 5. Definition
(e) "Communication to the public" means making the transmissions referred to in provisions (a), (b) or (d) of this Article audible or visible, or audible and visible, in places accessible to the public;

[934] Ibid, Article 10. Right of Communication to the Public.
Alternative L
Broadcasting organizations shall enjoy the exclusive right of authorizing the communication to the public of their broadcasts, if such communication is made in places accessible to the public against payment of an entrance fee.
Alternative M
(1) [Provision as in Alternative L above]
(2) It shall be a matter for the domestic law of the Contracting Party where protection of the provision of paragraph (1) is claimed to determine the conditions under which it may be exercised.
(3) Any Contracting Party may, in a notification deposited with the Director General of WIPO, declare that it will apply the provisions of paragraph (1) only in respect of certain communications, or that it will limit their application in some other way, or that it will not apply these provisions at all. If a Contracting Party makes such a declaration, the other Contracting Parties shall not be obliged to grant the right referred to in paragraph (1) to broadcasting organizations whose headquarters are in that Contracting Party.

[935] WIPO Document SCCR/6/2, Proposal by the European Community and its Member States on the protection of broadcasting organizations of October 3, 2001, Article 8

proposal made by the USA.[936] It means that not only the right could be applied in places accessible to the public against payment of an entrance fee, but also the domestic law of the contracting party where protection of the right is claimed determines the conditions under which it may be exercised and there would be a possibility for contracting parties to make reservation in respect of certain communications, or limit their application in some other way, or that it will not apply these provisions at all. However as a matter of reciprocity, if a contracting party makes such a declaration, the other contracting parties would not be obliged to grant the right referred to in paragraph (1) to broadcasting organizations whose headquarters are in that contracting party.

Since the fifteenth SCCR session in July 2006 until its twenty-forth session in July 2012, the SCCR was engaged in different discussions particularly regarding the so-called 'right-based and signal-based approach' and interpretation of the WIPO General Assembly decision in 2006. In July 2012 the respective Delegations of South Africa and Mexico in a joint effort to move on the works of SCCR on the protection of broadcasting organizations submitted their joint proposal to the twenty-forth session of the SCCR.[937] This proposal, due to the fact that there was opposition in SCCR regarding the list of new rights to be granted to broadcasting organizations, proposed an Article with only three exclusive rights to authorize including a broad 'right to communication to the public' (as it is in the Berne and WCT sense), 'right of performance in public' (as it is in the Article 13(d) but against commercial advantage such as entrance fee to the places open to the public) and 'right to use pre-broadcast signals'. The joint proposal also presented a broad definition of the communication to the public. [938] Through this proposal on the right of communication to the public, there was no need to include separate rights of rebroadcasting, retransmission and making available fixation of broadcast to the pubic in the draft treaty. In fact the definition of the communication to the public was drafted in such a way that it was capable of including all those rights referred to above. This proposal also was not accepted in the SCCR by the respective Delegations of the USA and India for the reason that it proposed a 'right to communication to the public' which would extend the scope of protection of the new treaty to post-broadcast activities and provide post-fixation rights for broadcasters. In the same session of the SCCR, the committee adopted a single working document as a basis for continuation of the discussion on the protection of broadcasting organizations.[939] This working document also followed the joint

---

[936] WIPO Document SCCR/8/7, Proposal by the United States of America on protection of broadcasting organizations of October 21, 2002; and WIPO Document SCCR/9/4 Rev, Proposal by the United States of America on protection of broadcasting organizations of May 1, 2003, Article 2(h) and Article 5(g)(i)

[937] WIPO Document SCCR /24/5, Proposal by the Delegation of South Africa and Mexico on the draft treaty on the protection of broadcasting organizations of July 2, 2012

[938] Ibid, Article 2. Definition

(g) "Communication to the public", means any transmission or retransmission to the public of a broadcast signal, or a fixation thereof, by any medium or platform.

Article 6. Rights of Broadcasting Organizations

(1) Broadcasting organizations shall enjoy the exclusive right to authorize:

(i) the communication of their broadcast signals to the public, by any means, including the making available to the public of fixations of the broadcast signal in such a way that members of the public may access them from a place and at a time individually chosen by them;

(ii) the performance in public of their broadcast signal to obtain commercial advantage; and

(iii) the use of a pre-broadcast signal intended for them.

(2) With respect to the acts under paragraphs (1)(ii) and (iii), in this article, it shall be a matter for domestic law of the Contracting Party where protection of this right is claimed to determine the conditions under which it may be exercised, provided that such protection is adequate and effective.

[939] WIPO Document, SCCR/24/10 CORR, Working document for a treaty on the protection of broadcasting organizations, adopted by the SCCR of March 6, 2013.

proposal submitted by South Africa and Mexico and has two main alternative provisions; a broad concept of the right to communication to the public; and a narrowed concept that covers making audible or visible (performance in public) of the broadcast or its fixation to the public in places open to the public but without establishing any conditionality in regard to the payments of entrance fee.[940]

3. Proposal on the right of communication to the public

We considered the 'right of communication to the public' in the existing international copyright and related rights treaties, identifying different forms and concepts of communication to the public and comparing them with the present realities of the broadcasting industry. It is also intended to consider the current tendency among the Member States in their submissions to the SCCR regarding the right of communication to the public

[940] Ibid, Article 5. Definition

Alternative A

(f) "Communication to the public" means any transmission or retransmission to the public of a broadcast signal, or a fixation thereof, by any medium or platform.

Alternative B

(e) "Communication to the public" means making the transmissions referred to in provisions (a), (b) or (d) of this Article audible or visible, or audible and visible, in places accessible to the public;

Article 9. Protection for Broadcasting Organizations

Alternative A for Article 9 [paragraphs (1) and (2)]

(1) Broadcasting organizations shall enjoy the exclusive right to authorize:
i. the retransmission of their broadcast signals to the public, by any means;
ii. performance of their broadcast signal in places accessible to the public, for commercial advantage or using very large screens;
iii. the use of a pre-broadcast signal intended for them.
(2) With respect to the acts under subparagraphs (1)(ii) and (iii), in this article, it shall be a matter for domestic law of the Contracting Party where protection of this right is claimed to determine the conditions under which it may be exercised, provided that such protection is adequate and effective.

Alternative B for Article 9 [paragraphs (1) to (4)]

(1) Broadcasting organizations shall enjoy the exclusive right to authorize:
i. the right of fixation of their broadcasts;
ii. the direct or indirect reproduction, in any manner or form, of fixations of their broadcasts;
iii. the retransmission of their broadcasts by any means, including rebroadcasting, retransmission by wire, and retransmission over computer networks;
iv. the communication to the public of their broadcasts;
v. the making available to the public of the original and copies of fixations of their broadcasts in such a way that members of the public may access them from a place and at a time individually chosen by them;
vi. the transmission by any means for the reception by the public of their broadcasts following fixation of such broadcasts;
vii. the making available to the public of the original and copies of fixations of their broadcasts, through sale or other transfer of ownership.
(2) With respect to the acts under subparagraphs (1)(ii) and (iii), in this article, it shall be a matter for domestic law of the Contracting Party where protection of this right is claimed to determine the conditions under which it may be exercised, provided that such protection is adequate and effective.
(3) Any Contracting Party may, in a notification deposited with the Director General of WIPO, declare that it will establish protection for broadcasting organizations, instead of the exclusive right of authorizing provided for in subparagraphs (1) (ii), (iv), (v), (vi), and (vii), by providing a right to prohibit.
(4) Contracting Parties shall provide adequate and effective legal protection in relation to their signals prior to broadcasting. The means of the protection granted by this paragraph shall be governed by the legislation of the country where protection is claimed.

and the ways, in which they implemented new forms of communication to the public of broadcast into their national jurisdiction. To this end, although in the recent proposals received by the SCCR there are proposals with a few alternatives that would provide for a broad right of communication to the public instead of a list of rights for example the right to rebroadcast, right to retransmission, right to make available and right to performance in public of the broadcast or its fixation, but the major tendency of the Member States in not only in their proposals to SCCR but also in amending their existing legislations or new enactments were to give rights and protection in regard communication to the public in the sense that exists in Article 13(d) of the Rome Convention[941] and not a broad right of communication to the public.[942] The question whether this specific concept of the right of

[941] It covers performance in public or making audible or visible the broadcast and its fixation to the public in places where open to the public. This type of Communication may include the reception of a signal and projection of the program content of the broadcast to the public in a café, hotel lobby, the premises of a fair, on the screen of a cinema, or in other premises open to the public. It includes making program content audible and/or visible to the public through a radio or a television set located in the types of premises mentioned above. See: WIPO Document SCCR/15/2, Revised draft basic proposal for the WIPO treaty on the protection of broadcasting organizations, prepared by the Chair of the Standing Committee on Copyright and Related Rights in cooperation with the Secretariat of July 31, 2006.

[942] See for examples:

- Switzerland Federal Act on Copyright and Related Rights of October 9, 1992

Art. 37 Rights of broadcasting organizations

A broadcasting organization has the exclusive right:

a. to retransmit its broadcasts;

b. to make its broadcasts perceptible;

c. to fix its broadcasts on blank media and to reproduce such fixations;

d. to offer, transfer or otherwise distribute copies of the fixations of its broadcast;

e. to make its broadcasts available through any kind of medium in such a way that persons may access them from a place and at a time individually chosen by them. (Inserted by Art. 2 of the Federal Decree of 5 Oct. 2007, in force since 1 July 2008)

- Brazil Law on Copyright and Neighboring Rights No. 9610 of February 19, 1998

Article 95. Broadcasting organizations shall have the exclusive right to authorize or prohibit the retransmission, fixation and reproduction of their broadcasts, and the communication of those broadcasts to the public by television in places frequented by the said public, without prejudice to the rights of the owners of the intellectual property embodied in the programs.

- Germany Copyright Act of 9 September 1965 (Federal Law Gazette Part I, p. 1273), as last amended by Article 83 of the Act of 17 December 2008 (Federal Law Gazette Part I, p. 2586)

Article 87 Broadcasting organization

(1) The broadcasting organization has the exclusive right to

3. Make its broadcast perceivable to the public in places, which are accessible to the general public only against payment of an entrance fee.

- Japanese Copyright Act (Act No. 48 of May 6, 1970, as last amended by Act No. 65 of December 3, 2010)

Right of communication of television broadcasts

Article 100.

Broadcasting organizations shall have the exclusive right to communicate to the public their television broadcasts or those diffused by wire from such broadcasts, by means of a special instrument for enlarging images.

- Canadian Copyright Act 1985 (Last amended November 7, 2013)

Rights of Broadcasters

Copyright in communication signals

21. (1) Subject to subsection (2), a broadcaster has a copyright in the communication signals that it broadcasts, consisting of the sole right to do the following in relation to the communication signal or any substantial part thereof:

(*d*) in the case of a television communication signal, to perform it in a place open to the public on payment of an entrance fee, and to authorize any act described in paragraph (*a*), (*b*) or (*d*).

- USA Copyright law

Title 17 USC, Section 106

communication to the public is responsive to address all forms of broadcast piracy is a matter that is to be answered in light of the whole package of rights and protections that the new treaty would provide for broadcasting organizations.
Consequently, subject to granting other necessary rights that could cover other forms of communication to the public, the right of communication to the public in the specific concept as discussed above should be drafted in a neutral way to cover all means of making audible and visible of the broadcast to the public present at place where communication or performance (display) take place.
It would be preferable that the right to be conferred without establishing the condition of payment entrance fee by the public, and instead leave the contracting parties where protection of this right is claimed to determine conditions under which it may be exercised, provided that such protection is adequate and effective. This formula would not only maintain the maximum compatibility with the national legislation of the majority of Member States but also has an acceptable level of flexibility to be implemented by its contracting parties.

In addition, due to the fact that in some national legislations, this form of communication to the public is protected under the right to performance in the public, the new treaty may allow application of the principle of free legal characterizations of the title of the right and keep the relative freedom of its contracting parties. Finally, it seems that to encourage contracting parties not to declare any reservation in regard the exercise of the right, establishing the principle of reciprocity is recommended. Accordingly, the recommended solution would not be in the model adopted by the Rome, WCT, or the WPPT. If the new treaty define communication to the public of a broadcast as ‘making the broadcast or a

---

…. the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:
(4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
(5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and
(6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission
Section 101 of the Act defines ‘display’ and ‘perform’ as follows:
To ‘display’ a work means to show a copy of it, either directly or by means of a film, slide, television image, or any other device or process or, in the case of a motion picture or other audiovisual work, to show individual images non sequentially.
To ‘perform’ a work means to recite, render, play, dance, or act it, either directly or by means of any device or process or, in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible.
- Indian Copyright Act with amendment of 2012
Section 2. Definition of communication to the public and broadcasting
'(ff) "communication to the public" means making any work or performance available for being seen or heard or otherwise enjoyed by the public directly or by any means of display or diffusion other than by issuing physical copies of it, whether simultaneously or at places and times chosen individually, regardless of whether any member of the public actually sees, hears or otherwise enjoys the work or performance so made available.
(dd) “Broadcast” means communication to the public (i) by any means of wireless diffusion, whether in any one or more of the forms of signs, sounds or visual images; or (ii) by wire, and includes a re-broadcast;
Section 37. Broadcast reproduction right
(1) Every broadcasting organization shall have a special right to be known as “broadcast reproduction right” in respect of its broadcasts.
(3) During the continuance of a broadcast reproduction right in relation to any broadcast, any person who, without the license of the owner of the right does any of the following acts of the broadcast or any substantial part thereof,
(a) re-broadcasts the broadcast; or
(b) causes the broadcast to be heard or seen by the public on payment of any charges;

fixation thereof audible or visible in places accessible to the public.' The following draft might be a flexible basis to agree on the right of communication to the public in the SCCR:

(1) Broadcasting organizations shall enjoy the exclusive right of authorizing the communication to the public of their broadcasts.
(2) It shall be a matter for the domestic law of the Contracting Party where protection of the provision of paragraph (1) is claimed to determine the conditions under which it may be exercised.
(3) Any Contracting Party may, in a notification deposited with the Director General of WIPO, declare that it will apply the provisions of paragraph (1) only in respect of certain communications, or that it will limit their application in some other way, or that it will not apply these provisions at all. If a Contracting Party makes such a declaration, the other Contracting Parties shall not be obliged to grant the right referred to in paragraph (1) to broadcasting organizations whose headquarters are in that Contracting Party.

VIII. Right of making available of fixation of broadcast

The expression making available was used in 1896 by the Berne Convention to define 'publication'[943]. As it currently reads, Article 3(3) of the Berne Convention includes 'availability' in its definition of 'published works':

"The expression published works means works published with the consent of their authors, whatever may be the means of manufacture of the copies, provided that the 'availability' of such copies has been such as to satisfy the reasonable requirements of the public, having regard to the nature of the work."

This suggests that 'whatever may be the means of manufacture of the copies' publication of works in the digital environment is also covered by the concept of 'published works' through the making available of digital copies of works, as the Convention renders, it is immaterial how those copies are made. The usage of making available in Article 3(3) is "limited to one of the possible ways of making available works to the public, namely making available copies of works."[944]

However, there are two other articles within the Convention that the expression 'making available to the public' is used but in a broader concept. It is used in paragraphs 2 and 3 of Article 7 and again in Article 10,[945] in which Ficsor rightly claims has a more general

[943] According to Ficsor 'making availabe' apeared for the first time in the definition of 'publication' in the1896 Interpretative Declaration adopted in Paris along with an Additional Act of the Convention. Then in the 1928 Rome revision conference, it transferred into Rome text of the convention without anu substantial changes. Finally in the 1948 Brussels revision conference appeared in the current Article 3(3) of the Berne Convention. For further historical backgrounds see: Ficsor, M. (2002). *The Law of Copyright and the Internet, The 1996 WIPO Treaties, their Interpretation and Implementation* . Oxford, UK: Oxford University Press, p. 166.

[944] Ficsor, M. (2002). *The Law of Copyright and the Internet, The 1996 WIPO Treaties, their Interpretation and Implementation* . Oxford, UK: Oxford University Press, p. 167.

[945] Paragraphs 2 and 3 of Article 7 of the Berne Convention on the terms of protection of cinematographic and other audiovisual works and of anonymous or pseudonymous works reads:
(2) However, in the case of cinematographic works, the countries of the Union may provide that the term of protection shall expire fifty years after the work has been made 'available to the public' with the consent of the author, or, failing such an event within fifty years from the making of such a work, fifty years after the making.
(3) In the case of anonymous or pseudonymous works, the term of protection granted by this Convention shall expire fifty years after the work has been lawfully made 'available to the public'. However, when the pseudonym adopted by the author leaves no doubt as to his identity, the term of protection shall be that provided in paragraph (1). If the author of an anonymous or pseudonymous work discloses his

meaning, since it is used without any limitation. Its use encompasses both the making available of copies as well as other kinds of 'publication' of works, which results in members of the public having access to them.[946]
Therefore, under the Berne Convention, the phrase 'making available to the public' has a number of different meanings. In the Article 3(3) it is limited to the 'making available copies of works', whereas in both Article 7 and 10 it entails all forms of making available to the public of works e.g. communication to the public, radio diffusion, public performance and public exhibition. This might be the reason that in WIPO's *Glossary of Copyright and Related Rights Terms* making available is defined as 'offering' a work or object of related rights to the public by any means, such as by distribution of copies, public display, public performance, public recitation, broadcasting, other communication to the public- or by (interactive) making available to the public.[947]

Through the development of digital technology it has become possible for copies of works to become available and perceptible for the users through their own individual selection at different times and different places. This possibility allows for a greater interactivity in the digital environment. Therefore, in international intellectual property law the new concept of the 'right of making available to the public' of the literary and artistic works and other objects of the related rights appeared in 1996 WIPO Internet Treaties i.e. WCT[948] and WPPT.[949] More recently, the 2012 Beijing Treaty on Audiovisual Performances also recognized this right for performing artists in their audiovisual performances.[950] Indeed this new intellectual property right owes its recognition to the requirements and realities of the Internet, computer networking and digitization that has led to on-demand services.

1. Constituent elements of making available in digital transmission

Commentators on the international copyright and related rights treaties have discussed the right of making available of copyright and objects of related rights in a number of different points of view. Their comments include; different aspects of the issue such as historical background of the right, modes of making copies available and conceptual differences, which exist in the context of copyright and related rights. In addition, the application of the right in the context of copyright and related rights is not wholly the same.
Here the fact is that though the existing international treaties do not contain provisions on the right of making available 'fixed broadcast signals' or 'previously broadcasted program item(s)' over digital networks for broadcasting organizations, but there are numerous activities of placing or making available of fixed broadcast signals in the Internet and computer networks that are not yet regulated by international intellectual property law.

---

identity during the above-mentioned period, the term of protection applicable shall be that provided in paragraph (1). The countries of the Union shall not be required to protect anonymous or pseudonymous works in respect of which it is reasonable to presume that their author has been dead for fifty years.
Article 10 (1) of the Berne Convention reads:
It shall be permissible to make quotations from a work which has already been lawfully made 'available to the public', provided that their making is compatible with fair practice, and their extent does not exceed that justified by the purpose, including quotations from newspaper articles and periodicals in the form of press summaries.
946 Ficsor, M. (2002). *The Law of Copyright and the Internet, The 1996 WIPO Treaties, their Interpretation and Implementation* . Oxford, UK: Oxford University Press, p. 169.
947 Ficsor, M. (1981). *Guide to the Rome Convention and to the Phonograms Convention* (Vol. 617 (E)). Geneva: World Intellectual Property Organization, p. 295.
948 WCT, Article 8.
949 WPPT, Article 10 and 14.
950 Beijing Treaty, Article 10.

Therefore, to examine the possibility of granting a new right of making available of fixation of broadcast signal to broadcasting organizations we need to consider the constituent elements of 'making available of copyright and objects of related rights'. This may help us to make a clear judgment on the possibility of protection of broadcasting organizations against the unauthorized making available of the 'fixation of their broadcast signals' or 'previously broadcasted program' in the digital world.

I. Interactivity

Interactivity is the first element of making available, meaning a two-way communication. In principle, the making available copies of works and other objects of related rights rely on the existence of a form of electronic communication, i.e. Internet transmission and computer networking, which provide interactivity for both the transmitter and the user. In contrast to broadcasting where there is a one-way communication between broadcaster and user and is "premised on the idea of simultaneous reception; making available encompasses individual communications to persons who are members of the public,"[951] interactive transmission uses connected networks and 'pull' technology that the user or recipient can access available copies of works or content from a place and at a time chosen by the them. This is the reason that making available is often known as "placing'' or "offering" copies of works or objects of related rights in such a way that members of the public may access them at anytime and anywhere. This feature of making available distinguishes it from the simultaneous and unchanged transmission of broadcasting program over Internet (simulcasting) and Internet transmission of original program (webcasting or we-originated program only), as, similarly to traditional broadcasting, the latter methods latter are based on simultaneous reception by the public. Namely, 'broadcasting' and 'cable casting' are the "communication of pre-selected programme to public via a push technology"[952] without any interactivity or choice and selection from recipients' side with "pull technology".

II. Technological neutrality

The technological means and modes of making available and means of access to the available content are irrelevant.[953] In making available copies of works or objects of related rights "technological neutrality applies"[954] in two standpoints. Firstly, there is no difference between ways of offering copies of content through Internet transmission and any other similar computer networks or in any other existing or future platforms of exploitation. It may apply to any methods of 'pull technology' used to access available copies. Namely it covers not only traditional access to available copies through 'downloading' but it also covers 'on-demand streaming' of available copies. Secondly, means of access to the available content e.g. broadband, mobile phones or even fixed telephone lines is immaterial.

---

[951] Bently, L., & Sherman, B. (2009). *Intellectual property law* (3rd ed.). Oxford: Oxford University Press, P. 150, No. 6.2. Also see: Walter, M. M. (2010). Article 3 Right of communication to the public of works and right of making available to the public of other subject-matter. In M. M. Walter, & S. V. Lewinski, *European Copyright Law A Comentary* (p. 1555). Oxford: Oxford University Press. No.11.3.32.

[952] Rikeston, S., & Ginsburg, J. C. (2006). *International Copyright and Neighbouring Rights* (Second ed.). Oxford University Press, p. 740.

[953] Ibid, p. 747.

[954] Reinbothe, J., & Lewinski, S. v. (2002). *The WIPO Treaties 1996 The WIPO Copyright Treaty and The WIPO Performances and Phonograms Treaty Commentary and Legal Analysis.* London, UK: Butterworths, p. 105.

Today, on-demand streaming is used to "make any kind of content e.g. video, videogame and music available to users upon request."[955] Recently it is widely used in making available the fixation of broadcast program. Major instances of the making available of all kinds of content includes, but is not limited to, any types of placing or offering copies of work or objects of related rights on a hosting services or user generated sites by uploading or any other means, file sharing of a content on a peer-to-peer network, hyper linking and on-demand streaming.[956]

III. Public

The third element of making available in the context of copyright and related rights is 'the public itself'. This means that the works of copyright and other objects of related rights should be available for the public not for a specific individual. Otherwise it might fall under private use as an instance of limitation and exceptions. Whereas making available is 'in such a way that members of the public may access these works from a place and at a time individually chosen by them', the main questions here are what do the concept of 'public' mean in case of making available in Internet and any other computer networks? Is it necessary that members of the public really receive available works or content? Or on the contrary, does merely making available of works or content in the Internet or computer networks constitutes the act of making available? And finally what does mean and how make sense 'place' in cyberspace?

The reason for the above questions is that there is no doubt that the concept of public in the case of broadcasting to the public that relying on the push technology. Since in broadcasting, the intended publics are clear for broadcasters and the public may passively and simultaneously receive pre-selected programming. But in making available any individual recipient may actively access an individual program item or content when and where he or she chooses.

Responding to the first and second questions it is worthy to note that the 'public' has not been defined in any international binding instrument. However it is understandable from relevant provisions of the Bern Convention and WCT on the right of communication to the public that 'public' to be considered as being indeterminate potential viewers or recipients regardless of whether they actually receive or watch the program or not. It also does not matter that the members of the public to which the works or other objects of related right are transmitted or are made available to them receive them at the same time.

---

[955] Borghi, M. (2011). Chasing Copyright Infringement in the Streaming Landscape. *International Review of Intellectual Property and Competition Law , 42* (3), p. 318.

[956] In European case law there are many cases that dealt with different types of making available of copyrighted works and other objects of related rights excluding fixation of broadcast program. Fro example in:

- Organismos Sillogikis Diacheirisis Dimiourgon Theatrikon kai Optikoakoustikon Ergon v Divani Akropolis Anonimi Xenodocheiaki kai Touristiki Etaireai (Case C-136/09), Court of Justice of the European Union, March 18, 2010.
- Sociedad General de Autores y Editores de Espana (SGAE) v Rafael Hoteles SA C-306/05, Court of Justice of the European Union, December7, 2006.
- Società Consortile Fonografici (SCF) v Mathe Rome Conventiono Del Corso (Case C-135/10), Court of Justice of the European Union, March15, 2012.
- Phonographic Performance (Ireland) Limited v Ireland and Attorney General (Case C-162/10) Court of Justice of the European Union, March15, 2012.
- Bezpečnostní softwarová asociace - Svaz softwarové ochrany v Ministerstvo kultury (Case C-393/09) Court of Justice of the European Union, December22, 2010.
- Twentieth Century Fox Film Corporation v Newzbin limited [2010] EWCH 608 (CH).
- ITV Broadcasting Limited v TVcatchup limited [2011] EWHC 2977 (Pat) (Approved Judgment on question for CJEU and deferred issues)
- Polydor Limited & Others v. Brown & Others [2005] EWHC 3191 (CH) (UK)

Regarding the third question that; does merely making available of works or content in the Internet or computer networks constitutes the act of making available? Some commentators rightly asserted that merely an invitation to any member of the public to access the available content would be deemed as the availability of the communication to the public and the number of recipients should not in fact matter.[957]

Finally regarding the last question that what does mean and how make sense 'place' in cyberspace, it has been argued that whereas the term making available assumed to cover most internet transmission (other than broadcasting) when a person uploads content to a website, the place where members of the public can access the work, be it their terminal, in their office, home, or on their mobile telephone.[958] For example "where a CD-ROM is made accessible through transmission to a number of terminals, the right of making available applies, even if all terminals are located in the same building, such as a university or library building."[959]

2. Overview of making available under the WCT and WPPT

WIPO Internet treaties primarily intended to address challenges and concerns created by the Internet and digital transmission for the application of the rights of authors and holders of related rights. Internet and digital transmissions have facilitated unauthorized delivery, offerings and access to the works and other objects of related rights. The traditional concept of the right of communication to the public in the Berne Convention does not protect all these situations. In addition to this, right holders welcomed new business models in the distribution of their content based on on-demand digital transmissions whether that distribution is by wired or wireless means.

Moreover, the WIPO digital treaties cleared some doubts on the traditional notion of exactly who to regard as the 'public'. Under the Berne Convention it was not clear that in addition to separation in places, whether the 'public' may also be separated in terms of the time at which they receive on-demand transmission of works and other object of related rights. Separation in time of access to available content by members of public 'at anytime and anywhere' is one of the main characteristics of making available. Therefore, these treaties, by recognizing the right of making available to the public, made it clear that "the members of the public may be separated both in space and in time."[960] "The wording, which WCT eventually adopted thus

---

[957] Rikeston, S., & Ginsburg, J. C. (2006). *International Copyright and Neighbouring Rights* (Second ed.). Oxford University Press, p. 740, No. 12.50. The authors also expressed that 'in an on-demand digital communication from a website should also be considered communication to the public. Since any member of the public may access the website and respond to its offer to receive a communication by streaming or downloading of the work. The same analysis would apply to peer-to-peer file sharing a computer user who has designated files on her hard drive as available for sharing invites any member of the public who has aquired the appropriate file-sharing program to initiate a communication of a copy of the designated file from the offeror's computer to the acquirer.'

[958] Bently, L., & Sherman, B. (2009). *Intellectual property law* (3rd ed.). Oxford: Oxford University Press, P. 150 ; Reinbothe, J., & Lewinski, S. v. (2002). *The WIPO Treaties 1996 The WIPO Copyright Treaty and The WIPO Performances and Phonograms Treaty Commentary and Legal Analysis.* London, UK: Butterworths, P. 111.

[959] Ibid, p. 109.

[960] Rikeston, S., & Ginsburg, J. C. (2006). *International Copyright and Neighbouring Rights* (Second ed.). Oxford University Press, p. 746.

explicitly makes clear that also the successive addressing of the public is deemed public communication."[961]

Nevertheless, there are some differences between the right of making available in the WCT compared to the WPPT that seems logical.

The right of communication to the public in the Berne Convention has a fragmentary nature and only covers traditional forms of communication, excluding online transmission. Therefore, "from 1995 onwards, discussions began to focus on what was called the digital agenda including in particular the online communication"[962] in the Committee of Experts of WIPO. The US pioneered for recognition of a "right of digital transmission" for authors since this right would have wider implications for the effectiveness of the reproduction right under Article 9 of the Berne Convention.[963]
However, due to the fact that making available of works by means of digital transmission is a feature or an aspect of communication to public; as some commentators rightly pointed out, Article 8 of WCT was drafted in technologically neutral language that "supplements those provisions by an exclusive right of communication to the public for authors of all kinds of works, as far as this is not yet covered by the Bern Convention."[964]

Article 8 of WCT is entitled 'right of communication to public' and reads as follows:

Without prejudice to the provisions of Articles 11(1)(ii), 11bis(1)(i) and (ii), 11ter(1)(ii), 14(1)(ii) and 14bis(1) of the Berne Convention, authors of literary and artistic works shall enjoy the exclusive right of authorizing any communication to the public of their works, by wire or wireless means, **including the making available to the public** of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them.

Indeed Article 8 of WCT includes the making available to the public of works as part of the exclusive right of authorizing any communication to the public of works.

The 'right of making available to the public' in Article 10 and 14 of the WPPT, however is modeled on Article 8 of the WCT, but contrary to WCT provision it is a new intellectual property right granted to the performing artists and phonogram producers. Indeed, the right of making available to the public in WPPT is an independent 'interactive communication right' separated from the broader notion of communication to the public.[965] Hence, Article 10 and 14 of the WPPT titled as 'right of making of fixed performance and phonograms' and Article 10 reads:

"Performers shall enjoy the exclusive right of authorizing the **making available** to the public of their performances fixed in phonograms, 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."

---

[961] Walter, M. M. (2010). Article 3 Right of communication to the public of works and right of making available to the public of other subject-matter. In M. M. Walter, & S. V. Lewinski, *European Copyright Law A Comentary* (p. 1555). Oxford: Oxford University Press, p. 978.
[962] Reinbothe, J., & Lewinski, S. v. (2002). *The WIPO Treaties 1996 The WIPO Copyright Treaty and The WIPO Performances and Phonograms Treaty Commentary and Legal Analysis.* London, UK: Butterworths. p. 100.
[963] Ibid.
[964] Ibid, p. 104.
[965] Walter, M. M. (2010). Article 3 Right of communication to the public of works and right of making available to the public of other subject-matter. In M. M. Walter, & S. V. Lewinski, *European Copyright Law A Comentary* (p. 1555). Oxford: Oxford University Press, p. 979.

In a similar manner to Article 10, Article 14 of WPPT is entitled 'right of making available of phonogram' reads:

"Producers of phonograms shall enjoy the exclusive right of authorizing the **making available** to the public of their phonograms, 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."

Notably, in the WPPT the exclusive right of authorizing of making available of fixed performances (Article 10) and of phonograms (Article 14) is a neutral legal-characterization-free description of an interactive digital transmission in the digital environments and global computer network. It means that in its implementation into the national law of a Member State, the principle of 'relative freedom of legal characterization' or the 'umbrella solution' would apply. According to this principle or the 'umbrella solution' the obligations of Member States under Articles 10 and 14 may be fulfilled not only through granting a separate exclusive right of 'making available to the public' but also through the application of the right of distribution, the right of communication to the public, or through the combination of these rights subject to the condition that the right or rights to be applied must fully correspond to the nature and effectiveness of the protection required.[966] In fact, the 'umbrella solution' "leaves national legislation free to adapt the rights granted to in the WCT and WPPT in line with its national system of protection."[967]

3. Making available of fixation of broadcast

The Internet has brought about the availability of multiple choices of accessing media. "The flexibility and portability of digital media favor the globalization of audio-visual production and distribution as well as greater consumer access to audio-visual content."[968] Through the invention and subsequent development of the Internet and technology of digital transmission of content making available of works, the sharing of fixed performances and phonograms to the public has spread out through online media markets. They provided new methods of consumption and exploitation of works of copyright and objects of related rights. In addition to this, along with numerous advantages and new opportunities, which have changed the landscape of the copyright and related rights industry, digitization has resulted in emergence of new business models and interactive services in the copyright and related rights industry. Nevertheless, digital technology has also brought disadvantages particularly the unauthorized distribution of works and objects of related rights through global digital networks that have no boundary and territoriality.

Along similar lines to online transmission of works, fixed performances and phonograms, broadcasting organizations have also entered into the online world and market. Although on-demand or digital interactive services are not considered to be broadcasting in its specific legal term, it is a legitimate activity of broadcasting organizations that is recognized and protected in much national legislation.

---

[966] Ficsor, M. (2002). *The Law of Copyright and the Internet, The 1996 WIPO Treaties, their Interpretation and Implementation* . Oxford, UK: Oxford University Press, p. 629.

[967] Walter, M. M. Armstrong, R. (2010). *Broadcasting Policy in Canada.* University of Toronto Press. (2010). Article 3 Right of communication to the public of works and right of making available to the public of other subject-matter. In M. M. Walter, & S. V. Lewinski, *European Copyright Law A Comentary* (p. 1555). Oxford: Oxford University Press, p. 975.

[968] Armstrong, R. (2010). *Broadcasting Policy in Canada.* University of Toronto Press, p. 192.

Not only in national legislations, but also WCT, WPPT[969] and more recently the Beijing Treaty have recognized and regulated these online interactive services with respect to author's right and of performing artists and phonogram producers. Authors, performers and phonogram producers were given effective protections through the right of making available to the public. The WCT, WPPT and Beijing Treaty has left alone the question updating of the rights and protections of broadcasting organizations but throughout the process faced repeated questions as to whether digitization and transmission over computer networks has brought any similarly negative impacts for broadcasting organizations with regards to their broadcast signal or fixations made from their broadcasts? If the question was answered yes, then what would be the best way to provide international protection for broadcasting organizations against unauthorized making available and unauthorized distribution of fixation of their broadcast signal? Since it makes it is so easy that individuals or members of the public may access them from a place and at a time individually chosen by them.

However, with regard to their activities in the online business market, due to the fact that broadcasting organizations were not granted intellectual property rights by any of the aforementioned international treaties, this situation has created and increased the third category of broadcast piracy, that of the piracy of fixation of broadcast. Major examples of this category of broadcast piracy are 'unauthorized on-demand services' or ' unauthorized making available of fixation of broadcast program', which include -but are not limited to- unauthorized uploading on websites, file sharing networks, deep linking and hyper linking services, listing sites and user-generated services.

As mentioned above, the right of making available of fixation of broadcast has been recognized in much national legislation. Though many countries, due to weakness of development in their national communication and information infrastructures are not yet at a stage to enact such legislation effectively, there are many other developed countries that have adopted their own unique legislative measures and solutions to protect their national broadcasting organizations against unauthorized distribution or the making available of fixation made from their broadcast. In addition to this, as "networking technology, including peer-to-peer file sharing, deprives right holders of control as regards the distribution of copyrighted works to users,"[970] it is playing the same role in unauthorized distribution or making available fixation of broadcast to the public.
Moreover, making available fixation of broadcast in the Internet and digital environment is not only a newly employed business model of almost all broadcasting organizations; but also, particularly with regard to public broadcasting organizations, it has entered into their organizational mission to provide new public services and respond their audiences' demands for such a service. Today, national legislation has adopted provisions of these kinds of services as broadcaster's right and as their public service tasks. For example, Swiss legislator in its new Radio and Television Law[971] grants the SRG a right to be active in and cover new markets, for instance the online media markets that, according to Professor Weber this right indeed is a legal doctrine refers to a so-called '*Entwicklungsgarantie'* (development

[969] As WCT and WPPT first and foremost aimed at providing a legal framework for exploitation of works and other objects of related rights on the Internet. See: Walter, M. M. (2010). Article 3 Right of communication to the public of works and right of making available to the public of other subject-matter. In M. M. Walter, & S. V. Lewinski, *European Copyright Law A Comentary* (p. 1555). Oxford: Oxford University Press, p. 977, No. 11.3.10.
[970] Drier, T. (2013). Online and its effect on the "Goods" versus "Services" distinction. *International Review of Intellectual Property and Competition Law , 44* (2), p.137.
[971] Radio- und Fernsehgesetz- RTVG adopted in parliament on 24 March 2006, entered into force on 1 April 2007, Article 25 par. 3 Lit. b.

guarantee) of the public service broadcast provider, which includes the possibility of playing an important role in online media markets for example providing online programs as complementary products, online delivery as additional distribution channel ,content syndication etc.[972]

4. Analysis of discussions at WIPO

During long-term negotiations in the SCCR, the recognition of the right of making available fixation of broadcast has been frequently debated. This issue is one of most controversial issue for the WIPO Member States, which has not yet been resolved.

The reasons that the SCCR has not reached an agreement and resolved this issue is mainly down to their inability to reach a consensus on the answer to the following: how will the WIPO broadcasting treaty provide a reliable legal framework for further exploitation of fixation of broadcast program on the Internet?

Similar to the discussions on other post-fixation rights, proponents say that the right of making available would contradict the mandate of the WIPO General Assembly Decision that ruled out the possibility that the new broadcaster treaty would follow a signal-based approach. In addition to this, in their opinion, after reception of broadcast signal by its intended recipients or when it is being perceived (watched/listened to) there is not any signal, and what remains -if the broadcast program is fixed- is the content and not the signal. Such content belongs to its owner and not to the broadcaster. The second concern of the proponents of new post-fixation rights -including making available fixation of broadcast signals- is that it would bring the Internet within the scope of the new treaty that would again contradict with the mandate of WIPO General Assembly that insisted the new treaty should address traditional broadcasting only. But since without the Internet 'making available fixation of broadcast signals' makes no sense thus it is closely associated with the Internet, webcasting and other new medias. The making fixed broadcasts available in such a way that members of the public may access them from a place and at a time individually chosen by them, is an interoperable activity that may only take place through a digital transmission *via* downloading or streaming over the Internet or similar networks.[973]

Nevertheless, we may respond to the proponents that when a broadcast program is fixed, the given fixation is not merely fixation of the underlying content, but rather it is fixation of signals, which carries the underlying content. Therefore, any subsequent uses of the fixation of a broadcast are not only subject to authorization of content owner but also it should be subject to authorization of the broadcaster that has produced the program-carrying signals. The broadcaster's right over fixation of its broadcast signal does not stem from the rights granted from content owner. A broadcaster's right stems from its neighboring rights over its signal. Imagine that 'A' as a content owner licenses 'B' only to terrestrial broadcast, and licenses 'C' only to satellite broadcast; 'C' could not use fixation of terrestrial broadcast signal of B in its satellite broadcast, as 'A' has not licensed 'B' to the satellite broadcast.

---

[972] Weber, R. H. (2007). Switzerland. In E. A. Susanne Nikoltchev, *The Public Service Broadcasting Culture IRIS Special*, Council of Europe, p.30.

[973] WIPO Document SCCR/17/INF/1, Informal paper on the WIPO Treaty on the Protection of Broadcasting Organizations prepared by the Chairman of the Standing Committee on Copyright And Related Rights of November 3, 2008, para 26-27.

Furthermore, recognition of a new right of making available fixation of broadcast signals would not bring Internet and webcasting organizations within the scope of the new treaty. Rather, it would cover making available of fixation of broadcast signals only as an operation against which the traditional broadcaster would enjoy protection. Logically, any other third party for example, webcasting organizations would not be granted any protection.[974]

The existing situation in the SCCR on the new right of making available fixation of broadcast to the public is a result firstly of the non-clarification on the precise identification of the challenges, which the new proposed right would resolve. Secondly, it is affected by the reality that each individual Delegation still continues to lobby for their national legal traditions to influence the new treaty. This would not happen, since major variations exist in the national law and no national legislation is far-reaching enough to be adopted in an international context.

Regarding the precise identification of the challenge, which the new right of making available would or should resolve, it seems that apart from the nature of the new proposed right, it should recognize a broadcaster's on-demand services and effectively protect broadcasting organizations against extraterritorial unauthorized offering and distribution of fixation of their broadcast in the new medias, Internet and digital connected networks.
On the other hand, to be able to propose a consensus based solution on the new right to make available fixation of broadcast, we would also need to explore major existing national tendencies and legislating experiences that recognize a broadcaster's right in on-demand services and protect them against unauthorized offerings or making available fixation of their broadcast to the public.

In the European copyright and related rights system, the Directive 2001/29/EC or so-called InfoSoc Directive[975] that has been implemented by Member States of the European Community, has successfully harmonized the internal laws of EC Member States on the acts of making available of the copyright works and other subject matter of related rights including fixation of broadcasts. On the rationale of such proposed harmonization it is stated that the legal uncertainty regarding the nature and the level of protection of acts of on demand transmission of copyright works and subject-matter protected by related rights over networks should be overcome by providing for harmonized protection at Community level.[976]

This directive however does not define making available but makes its meaning clear in its different contexts. As it states that the right to make available to the public subject matter of related rights should be understood as covering all acts of making available such subject-matter to members of the public not present at the place where the act of making available originates, and as not covering any other acts.[977] Authors and owners of related rights should have an exclusive right to make available to the public copyright works and subject-matters of related rights by way of interactive on-demand transmissions, which are characterized by the fact that members of the public may access them from a place and at a time individually chosen by them.[978] In the same manner as the WCT, the Directive differentiates between the

[974] Ibid, para 26-27.
[975] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society. The Directive is being implemented successfully in the Member States to the European Community.
[976] Ibid, Recital No. 25.
[977] Ibid, Recital No. 24.
[978] Ibid, Recital No. 25.

making available of copyright works and subject matters of related rights. It recognizes making available acts of copyright works as acts of communication of works to the public and accordingly the author's exclusive right to authorize or prohibit any communication to the public includes the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them.[979] But on the protection of owners of related rights the directive follows the same approach recognized in Article 10 and 14 of WPPT i.e. new exclusive right to authorize or prohibit the making available to the public. The directive grants all four members of related rights in European legal system i.e. performers, phonogram producers, producers of the first fixations of films and broadcasting organizations (regarding fixation of their broadcasts) new exclusive right to authorize or prohibit the making available to the public of their protected subject matters in such a way that members of the public may access them from a place and at a time individually chosen by them.[980]

Without any considerable differences, the Swiss legal system follows a similar approach as European Community law regarding protection of broadcasting organizations against making available acts of fixation of their broadcasts and their exploitation in on-demand services. Article 37(e) of Swiss Copyright and Related Rights Act grants broadcasting organizations the exclusive right to make their broadcasts available through any kind of medium in such a way that persons may access them from a place and at a time individually chosen by them.[981]

In the Copyright Act of Japan, broadcasting organizations have the exclusive right to 'make transmittable' their broadcast or those diffused by wire from such broadcasts.[982] This exclusive right covers broadcaster's on-demand services and protects them against unauthorized making available of fixation of their broadcast to the public. However, Japanese law wherein defines 'making transmittable' as the putting in such a state that interactive transmission can be made, establishes conditions on the interactive transmission.[983]

The Iranian legal system that follows civil law tradition is another example in providing updated protection and IP rights to broadcasting organizations. Iran, though not a party to the Rome Convention but its legislation recognizes broadcaster's right including right to make available to the public of fixation of broadcast under the auspices of neighboring rights. Without prejudicing rights of authors and of owners of other subject matters subsist in broadcasted program, the Iranian copyright and related rights acts offers broadcasting organizations the 'right of distribution' in the digital environment that covers publication and offering of fixation of broadcast including making them available to the public.[984] The nature

---

[979] Ibid, Article 3(1) states that:
'Member States shall provide authors with the exclusive right to authorize or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them.'

[980] Ibid, Article 3(2) states that:
'Member States shall provide for the exclusive right to authorize or prohibit the making 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:
….
(d) for broadcasting organizations, of fixations of their broadcasts, whether these broadcasts are transmitted by wire or over the air, including by cable or satellite.'

[981] Switzerland Federal Act of October 9, 1992 on Copyright and Related Rights (Inserted by Art. 2 of the Federal Decree of 5 Oct. 2007, in force since 1 July 2008)

[982] Article 99bis Copyright Act of Japan (Act No. 48 of May 6, 1970, as last amended by Act No. 65 of December 3, 2010)

[983] Article 2 Copyright Act of Japan (Act No. 48 of May 6, 1970, as last amended by Act No. 65 of December 3, 2010).

[984] Article 62 of the Iran Electronic Commerce Law (2004)

of this protection is an exclusive right and any making available activities of fixation of broadcast are subject to consent of original broadcaster. Furthermore, broadcasting organizations are protected against unauthorized offerings (including making available) of fixation of their broadcast program in the electronic environment through criminal sanctions and civil remedies. [985]

Another example of national legislation can be found within the Indian copyright system. Before considering the Indian law's stance on the broadcasters' right to making available fixation of their broadcast, an introductory comment on the Indian law in general would be helpful. In Indian copyright law system, protection of broadcasting organizations only extends to the transmitted signal that constitutes the broadcast. Like an author's right system, in Indian law a broadcaster's right is not based upon a creative contribution to a work. It is based on protection of the investment that it has made for broadcasting of the work or underlying content to the public. Therefore, the broadcasters' right is supplementary protection to copyright in a work and would also apply to works that would be in the public domain under copyright law.[986] In this legal system a broadcast is treated at a par with an original literary or dramatic work and is in itself amenable to copyright and protection of broadcasters does not affect the copyright vested in the work broadcasted[987]. Accordingly, based on the Section 37 Indian copyright Act 1957, the sole protection that the Indian law offers for broadcaster is the inability on the part of any other to legally broadcast the same or substantial part of the broadcast so made, unless consented to by the original broadcaster.[988]
In principle, where copyright or performer's right subsists in respect of any work or performance that has been broadcast, any post-fixation exploitation of a broadcasted program including the making available fixation of broadcast to the public belongs to the owner of copyright and performer or both. Exploitation of fixation of broadcast e.g. their making available to the public either by the original broadcaster itself or by any others is subject to or limited to the extent permitted in the contract concluded between owners of copyright or performance and broadcaster.[989] Furthermore, the Indian Copyright Act as amended in 2012 included making available acts as part of communication to the public,[990] which is the exclusive right to authorize or to carry out by owners of copyright[991] but not by broadcasting organizations. However it seems that where copyright or performer's right does not subsist in

[985] The infringer will be sentenced from three months to one year in prison or a penalty of 50,000,000 Rials and all damages incurred. (Article 74, Iran Electronic Commerce Law (2004).
[986] Subramanian, D. (2010). The Milieu of Broadcasting Rights: An Indian Perspective. *Entertainment Law Review , volume 21* (issue 1), p.26.
[987] Section 39A(2) Indian Copyright Act, 1957 provided that:
…the broadcast reproduction right or the performer's right shall not affect the separate copyright in any work in respect of which, the broadcast or the performance, as the case may be, is made.
[988] Jain, T. (2008). Broadcaster's right under copyright law. *Icfai University Journal of Intellectual Property Rights. Available at SSRN: http://ssrn.com/abstract=1098307 , VII* (3), p. 4. Also see: [988] Subramanian, D. (2010). The Milieu of Broadcasting Rights: An Indian Perspective. *Entertainment Law Review , volume 21* (issue 1), p.26.
[989] Section 39A(1) Indian Copyright Act, 1957 provided that:
…Where copyright or performer's right subsists in respect of any work or performance that bas been broadcast, no license to reproduce such broadcast, shall be given without the consent of the owner of right or performer, as the case may be, or both of them.
[990] Section 2(ff) Indian Copyright Act (Amended in 2012):
"Communication to the public" means making any work or performance available for being seen or heard or otherwise enjoyed by the public directly or by any means of display or diffusion other than by issuing physical copies of it, whether simultaneously or at places and times chosen individually, regardless of whether any member of the public actually sees, hears or otherwise enjoys the work or performance so made available.
[991] Section 14 Indian Copyright Act (1957).

the program that has been broadcasted, it is the broadcaster's right to execute or authorize making fixation of its broadcast available to the public.[992]

Finally there are certain countries including the US, where their copyright law does not currently recognize any post- fixation rights including right to make available fixation of broadcast signals for broadcasting organizations. Nevertheless, in some cases other commercial entities exploit post-fixation broadcasts without being authorized by original broadcaster, the US Federal anti- competition laws would apply on such unauthorized exploitation. The US copyright law recognizes the exclusive right to make available to the public only for copyright works used in broadcasts through applying the exclusive right of distribution[993]. Therefore, broadcasting organizations do not have the exclusive right to make available fixation of their broadcast to the public unless their broadcast program itself qualifies as a work of copyright pursuant to title 17 United States Code section 101 on the fixation requirement. This provision states that "a work consisting of sounds, images, or both, that are being transmitted, is 'fixed' for purposes of this title if a fixation of the work is being made simultaneously with its transmission." In this regard, as some commentators on US copyright law realized, under this provision, as it is common practice for broadcasters, if a live radio or television broadcast such as news, sporting events, live TV shows, live performance that are transmitted to the public in unfixed form legally recorded simultaneously with its transmission; such an extension of the concept of fixation would seem to effective protect virtually all broadcast.[994]

5. Proposal on the right to make available fixation of broadcast

Through the above discussions and analysis and based on the same grounds and rationales, it seems that the ideal solution in a new international related rights treaty to protect broadcasting organizations in regard their interactive and on-demand services would be *mutatis mutandis* the model of protection adopted in the WPPT. As in Articles 10 and 14 of WPPT, which grants performers and phonogram producers a new exclusive right to authorize making available, the new broadcaster's treaty which is to be an international treaty in the context of related rights ought to grant broadcasters the same exclusive right to authorize making available fixation of their broadcast. This new right would not prejudice authors, performers and phonogram producers right in any sense. The new right should be technologically neutral so as to include all platforms of on-demand transmission and effectively be able to protect broadcaster's legitimate rights over exploitation of fixation of their broadcasts in on-demand or interactive services. In addition, no rights are exhausted in connection with making broadcasts available to the public fixations of broadcasts in the

[992] The broadcaster's right to make fixation of their broadcast available to the public is inferable from Section 2(ff), Section 2(dd) and Section 37(3)(a).

[993] Title 17 US Code Section 106(3). See: Sydnor II, T. D. (2009). The Making-Available Right under U.S. Law. *The progress & Freedom Fundation. Available at SSRN: http://ssrn.com/abstract=1367886 , 16* (7), p. 3; Nicholds, K. (2009). The free jammie movement: Is making a file avaialable to other users over a peer-to peer computer network sifficient to infringe the copyright owner's 17 U.S.C. § 106(3) Distribution right? *Fordham Law Review. Available at SSRN: http://ssrn.com/abstract=1274348 , 78* (2), p.1028 and Menell, P. S. (February 2012). In Search of Copyright's Lost Ark: Interpreting the Right to Distribute in the Internet Age. *Journal of the Copyright Society of the USA. Available at SSRN: http://ssrn.com/abstract=1679514 or http://dx.doi.org/10.2139/ssrn.1679514*. p. 60-61.

[994] Nimmer on Copyright, § 2.03[B][2], (California: Lexis Nexis, 2001) as quoted by Jain, T. (2008), Broadcaster's right under copyright law. *Icfai University Journal of Intellectual Property Rights. Available at SSRN: http://ssrn.com/abstract=1098307 , VII* (3), p. 12-13.

digital networks. Since, exhaustion of rights is only associated with the distribution of tangible copies put on the market by the right holder or with their consent. Therefore, the desirable model of broadcaster's right to make available would be the following:

'The broadcasting organizations shall enjoy the exclusive right of authorizing the making available to the public their broadcasts from fixations, 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.'

However, as there seems resistance[995] against the granting of the new right with the exclusive right to authorize, and to keep the relative freedom of legal characterization in national legislation, it can be an exclusive right of authorizing the making available to the public of fixations of broadcasts with an optional statutory prohibition. Through this model, without prejudicing rights of other right holders in the underlying contents or program items, broadcasting organizations shall enjoy the exclusive right of authorizing the making available to the public of their broadcasts from fixations, 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. For the sake of upmost flexibility, the new treaty may give an option to its contracting parties that through a notification deposited with the Director General of WIPO, declare that instead of the exclusive right of authorizing making available it will establish protection for the broadcasting organizations through prohibition of making available to the public of fixations of broadcasts without the consent of the broadcasting organizations. In addition to this, it shall be a matter for domestic law of the Contracting Party where protection of this right is claimed in order to determine the conditions under which it may be exercised, provided that such protection is adequate and effective. For example, broadcasting organizations shall have recourse to effective legal remedies in respect of breach of this prohibition. This format gives freedom to contracting parties to characterize the new right legally in a way, which is appropriate to their national legal system.[996]

Part Three

Other protections

I. Protection of pre-broadcast signals

In chapter one we established that the piracy of pre-broadcast signal is the first stage of broadcast piracy. It was also stated that pre-broadcast signals, although not being intended for

[995] It should be noted that until the twenty-seventh SCCR session in April and May 2014, the Delegation of India favored granting a defensive protection – through right to prohibition or prevention - to broadcasting organizations in regard unauthorized making available to the public of fixations of broadcasts by third parties. This Delegation opposes granting any exclusive intellectual property type right to broadcasting organizations to authorize making available fixation of broadcasts.

[996] Article 15 of the WIPO Document SCCR/15/2 includes other proposals regarding right to make available fixation of broadcast. See: WIPO Document SCCR/15/2, Revised draft basic proposal for the WIPO treaty on the protection of broadcasting organizations, prepared by the Chair of the Standing Committee on Copyright and Related Rights in cooperation with the Secretariat of July 31, 2006.

the public are also capable of being pirated. In addition, that the piracy of pre-broadcast signals can have more advantages than the broadcast signal for pirates; a pre-broadcast signal is like a raw material for broadcasters, including no advertisements or graphics and usually without a logo of the television station or channel. Therefore, commercial pirates that base their unauthorized activities on adding their own advertisements to the broadcast can do this easily on the pirated pre-broadcast signal, not having to remove the original broadcasters' advertisement. When pirates use a broadcast signal, in many instances, they have to remove original advertisements, blur added graphics and broadcaster's logo etc. all, which requires additional technology. The significance of the pre-broadcast signal is that broadcasting organizations use this signal to transfer program materials from a studio or from the site of filming to the place where a transmitter is situated; or to transfer program material between two or more broadcasting organizations for final broadcast to the public.[997] Other purposes of pre-broadcast signal is the simultaneous relaying of signal over another broadcast network, a cable distribution system, the Internet, broad-band, mobile telephony or etc.[998] Pre-broadcast signals are often transmitted in a digital form and perfect digital copies can be obtained from them, downloaded or used for re-broadcasting and retransmission purposes. Pirates can disseminate pre-broadcast signals simultaneously with the official broadcast transmissions or even before the scheduled time for original broadcast to the public.[999]

Currently, we can categorize pre-broadcast signals as follows:

- Transmission between an event organizer (from event location e.g. concert hall, stadium, public places) and a broadcaster via a telecommunications link (terrestrial, satellite or broadband;
- Transmission between two or more broadcasters (inter-broadcasters signal transmission);
- Transmission between different stations or transmitters of a single broadcasting organization. (It also includes signal transmission between cameras, production plant and transmission area and during satellite uplinks and downlinks.)

Now the question is that while in essence, pre-broadcast signal transmission is a point-to-point transmission by telecommunications links or the broadcasting organizations themselves and the public is not involved, do broadcasters deserve to be protected against unauthorized exploitation of their pre-broadcast signals in the proposed new WIPO broadcasters' treaty? If the answer is in the affirmative what is the desirable scope and form of protection of pre-broadcast signal?

To answer this question, at the outset we should state that with the exception of the Brussels Satellite Convention, which could be used for protection of specific form of satellite pre-broadcast signal, no other international or regional instrument gives broadcasters protection against unauthorized uses of their pre-broadcast signal. Most importantly the Brussels Satellite Convention includes such protection, though not necessarily as a neighboring right. The Rome Convention and the TRIPS Agreement do not protect broadcaster's pre-broadcast signals,[1000] potentially because the piracy of pre-broadcast signal was not widespread at the

[997] Guibault, L., & Melzer, R. (2004 November). The legal protection of broadcast signals. *IRIS Plus, Legal observations of the European Audiovisual Observatory* (10), p. 7.
[998] European Broadcasting Union. (2007). *A selection of Articles and Speeches by Werner Rumphorst.* Geneva, p. 176.
[999] Guibault, L., & Melzer, R. (2004 йил November). The legal protection of broadcast signals. *IRIS Plus, Legal observations of the European Audiovisual Observatory* (10), p. 7.
[1000] Rikeston, S., & Ginsburg, J. C. (2006). *International Copyright and Neighbouring Rights* (2nd Edition ed., Vol. II). Oxford: Oxford University Press, No. 19.21.

time of their respective signatures and that the signals were not intended to public reception. The granting of protection over pre-broadcast signals might possibly be criticized as the protection of pre-broadcast signal is a matter of contract law and should not be protected by granting neighboring rights to broadcasting organizations. Furthermore, broadcasters do not add anything to the pre-broadcast signals, these signals are not edited, transmitted to the public yet and like raw material have no graphics and advertisements or supplemented with broadcaster's audio commentary. In addition to this, in the process of pre-broadcast signal transmission, other organizations for example satellite and telecommunication companies, the Internet service providers and event organizers may also be involved. There are many instances in which the pre-broadcast signal does not even belong to or possessed by a broadcasting organization. On the other hand, the intention of the WIPO Member States in the current negotiations of the SCCR is limited to work on the protection of broadcasting organizations and cablecasting organizations. Hence, protection of pre-broadcast signal would necessitate extension of the scope of application of the new treaty. In existing international instruments particularly the Rome Convention and TRIPS Agreement only broadcast signals and post-broadcast signals are included in the scope of application and pre-broadcast signals are excluded from protection.
While we intend to consider debates of the WIPO Member States on this issue and aim to propose possible solutions regarding the protection of pre-broadcast signals, it is necessary to point out the necessity of the protection of pre-broadcast signals in the new treaty.

In the fifth SCCR's, representative of the European Broadcasting Union (EBU) said that the Brussels Convention tried unsuccessfully to fight against piracy of pre-broadcast signal in 1974.[1001] In addition, the Brussels Convention had not found the broad support in the international community and left it open to Contracting States to provide some means of protection whether as communications law, penal law or related rights and national legislation were best placed to find solutions in the penal or telecommunications area.[1002] The representative was of the opinion that the broadcast of pre-broadcast signals should be included in the protection; otherwise broadcasters would have to prove from which source the pirate signal originated.[1003] Therefore, the Chairman of the SCCR agreed that pre-broadcast program-carrying signals should be considered as a possible object of protection.[1004]

During the Sixth SCCR session the Delegation of the European Community in his proposal for the treaty language included a separate article on the protection of pre-broadcast signal. Based on this proposal broadcasting organizations would enjoy adequate legal protection against unauthorized exploitation of their signals prior to broadcasting.[1005] The Japanese Delegation at that session made a precautionary intervention on this issue and stated that taking into consideration situations that signals before broadcasting to the public transmitted in a point-to-point way from a camera/microphone to a broadcasting station are intercepted, reproduced and/or transmitted without authorization, Japan had the issue whether to protect such signals or not under internal discussion.[1006] Accordingly, in the Sixth SCCR session, the Delegation of the European Community referred to its above proposal in treaty language

[1001] WIPO Document SCCR/ 5/6, Report of the fifth session of the Standing Committee on Copyright and Related Rights of March 1, 2005, para 53.
[1002] Ibid, para 59.
[1003] Ibid, para 53.
[1004] Ibid, para 54.
[1005] WIPO Document SCCR/6/2, Proposal by the European Community and its Member States on the protection of broadcasting organizations of October 3, 2001, Article 10.
[1006] WIPO Document SCCR/2/5, Comment made by the Delegation of Japan Submissions received from Member States of WIPO and the European Community (by March 31, 1999) of April 6, 1999, p. 5.

regarding protection of pre-broadcast signal, but added that further consideration was needed regarding the need, the nature and the circumstances of such protection.[1007] Therefore, after the Fifth SCCR session, the protection of a pre-broadcast signal was included in the majority of proposals submitted to the SCCR in the treaty language.[1008] Nevertheless, despite after ten years' negotiations, the Member States did not yet agree on the need, nature and the circumstances of such protections. There have been proposals that proposed, "contracting parties may provide for 'adequate and effective legal protection' in their national legislation to the transmitting broadcasting organization, to the receiving broadcasting organization or to both of them."[1009]

It seems that it is necessary for the proposed new treaty to grant protection to broadcasters against unauthorized exploitation of pre-broadcast signals, though a clear definition of 'pre-broadcast signal' must be established in order to do this. This protection would require the extension of the scope of application to pre-broadcast signal that has no precedence in the Rome Convention or in the TRIPS Agreement. Protection of pre-broadcast signal might therefore be justified by the fact that broadcasters are owners of these signals. Broadcasters pay for the reception and transmission of these signals and intend to use them in their final broadcasts, promote such broadcasts and use their investment and entrepreneurial works to obtain broadcast rights. Therefore, in terms of economic significance there is no difference between pre-broadcast signal and broadcast signal. In addition, the exclusion of the pre-broadcast signal from the scope of application of the proposed new broadcasters treaty would frustrate its application. Since it may not be easy on all occasions for a broadcaster to prove whether a pirate accessed or used a pre-broadcast signal or whether they used a live broadcast

[1007] WIPO Document SCCR/6/4, Report of the sixth session of the Standing Committee on Copyright and Related Rights of December 20, 2001, para 19.

[1008] WIPO Document SCCR/6/2, Proposal submitted by the European Community and its Member States of October 3, 2001, Article 10; WIPO Document SCCR/8/7, Proposal submitted by the United States of America of October 21, 2002, Article 7; WIPO Document SCCR/11/3, Consolidated text for a treaty on the protection of broadcasting organizations prepared by the Chairman of the Standing Committee on Copyright and Related Rights in cooperation with the Secretariat of February 9, 2004, Article 13; WIPO Document SCCR/12/2, Revised consolidated text for a treaty on the protection of broadcasting organizations prepared by the Chairman of the Standing Committee on Copyright and Related Rights in cooperation with the Secretariat, Article 13; WIPO Document SCCR/12/2 Rev.2, Second revised consolidated text for a treaty on the protection of broadcasting organizations prepared by the Chairman of the Standing Committee on Copyright and Related Rights in cooperation with the Secretariat of May 2, 2005, Article 13; WIPO Document SCCR/14/2, Draft basic proposal for the WIPO treaty on the protection of broadcasting organizations including a non/mandatory appendix on the protection in relation to webcasting prepared by the Chair of the Standing Committee on Copyright and Related Rights in cooperation with the Secretariat of February 8, 2006, Article 11; WIPO Document SCCR/15/2, Revised draft basic proposal for the WIPO treaty on the protection of broadcasting, prepared by the Chair of the Standing Committee on Copyright and Related Rights in cooperation with the Secretariat, Article 16; WIPO Document SCCR/23/6, Draft treaty on the protection of broadcasting organizations Proposal presented by the Delegations of South Africa and Mexico of November 28, 2011, Articles 6; WIPO Document SCCR/24/3, Proposal by the Delegation of Japan "Renewal Version of revised draft basic proposal for the WIPO treaty on the protection of broadcasting (SCCR/15/2 Rev)" of June 7, 2012, Article 13; WIPO Document SCCR/24/5, Draft treaty on the protection of broadcasting organizations, Joint Proposal by the Delegations of South Africa and Mexico of July 2, 2012, Article 6; WIPO Document SCCR/24/10 Corr, Working document for a treaty on the protection of broadcasting adopted by the Standing Committee on Copyright and Related Rights (SCCR) of March 6, 2013, Article 9; and WIPO Document SCCR /27/2 Rev, Working document for a treaty on the protection of broadcasting organizations prepared by the Secretariat of March 25, 2014, Article 9 (Alternative A)

[1009] WIPO Document SCCR/14/2, Draft basic proposal for the WIPO treaty on the protection of broadcasting organizations including a non-mandatory Appendix on the protection in relation to webcasting prepared by the Chair of the Standing Committee on Copyright and Related Rights in cooperation with the Secretariat of February 8, 2006, Article 11; Also see Explanatory Comments on this Article in paragraphs 11.01 and 11.03

signal, which was intended for public reception.[1010] Protection of pre-broadcast program-carrying signals would therefore affect the burden of proof and benefit those broadcasters that had paid for the exclusivity and wished to be protected against pirates stealing the signal in direct competition with their own broadcast using exactly the same picture.[1011] In this situation it should suffice merely for a broadcasting organization to prove that it is the owner or exclusive or non-exclusive holder of the broadcast right without bearing the burden of proof that the pirated signals are taken or intercepted from the pre-broadcast signal or broadcast signals. If the new treaty does not protect pre-broadcast signals or it differentiates between pre-broadcast and broadcast signals, broadcasters will not only have to prove their ownership to the signal itself but also have to prove that the pirated signal was taken from a specific source.
It is, however, necessary to make a clear definition of the pre-broadcast signal, because there are potential risks regarding the unintended expansion of the scope of application of the new treaty and including other entities or companies as beneficiaries of the protection of the new treaty. It should be made clear that protection of a pre-broadcast signal only would benefit broadcasting organizations and not other organizations such as event organizers, sport organizations, telecommunication and satellite companies or Internet service providers. In this regard, it may suffice that new treaty limits the beneficiaries of the rights and protection of the new treaty to broadcasting and cablecasting organizations.

Regarding the nature and scope of protection of the pre-broadcast signals there are two major approaches that have been pursued by WIPO Member States. The first approach is reflected in several proposals submitted to the SCCR and this approach suggests that it is necessary to grant pre-broadcast signals the adequate or same rights and protections that are granted to the during (live) broadcast and post-broadcast signals by the new treaty. [1012] According to this approach, only through having equal treatment with the rights and protections to the pre-broadcast and broadcast signal, would the new treaty be an efficient international instrument to fight against all forms of broadcast piracy and could also reduce future disparities in national legislation regarding protection of pre-broadcast signals. The second approach is an adoption of the model of protection provided by the Brussels Satellite Convention.[1013] Based on this approach protection of the pre-broadcast signal may differentiate from the rights and protections that would be afforded to the broadcast and post-broadcast signals. This approach suggests that it should be left to the Contracting Parties how best to protect pre-broadcast signals in their domestic law and determine the scope and means of protection.[1014] There

[1010] European Broadcasting Union (Legal Department). (2001, May 3). *Why should the right also cover pre-broadcast program-carrying signals?* Retrieved May 20, 2012 from www.ebu.ch: www.ebu.ch/CMSimages/en/leg_t_broadcasters_neighbouring_right_signals_tcm6-4351.pdf

[1011] WIPO Document SCCR/ 5/6, Report of the fifth session of the Standing Committee on Copyright and Related Rights of March 1, 2005, Intervention made by the representative of the European Broadcasting Union, para 59.

[1012] WIPO Document SCCR /23/6, Proposal submitted by the Delegation of South Africa and Mexico of November 28, 2011, Articles 6.

[1013] Article 2 (1) of the Brussels Convention each Contracting State undertakes to take adequate measures to prevent the distribution on or from its territory of any programme-carrying signal by any distributor for whom the signal emitted to or passing through the satellite is not intended.

[1014] WIPO Document SCCR/6/2, Proposal submitted by the European Community and its Member States of October 3, 2001, Article 10; WIPO Document SCCR/8/7, Proposal submitted by the United States of America of October 21, 2002, Article 7; WIPO Document SCCR/11/3, Consolidated text for a treaty on the protection of broadcasting organizations prepared by the Chairman of the Standing Committee on Copyright and Related Rights in cooperation with the Secretariat of February 9, 2004, Article 13; WIPO Document SCCR/12/2, Revised consolidated text for a treaty on the protection of broadcasting organizations prepared by the Chairman of the Standing Committee on Copyright and Related Rights in cooperation with the Secretariat, Article 13;

were several proposals submitted to the SCCR that followed the second approach.

In finding a workable solution to protect pre-broadcast signals, it should be remembered that the majority of national legislation is silent in respect of the protection of broadcaster's pre-broadcast signals. Therefore, it seems that before determining the nature, scope and means of protection of pre-broadcast signal, the SCCR should first define pre-broadcast signal and agree on the criteria of protection of pre-broadcast signal.

The new Iranian Copyright and Related Rights Bill, which was approved by the Cabinet of Ministers in October 2014, broadcaster's pre-broadcast signal are protected like during broadcast and post-broadcast signals. This Bill does not define a pre-broadcast signal but the criterion of protection of pre-broadcast signal is the ownership of a broadcasting organization over pre-broadcast signals. Accordingly, the beneficiary of the protection of pre-broadcast signal is confined to broadcasting organizations. Broadcaster's pre-broadcast signals are therefore granted the same rights and protections given to during and post-broadcast signals.[1015]

Whilst seeking to define pre-broadcast signal the SCCR considered a number of proposals from Member States. In the Eleventh session of the SCCR, based on the proposals and interventions made by Member States, the Chairman of the SCCR in cooperation with the Secretariat prepared a text that included the first definition of pre-broadcast signal.[1016] It has defined pre-broadcast signals as "signals that are not intended for direct reception by the public and are used by broadcasting organizations to transport program material from a studio or e.g. from the site of an event to the place where a transmitter is situated. Such signals may also be used for transport of program material between broadcasting organizations, as may be used for broadcast after a delay or after some editing of the material."[1017] This definition was entirely repeated in other draft proposals on the new broadcasters' treaty.[1018] Since then however, two alternative definitions were provided by new proposals. The respective Delegations of South Africa and Mexico, in a joint proposal on the draft treaty on the protection of broadcasting organizations in July 2, 2012 defined the pre-broadcast signal as "a private transmission of content to a broadcasting organization which that broadcasting

---

WIPO Document SCCR/12/2 Rev.2, Second revised consolidated text for a treaty on the protection of broadcasting organizations prepared by the Chairman of the Standing Committee on Copyright and Related Rights in cooperation with the Secretariat of May 2, 2005, Article 13;
WIPO Document SCCR/14/2, Draft basic proposal for the WIPO treaty on the protection of broadcasting organizations including a non-mandatory Appendix on the protection in relation to webcasting prepared by the Chair of the Standing Committee on Copyright and Related Rights in cooperation with the Secretariat of February 8, 2006, Article 11; and WIPO Document SCCR/15/2, Revised draft basic proposal for the WIPO treaty on the protection of broadcasting, prepared by the Chair of the Standing Committee on Copyright and Related Rights in cooperation with the Secretariat, Article 16.

[1015] Iran Copyright and Related Rights Bill (October 2014) approved by the Cabinet of Ministers.

[1016] WIPO Document SCCR/11/3, Consolidated text for a treaty on the protection of broadcasting organizations prepared by the Chairman of the Standing Committee on Copyright and Related Rights in cooperation with the Secretariat of February 9, 2004, Explanatory Comments on Article 13, p. 50.

[1017] Ibid.

[1018] WIPO Document SCCR/14/2, Draft basic proposal for the WIPO treaty on the protection of broadcasting organizations including a non-mandatory Appendix on the protection in relation to webcasting prepared by the Chair of the Standing Committee on Copyright and Related Rights in cooperation with the Secretariat of February 8, 2006, Explanatory Comments on Article 11, p. 32; WIPO Document SCCR/24/10 CORR. Working document for a treaty on the protection of broadcasting organizations, adopted by the SCCR of March 6, 2013, Explanatory Comments on Article 9.

organization intends to include in its program schedule."[1019] This definition was repeated recently in the new working document for a treaty on the protection of broadcasting organizations adopted by the SCCR in March 6, 2013.[1020] These definitions focused on the private character of the transmission of the pre-broadcast signal and the purpose of such signals, namely the broadcaster's intention to include it in its program schedule. These definitions however have proved problematic, and which may create inconsistency in the interpretation of the future treaty, as broadcasters always have to prove their prior intention to include pre-broadcast signals in their broadcast program schedule. Having the intention of broadcasters to include any given pre-broadcast signal into their broadcast as a criterion is problematic and proving it would be difficult.

The definition of the pre-broadcast signal should be based on the criteria of the broadcasters ownership or right to transmit and/or receive the pre-broadcast signal.
This definition is identical to that of the broadcast and post-broadcast signal other than the fact it is not intended for the public. The distinctive feature of this approach is that though the beneficiaries of the protection of pre-broadcast signals are confined to broadcasting organizations and other persons or entities are excluded, in instances where the transmitting and receiving broadcasting organizations are two or more different broadcasting organizations the potential plaintiffs or claimants in claims regarding unauthorized exploitation of pre-broadcast signals could be both of transmitter and receiving broadcaster. This approach was adopted in the Copyright and Related Rights Law reform of the Iran as referred above. Accordingly any reference to the broadcasters intention to include pre-broadcast signal into their broadcast schedule should be avoided.

Based on the above considerations Member States have proposed several proposals on the protection of pre-broadcast signals,[1021] it seems that the most workable solution on the nature

---

1019 WIPO Document SCCR/24/5 WIPO Document SCCR /24/5, Proposal by the Delegation of South Africa and Mexico on the draft treaty on the protection of broadcasting organizations of July 2, 2012, Article 2(h)

1020 WIPO Document SCCR/24/10 CORR. Working document for a treaty on the protection of broadcasting organizations, adopted by the SCCR of March 6, 2013, Article 5 Alternative D (g) "pre-broadcast signal" 8 means a transmission prior to broadcast that a broadcasting organization intends to include in its program schedule, which is not intended for direct reception by the public."

1021 WIPO Document SCCR/11/3, Consolidated text for a treaty on the protection of broadcasting organizations prepared by the Chairman of the Standing Committee on Copyright and Related Rights in cooperation with the Secretariat of February 9, 2004, Article 13 "Broadcasting organizations shall enjoy adequate and effective legal protection against any acts referred to in Article 6 to 12 of this Treaty in relation to their signals prior to broadcasting." This proposal proposed by Egypt, the European Community and its Member States, Kenya, the United States of America, Uruguay and Singapore.

-WIPO Document SCCR/24/3, Proposal by the Delegation of Japan "Renewal Version of revised draft basic proposal for the WIPO treaty on the protection of broadcasting (SCCR/15/2 Rev)" of June 7, 2012, Article 13
Alternative 1
"Broadcasting organizations shall enjoy adequate and effective legal protection against any acts referred to in Article6 to 12 of this Treaty in relation to their signals prior to broadcasting."
Alternative 2
"Contracting Parties shall provide adequate and effective legal protection in relation to their signals prior to broadcasting. The means of the protection granted by this Article shall be governed by the legislation of the country where protection is claimed."

-WIPO Document SCCR /27/2 Rev, Working document for a treaty on the protection of broadcasting organizations prepared by the Secretariat of March 25, 2014, Article 9
Alternative A
…

and the scope of protection of the pre-broadcast signal would be drafting the relevant provision with the sufficient flexibility in the following language:

Protection of pre-broadcast signal
(1) The Contracting Parties shall provide adequate and effective legal protection in relation to their signals prior to broadcasting to the transmitting and the receiving broadcasting organizations. The means of the protection granted by this article and the conditions under which it may be exercised shall be governed by the legislation of the country where protection is claimed.
(2) Any Contracting Party may, in a notification deposited with the Director General of WIPO, declare that it will apply the provisions of paragraph (1) only in respect of certain communications, or that it will limit their application in some other way, or that it will not apply these provisions at all.
(3) If a Contracting Party makes such a declaration, the other Contracting Parties shall not be obliged to grant the right referred to in paragraph (1) to broadcasting organizations whose headquarters are in that Contracting Party.

II. Protection of 'technological protection measures'

The invention of the digital technology and computer networking has evolved the landscape of the copyright and related rights industry. Although national and international instruments recognized intellectual property rights for authors and owners of related rights, legal protection is often not enough. As rightly pointed out "in the digital environment, the ease of copying renders legal protection inadequate."[1022] The digital files of creative works are "vulnerable to unauthorized copying and redistribution; unless the digital file can be secured against these acts"[1023] for example by putting a technological lock. Hence, right holders have begun to adopt technological measures to restrict unauthorized access, use and copying of their protected subject matters. Indeed, gradual migration toward a network-based distribution model, together with growing concerns over the effectiveness of intellectual property rights in a digital environment, have prompted rights holders to look for alternative

---

"(1) Broadcasting organizations shall enjoy the exclusive right to authorize:
…
(iii) the use of a pre-broadcast signal intended for them.
(2) With respect to the acts under subparagraphs (1)(iii), in this article, it shall be a matter for domestic law of the Contracting Party where protection of this right is claimed to determine the conditions under which it may be exercised, provided that such protection is adequate and effective."
Alternative B
…
"(4) Contracting Parties shall provide adequate and effective legal protection in relation to their signals prior to broadcasting. The means of the protection granted by this paragraph shall be governed by the legislation of the country where protection is claimed."

-WIPO Document SCCR/24/10 Corr, Working document for a treaty on the protection of broadcasting organizations adopted by the Standing Committee on Copyright and Related Rights (SCCR) of September 21, 2012 Article 9, Alternative A

"(2) It shall be a matter for domestic law of the Contracting Party where protection of this right is claimed to determine the conditions under which it may be exercised, provided that such protection is adequate and effective."

[1022] Rikeston, S., & Ginsburg, J. C. (2006). *International Copyright and Neighbouring Rights* (Second ed.). Oxford University Press, No. 15.02.
[1023] Ibid.

or supplementary strategies to protect their works.[1024] These supplementary strategies are the employment of so-called 'technological protection measures' (TPM).

The term 'technological protection measures (TPM)' is defined as being "any technology, device or component that, in the normal course of its operation, is designed to prevent or restrict acts, in respect of works or objects of related rights, which are not authorized by the owner of rights or by the law."[1025] Right holders spend considerable financial resources to limit access to and uses of their protected subject matters only for authorized persons and in those instances permitted by law by employing different technological measures. These measures aim to 'control access' or to 'control copying', distribution, retransmission and other uses of protected subject matter. They can consist of a varied assortment of measures, policies and devices including setting up conditional access systems, placing passwords and log-in procedures, digital lock, electronic watermarks, encrypting and scrambling program-carrying signals and different anti-copying devices. Nevertheless, such measures have proved to be only temporary in nature as right holders found that infringers can often circumvent their technological measures and access to and exploit their protected subject matters. Inevitably, right holder associations requested that their respective national legislators and international policy makers to protect their technological measures through the enactment of new law and adoption of new international binding instruments as "technical protection alone is rarely sufficient to effectively protect works"[1026] and other objects of related rights; and "legal protection supplemented by technological protection will fail unless the technological protection is in turn backed up by further legal protection against the provision of circumvention device or devices."[1027] Thus, according to its legal tradition and anti-circumventive approach, each country protects technological measures via anti-circumventive rules in its copyright, tort, unfair competition laws, as well as in their telecommunication and penal laws, prohibiting preparatory circumventive works such as the sale of satellite descramblers, and computer hacking.[1028] Indeed, the protection of TPMs takes place through the enactment of provisions in national laws designed to either inhibit the passing, deactivating and neutralizing technological measures that rights owners put in their works to prevent unauthorized access[1029] known as 'control access' or, alternatively, to inhibit copying, reproduction and distribution of the work known 'control copying'. There are countries that have adopted an anti-circumventive approach to cover 'control access', 'control copying' and prohibiting preparatory circumventive works or manufacturing, promoting and trade of circumventive devices. Therefore, we can define the 'protection' of TPM as 'supplementary' to national and international legal norms - in addition granting intellectual property rights- that reinforce TPM adopted by owners of copyright and related rights to prevent or sanctioning access, copying or reproduction, distribution, making available and communication to the public of protected subject matters that are not authorized by right holders or permitted by law.

[1024] Goldstein, P., & Hugenholtz. (2010). *International copyright: Principles, law and practice.* Oxford: Oxford University Press, pp.333-4.
[1025] *Guide to the Copyright and Related rights Treaties Administered by WIPO and Glossary of Copyright and Related Rights Terms* (Vol. 891(E)). (2003). Geneva: World Intellectual Property Organization, p. 313
[1026] Lewinski, S. v. (2008). *International Copyright Law and Policy.* Oxford: Oxford University Press, p.463
[1027] Rikeston, S., & Ginsburg, J. C. (2006). *International Copyright and Neighbouring Rights* (Second ed.). Oxford University Press, p. 966.
[1028] Ibid.
[1029] Wang, R. L.-D. (2006). DMCA Anti-Circumvention Provisions in a Different Light: Perspectives from Transnational Observation of Five Jurisdictions. *AIPLA Quarterly Journal , 34* (2), p. 219.

In the international sphere, originally "international copyright policymakers confronted the question whether international norms should reinforce authors and copyright owners' effort to prevent unauthorized copying, or whether technology and the market should be left to devise defenses and counter-ripostes"[1030] but subsequently both the WCT,[1031] WPPT[1032] gave effective legal protections to the TPM adopted by authors, performers and phonogram producers.[1033]

Article 11 of WCT, in a similar language as Article 18 of WPPT provided that:

"Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law."

The WCT and WPPT are the first international instruments that recognized 'obligations' of their Contracting States to protect TPM adopted by relevant rights owners. The WCT and WPPT provisions on protection of TPM are based on three points:

I. 'Adequate' legal protection and 'effective' legal remedies;
II. Only 'effective' technological measures are covered.
III. Only applies in connection with the 'exercise of their rights'.

Regarding 'adequate' legal protection and 'effective' legal remedies the WCT and WPPT codify the principle of legal protection against unauthorized circumvention in an open-ended manner. Contracting States have various options to implement this obligation.[1034] WCT and WPPT "do not require anti-circumvention rules within the legal framework of copyright"[1035] rather the relevant rules are left to the Contracting States themselves. In addition, WCT and WPPT do not bind the Contracting States to impose the use of technological measures by the right holders. Rather, "it is left entirely to the right holders to decide whether to employ technological measures or not."[1036] Nevertheless, while only so-called 'effective' TPM are

[1030] Rikeston, S., & Ginsburg, J. C. (2006). *International Copyright and Neighbouring Rights* (Second ed.). Oxford University Press, p. 966.

[1031] WCT, Article 11. Obligations concerning technological measures
"Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law."

[1032] WPPT, Article 18. Obligations concerning technological measures:
"Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by performers or producers of phonograms in connection with the exercise of their rights under this Treaty and that restrict acts, in respect of their performances or phonograms, which are not authorized by the performers or the producers of phonograms concerned or permitted by law."

[1033] According to Lewinski, WCT and WPPT provisions on technological protection measures and rights management information are novel provisions that were largely unknown beforehand in national and international law. Similar provisions with a very limited scope existed in Article 1707 of the NAFTA and Section 296 (ff) of the UK Copyright, Designs and Patents Act 1988 in respect of illegal decoding of satellite codes. Lewinski, S. v. (2008). *International Copyright Law and Policy.* Oxford: Oxford University Press. No.17.91, p. 462; Also See: (Reinbothe & Lewinski, 2002), p. , Historical background of Article 11 WCT.

[1034] Goldstein, P., & Hugenholtz. (2010). *International copyright: Principles, law and practice.* Oxford: Oxford University Press, p.334.

[1035] Ibid, p. 335.

[1036] Lewinski, S. v. (2008). *International Copyright Law and Policy.* Oxford: Oxford University Press, p.462

covered neither the treaty provisions nor their Agreed Statements give guidance as to how to interpret the meaning of 'effective technological measures' and fail to clarify other terminology such as 'acts…which are not authorized'. It is said technological measures are 'effective' where the use of protected subject matter is controlled through application of an 'access control' such as encryption or other transformation means, or a 'copy control mechanism'.[1037]

Finally, only those TPM that are applied in connection with the 'exercise' of the rights granted by WCT and WPPT are protected. TPM is a supplementary strategy provided by WCT and WPPT that a right holder may employ to control 'access' and 'copying' of their protected subject matter. It is neither a right granted to authors, performers and phonogram producers nor an obligation for them to adopt such protection measures. Instead, the 'protection' of TPM is a 'protection' that Contracting States to WCT and WPPT are obliged to reinforce through national legislation and in-keeping with national legal tradition. Therefore, although the WCT and WPPT introduced two new obligations (legal protections for the technological protection measures and electronic rights management information) "they do not create or enlarge exclusive rights as such, but which enhance the exploitation and enforcement of exclusive rights in the digital environment."[1038]

The WCT and WPPT were groundbreaking international instruments that obliged Contracting Parties to protect TPM used by the right holders, however, due to the vast freedom given to the Contracting Parties in relation the implementation of this obligation, the implementing legislation of the Contracting Parties varies in respect the scope and form of protection. [1039] In addition to this, it has become clear that protection of TPM would be inadequate in national laws if such protections and remedies were not extended to the preparatory activities. Preparatory activities including the manufacture, import, distribution, sale, rental, advertisement for sale or rental, or possession for commercial purposes of devices, products or components, or the provision of services which either marketed for the purpose of circumvention or have only a limited commercially significant purpose and primarily designed or produced for to enable or facilitate the circumvention of TPM.[1040]
The Contracting Parties to the WCT implemented its provisions regarding protection of the TPMs differently. While, WCT followed a minimal approach or giving lowest level of protection to the TPM (prohibition of circumvention acts against copying controls), both the USA and the European Community adopted a broad approach in the protection given to TPMs including both 'access controls' and 'copying controls'. [1041] In regard to circumventive device trafficking, while WCT has no provision, the USA and the European Community Member States introduced legislation that broadly cover devices used for access control and

---

[1037] World Intellectual Property Organization (WIPO). (2003). *Guide to the Copyright and Related rights Treaties Administered by WIPO and Glossary of Copyright and Related Rights Terms* (Vol. 891(E)). Geneva: World Intellectual Property Organization (WIPO), p. 313.
[1038] Rikeston, S., & Ginsburg, J. C. (2006). *International Copyright and Neighbouring Rights* (Second ed.). Oxford University Press, p. 965.
[1039] Sterling, J. (2003). *World Copyright law: protection of authors' works, performances, phonograms, films, video, broadcasts, and published editions in national, international and regional law* (2nd ed.). London: Sweet and Maxwell, p. 558.
[1040] World Intellectual Property Organization (WIPO). (2003). *Guide to the Copyright and Related rights Treaties Administered by WIPO and Glossary of Copyright and Related Rights Terms* (Vol. 891(E)). Geneva: World Intellectual Property Organization (WIPO), p. 313.
[1041] The United States Digital Millennium Copyright Act (1998) U.S.C. Section 1201; Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society, Article 6 and 13.

devices used for copying control.[1042] In fact they provide a complete shield against all kinds of circumvention-related acts that goes beyond a copyright approach and that established anti-circumvention as a semi-independent regime separate from the traditional copyright system. Other countries including Australia[1043] and Japan[1044] followed a more moderate approach in giving protection to the TPM. Japanese law gives protection only against 'copying control' against circumventive business and gives a moderate protection against device trafficking. In contrast to the USA and the European Community, the WCT and Japanese legislation consider anti-circumvention regulations as a form of protection ancillary to the existing copyright law and do not extend protection beyond what is necessary to impede copyright infringement.[1045] The Australian legislation is another example of a moderate model of the protection of TPMs.[1046] In contrary to the USA Digital Millennium Act; the Australian Copyright Act does not establish a separate and broad legal system of protection of TPMs. To correlate author's rights with the public interests, the Australian Copyright Act covers TPMs used for access control and copying control, but only in the context of copyright law in order to prevent the infringement of an author's exclusive rights and not in a separate and self-sufficient legal regime. Furthermore, it does not prohibit circumvention itself but rather provides for criminal penalties and civil remedies for persons who know or should have known that the circumventive devices or services would be used to circumvent technological measures.[1047]

i. Analysis of discussions at WIPO

Many of the public and commercial broadcasting organizations that are affected by the negative impacts of the digital technologies and digital broadcast piracy employ TPMs to protect their pre-broadcast, broadcast and post-broadcast signals. Broadcasters use similar TPMs[1048] to authors and other right holders. However, due to the specificity of broadcasting activities, such organizations also employ additional TPMs that can encrypt and encode program-carrying signals in order to control access and copying of their broadcast. Encrypting and encoding conceal broadcast-signals through special means, for example conversion of signals into codes or symbols to prevent unauthorized access and uses of the program-carrying signals. These signals would not be audible or visible unless decrypted or decoded by using designed set top box and special cards or other descrambling devices. In addition to this, the majority of broadcasters use 'transmission control system', 'control access' and 'control copying' not only to limit access to their signals to authorized persons or subscribers but also, due to obligations that they have to other right owners in content or sport organizations, to limit reception area of their signal to a particular territory or country.

[1042] Ibid.
[1043] Australian Copyright Act 1968 as amendment in 2003, Section 10 (1).
[1044] Japanese Copyright Law as amended in 1999, Article 2(xx).
[1045] Wang, R. L.-D. (2006). DMCA Anti-Circumvention Provisions in a Different Light: Perspectives from Transnational Observation of Five Jurisdictions. *AIPLA Quarterly Journal , 34* (2), pp. 221, 236 and 249.
[1046] Australian Copyright Amendment (Digital Agenda) Act 2000.
[1047] Wang, R. L.-D. (2006). DMCA Anti-Circumvention Provisions in a Different Light: Perspectives from Transnational Observation of Five Jurisdictions. *AIPLA Quarterly Journal , 34* (2), p. 235.
[1048] Including "hard copy access control", "playback equipment control", "playback repeat control" and copy control systems. (The classification of TPM is made in: Sterling, J. (2003). *World Copyright law: protection of authors' works, performances, phonograms, films, video, broadcasts, and published editions in national, international and regional law* (2nd ed.). London: Sweet and Maxwell, p.557-8.

However, TPMs used by broadcasting organizations are also circumvented by devices such as forged smart cards, illegal code and card sharing, illegal set top boxes and other unauthorized decoders of encrypted signals particularly satellite descramblers which convert or restore a signal to an intelligible form. Consequently, as it was the case for authors, performers and phonogram producers, the question was raised during the SCCR discussions on the proposed new broadcaster treaty whether broadcasters' TPMs also need to be protected by national legislation and by a new international instrument. If the answer is affirmative, how broadcaster's TPMs should be protected? What are its possible positive and negative consequences of such protection? And what is desirable scope and forms or means of protection of broadcasters' TPMs in the new treaty?

Many proposals submitted by the WIPO Member States in the treaty language included provisions regarding protection of broadcasters' TPMs that indicated a willingness and recognized the necessity of providing such protection in the proposed new broadcasters treaty for the digital age.[1049] Although the majority of proposals followed the scope and the form of protection provided by Article 11 of WCT and Article 18 of WPPT, there were proposals that contained a new exclusive right of 'decryption' or an exclusive right of the 'decoding' of the broadcast for broadcasting organizations that had no precedent in any existing international instruments.[1050] The discussions on the possible protection of broadcasters' TPMs proved to be much more controversial than the discussions of the same topic at the preparatory meetings of the WCT and WPPT. Since 1998 that SCCR has started to prepare a draft treaty

---

[1049] Proposal made by the delegation of Switzerland for a Protocol on the Protection of the Rights of Broadcasting Organizations Under the WIPO Performances and Phonograms Treaty, WIPO Document SCCR/2/5 of April 6, 1999, Article 13 and 14; WIPO Document SCCR/3/4, Proposal submitted by Argentina of July 29, 1999, Article 8; WIPO Document SCCR/6/2, Proposal submitted by the European Community and its Member States of October 3, 2001, Article 13; WIPO Document SCCR/8/4, Proposal submitted by Honduras of August 28, 2002, Article 8; WIPO Document SCCR/8/7, Proposal submitted by the United States of America of October 21, 2002, Article 10; WIPO Document SCCR/11/2, Proposal submitted by Singapore of December 26, 2003, Article 13; WIPO Document SCCR/11/3, Consolidated text for a treaty on the protection of broadcasting organizations prepared by the Chairman of the Standing Committee on Copyright and Related Rights in cooperation with the Secretariat of February 9, 2004, Article 16; WIPO Document SCCR/12/2, Revised consolidated text for a treaty on the protection of broadcasting organizations prepared by the Chairman of the Standing Committee on Copyright and Related Rights in cooperation with the Secretariat, Article 16; WIPO Document SCCR/12/2 Rev.2, Second revised consolidated text for a treaty on the protection of broadcasting organizations prepared by the Chairman of the Standing Committee on Copyright and Related Rights in cooperation with the Secretariat of May 2, 2005, Article 16; WIPO Document SCCR/14/2, Draft basic proposal for the WIPO treaty on the protection of broadcasting organizations including a non-mandatory Appendix on the protection in relation to webcasting prepared by the Chair of the Standing Committee on Copyright and Related Rights in cooperation with the Secretariat of February 8, 2006, Article 14; WIPO Document SCCR/15/2, Revised draft basic proposal for the WIPO treaty on the protection of broadcasting organizations, prepared by the Chair of the Standing Committee on Copyright and Related Rights in cooperation with the Secretariat of July 31, 2006, Article 19; WIPO Document SCCR /23/6, Proposal submitted by the Delegation of South Africa and Mexico of November 28, 2011, Articles 9; WIPO Document SCCR/24/3, Proposal submitted by Japan on Renewal version of the Revised Draft Basic Proposal for the WIPO treaty on the protection of broadcasting organizations (SCCR/15/2rev) of June 7, 2012, Article 16; WIPO Document SCCR /24/5, Proposal submitted by the Delegation of South Africa and Mexico of July 2, 2012, Article 9; WIPO Document SCCR/24/10 CORR., Working document for a treaty on the protection of broadcasting organizations, adopted by the SCCR of March 6, 2013, Article 12; and WIPO Document SCCR /27/2 Rev, Working document for a treaty on the protection of broadcasting organizations prepared by the Secretariat of March 25, 2014, Article 13.

[1050] WIPO Document SCCR/7/7, Proposal submitted by the Eastern Republic of Uruguay of April 17, 2002, Article 11; WIPO Document SCCR/3/4, Proposal submitted by Argentina of July 29, 1999, Article 5; WIPO Document SCCR/2/5 of April 6, 1999, Proposal made by the delegation of Switzerland for a Protocol on the Protection of the Rights of Broadcasting Organizations Under the WIPO Performances and Phonograms Treaty, Article 6.

on the protection of broadcasting organizations, the WIPO Member States, non-governmental organizations and observers from different stakeholders have discussed the protection of TPMs on different occasions during several SCCR sessions.[1051] In this section while considering the main substantive discussions by proponents and opponents within the SCCR, we aim to propose a compromised solution or a possible model for global anti-circumvention provisions for the protection of broadcaster's TPMs in the new draft treaty.

The discussions on the TPMs in the Fourteenth and Fifteenth SCCR proved to be very difficult. The Fourteenth session saw developing and least developed countries first raise their concerns to the inclusion of TPMs, which was followed by NGOs concerns in the 15th session. At the beginning of Fourteenth session the Delegation of Columbia referred to the regional consultation of the countries of Latin America and the Caribbean held in July 2005 that discussed the possibility of establishing a criterion to establish limitations to TPMs in the prosed treaty. It emphasized that the exceptions and limitations enjoyed by users of productions could be undermined by the TPMs. Broadcasters could, on the basis of TPMs, decide to prohibit access to users where the technical measures were so robust as to exclude enjoyment of the work by the user under that limitation. Therefore the TPMs provision should be drafted in a way that problems that could arise in maintaining access to information, education and cultural events could be avoided.[1052] Following the intervention made by the Delegation of Columbia, other least developed and developing countries raised similar concerns regarding protection of broadcasters' TPMs.[1053] The Delegation of Brazil opposed the inclusion of any provision in the new treaty that would directly or indirectly provide for a legal sanctioning of TPMs because it was a highly controversial issue;[1054] TPMs are self-implementing rights for the broadcast industry and has different implications in an industry from one country exercising its rights in another country independently of what the legislation in that other country might provide. This would have an element of extra-territorial application of self-established rights by the industry, which went against the national sovereignty of States to determine for their national territory what measures were available to protect the rights that were granted under the national legislation.[1055]

Other delegations including the Delegation of Iran associated itself with the Delegation of Brazil and stated it saw no need to have legally sanctioned TPMs in the new treaty because protection of broadcasters' TPMs was against the public interest in the case of unprotected works and broadcasters' TPMs could not be used for works that were already protected by TPMs. Accordingly, it would be inappropriate to grant legal protection to further and broaden the level of technical measures.[1056] However, other delegations in particular the Delegations of the European Community and the USA supported inclusion of the provisions protected broadcasters' TPMs, but announced their readiness to work to remove concerns raised on TPMs negative impacts on the exercise of limitations and exceptions and other public interests issues.[1057] To solve this problem, the Delegation of Columbia proposed that

---

[1051] During one decade, the SCCR devoted much times to discuss technological protection measures very vastly in numerous regular sessions mainly 2nd, 3rd, 5th, 6th, 10th, 11th, 12th, 14th, 15th, 16th and its First Special Session in January 2007.

[1052] WIPO Document SCCR/ 14/7, Report of the fourteenth session of the Standing Committee on Copyright and Related Rights of May 1, 2007, para 17.

[1053] Ibid, Interventions made by the Delegations of the Peru, Brazil, Thailand, Bangladesh, Jamaica, Benin and Nigeria para 18, 20, 21, 22, 30, 40 and 44.

[1054] WIPO Document SCCR/13/3/Corr, Proposal by Brazil on the protection of broadcasting organizations of November17, 2005, p. 5.

[1055] Intervention made by the Delegation of Brazil, WIPO Document SCCR/ 14/7, Report of the fourteenth session of the Standing Committee on Copyright and Related Rights of May 1, 2007, para 233.

[1056] Ibid, para 243.

[1057] Ibid, para 229, 236 and 230.

Contracting States could provide that the circumvention of an effective TPM imposed by broadcasting organizations in order to obtain access to a broadcast for the purpose of a non-infringing use of that broadcast, should not constitute the infringement of the TPMs.[1058]

The discussion on the protection of broadcasters' TPMs continued in the Fifteenth SCCR session. In this session the powerful public interest groups raised a range of concerns in relation of inclusion of protection of TPMs in the new broadcasters' treaty and these concerns have led to the issue remaining unresolved. There were requests by NGOs to remove the TPMs provisions from the new treaty entirely.[1059] Explaining the reason to exclude any reference to TPMs in the new treaty, they alleged that TPMs create security risks, restrict lawful use, and lend themselves to anti-competitive abuse. Therefore they are considered inadvisable to import or export statutory protection for technological measures in any international legal instrument without further study of the effect of such measures.[1060]

Other NGOs added further reasons to oppose the inclusion of TPMs provisions in the new broadcast treaty. The representative of the Civil Society Coalition (CSC) alleged the same reason was made by the Delegation of Iran in the Fourteenth session of the SCCR that granting legally sanctioned TPMs to the broadcasters and cablecasters are useless for works already protected by TPMs and they are against the public interest in the case of non-protected works. CSC added that the protection of TPMs is not required to protect broadcasters signals. Instead, such protection would pose a threat to the rights of consumers and to the investigative work of consumer organizations, because it would act as a lock that could be used to prevent access to broadcasts, and to segment markets using region coded TPMs, allowing broadcasters can raise prices and limit the availability of products. Besides, as thought in the development the WIPO Internet Treaties, TPMs could harm competition and technological innovation and outlaws circumvention of technology locks that means prevention of fair use and frustration in the exercise of exemptions and limitations.[1061]
The Electronic Frontier Foundation (EFF) viewed that legally enforced TPMs by WCT and WPPT have had unintended consequences in their Contracting States. He referred to the United States Digital Millennium Copyright Act (1998) and claimed it has overridden national copyright law exceptions and limitations that protect consumers, harmed scientific research and created monopolies over un-copyrightable technologies. In his opinion, broadcasters' TPMs have little relevance to signal protection. Meanwhile many other countries already have conditional access signal protection regimes that protect against unlawful reception or misappropriation of cable and satellite transmissions. Therefore, protection of broadcasters' TPMs would restrict consumers' uses after lawful reception of the broadcast signal and aims to assert control over a consumer's home devices, rather than

[1058] Ibid, para 17; Also see: WIPO Document SCCR/14/4, Proposal by Colombia concerning Article 16 of the Consolidated Text for the Draft Treaty on the Protection of Broadcasting Organizations prepared by the Secretariat of March 17,2006
[1059] WIPO Document SCCR/15/4, Statements from intergovernmental and non-governmental organizations, prepared by the WIPO Secretariat of July 19, 2006, Statement by Consumer Project on Technology (CPTech), Electronic Frontier Foundation (EFF), Electronic Information for Libraries (EIFL), International Music Managers Forum (IMMF), International Federation of Library Associations & Institutions (IFLA), IP Justice (IPJ), Open Knowledge Foundation (OKF), Public Knowledge (PK); Also see: Statement concerning the WIPO Broadcast Treaty provided by certain information technology, consumer electronics and telecommunications industry representatives, public interest organizations, and performers' representatives. Electronic Frontier Fundation. (2006, September 6). *Statement concerning the WIPO Broadcast Treaty* . Retrieved October 26, 2014 from www.eff.org: https://www.eff.org/document/statement-concerning-wipo-broadcast-treaty
[1060] Ibid, Statement made by the Computer & Communications Industry Association Statement (CCIA).
[1061] Ibid, Statement made by the Civil Society Coalition (CSC) and the Electronic Frontier Foundation (EFF)

signal theft. In addition, protection of broadcasters' TPMs would require manufacturers to design devices to detect and respond to TPMs and they seek to ban all devices that do not do so from the marketplace by various means. Accordingly, it would restrict in-home recording of broadcasted programs for personal, non-commercial use of broadcasting content that are reserved to the public, researchers, archivists and educators or time shifting services, which in the United States' law and under other existing national laws is recognized as lawful and non-infringing copyright.

Reiterating the intervention made by the Delegation of Brazil in the Fourteenth SCCR session, the Delegation claimed broadcasters' technological measure regime is likely to prejudice Contracting States' national sovereignty in terms of technology regulation through global standardization of the technology.[1062] The International Federation of Journalists raised concerns regarding impacts of protection of broadcasters' TPMs on the journalism such as exceptions for quotations and reporting on current events.[1063] The Electronic Information for Libraries (eIFL) and the International Federation of Library Associations (IFLA) raised the same concerns. They have asked the SCCR to ensure that the exceptions and limitations concerning the content always take precedence over the protection of the signal. To avoid problems for libraries and archives, IFLA and eIFL argued that licenses granted by content owners for beneficiaries such as libraries, cultural and educational institutions etc. must not be prevented by signal protection or blocked by TPMs protecting the signal. The Proposal by Colombia in SCCR/14/4[1064] would help libraries and archives in this regard.[1065]

Nevertheless, broadcasting organizations generally supported those proposals in the treaty language that contained provisions on protection of broadcasters' TPMs. Some broadcasters even requested substantive rights to be included, including unauthorized decryption; otherwise, in their view, there would be a lacuna in the protection, especially of pay-television services.[1066] They insisted the SCCR include provisions on protection of TPMs to fight against piracy of broadcast signals in its different forms. They did not consider any difference in authors' TPMs and broadcasters TPMs and on the importance of protection of TPMs. They demanded their technological measures to be protected in the similar manner to which the authors, performers and producers of phonograms were protected by WCT and WPPT. In their opinion, such protection is vital to rights holders if they are to invest in and continue to supply the majority of content carried on broadcast signals.[1067] The right holders groups that attended in the SCCR sessions welcomed broadcasters' position on the TPM provisions. In a leading joint position taken made by this group they stated that TPMs and Rights Management Information (RMI) play an important role in the digital marketplace and should benefit all rights holders alike. Therefore they found TPMs provisions essential in the new broadcasters' treaty and to keep the same elements and standards expressed in the 1996

[1062] Ibid, Statement made by the Electronic Frontier Foundation (EFF) and the IP Justice.
[1063] Ibid, Statement made by the International Federation of Journalists (IFJ).
[1064] WIPO Document SCCR/14/4, Proposal by Colombia concerning Article 16 of the Consolidated Text for the Draft Treaty on the Protection of Broadcasting Organizations prepared by the Secretariat of March 17,2006
[1065] Ibid, Joint Intervention made by Electronic Information for Libraries (eIFL) and International Federation of Library Associations (IFLA).
[1066] WIPO Document SCCR/ 5/6, Report of the fifth session of the Standing Committee on Copyright and Related Rights of March 1, 2005, Intervention made by the Association of Commercial Television in Europe (ACT), para 75.
[1067] WIPO Document SCCR/15/4, Statements from intergovernmental and non-governmental organizations, prepared by the WIPO Secretariat of July 19, 2006, Statement made by the Independent Film & Television Alliance.

WIPO Treaties. However they emphasized that any change away from the model adopted but the WCT and WPPT would have possibly unintended effects on the interpretation of the WPPT, WCT, and their implementation under national law for all rights holders, including broadcasting organizations.[1068]

Though divergent views were expressed, different approaches exist and the discussions have showed that there are serious concerns on the scope and form of protection of TPMs but they have also revealed the necessity to have provisions on the protection of TPMs in the new broadcasters' treaty. This is because although there is much national legislation that protect broadcaster's technological measures and provides effective civil and criminal remedies and sanctions; there is not any binding international instrument which does so and address this issue with the global perspective required in the digital age. In addition, due to the differences which exist in the anti-circumvention approaches in the national laws the new treaty may admit Contracting States the right to create or maintain limitations and exceptions in regard to the broadcast signals. Meanwhile it seems that protection of anti-circumvention measures could be provided in a way that would not frustrate application of limitation and exceptions, fair use and of public domain works. Rather, it can guarantee the protection of TPMs and anti-circumventive provisions are not applicable defense to use fair use and limitation and exceptions.

It seems that much of the opposition that has been made in the SCCR was for political reasons that normally exist in such discussions. Protection of broadcasters TPMs has no contradiction with national sovereignty, because the new draft treaty does not intend to mandate TPMs. Broadcasters have freedom to use TPMs or not. Broadcasters' TPMs has no relevance to TPMs employed by the right holders in content, because the object of protection of authors and other right holders is the program content, which is entirely different from the object of protection of broadcasters, which is the signal. There are mechanisms that could be adopted for operability or exercise of limitations and exceptions for example through providing robust limitations and exceptions. In addition, the new treaty could establish non-conditionality in exercising limitations and exceptions to protection of technological protection measures. In other words, it may stipulate that the protection of TPMs could not impede functioning of the limitations and exceptions.

However, in a similar manner to WCT and WPPT, any possible national or international legal protection of TPMs, such protection including the sanctioning of circumvention of TPMs, should not be considered as the granting of a new intellectual property type right to broadcasting organizations.[1069] Rather, it would be a supplementary protection in the context

[1068] Ibid, Joint Position of Rights Holder Groups consisted the European Federation of Producers Collecting Societies for Audiovisual Private Copying (EUROCOPYA), The European Film Companies Alliance (EFCA), The International Federation of Film Distributor Associations (FIAD), The International Federation of Film Producers Associations (FIAPF), The International Confederation of Music Publishers (ICMP/CIEM), The International Federation of the Phonographic Industry (IFPI), The Independent Film and Television Alliance (IFTA) and the Independent Music Companies Association (IMPALA).

[1069] Although there are proponents that believe available technology as built-in protection permit right-holders to control access, monitor and regulate the uses of protected subject matter in digital form and can be effective than any intellectual property rights protection and may have negative impacts on fair uses and limitation and exceptions. Correa, C. M. (2002). Fair use in the digital era. *International Review of Intellectual Property and Competition Law , 33* (5), 571-585, p. 580; Also See: Haynes, R. (2005). *Media rights and intellectual property.* Edinburgh: Edinburgh University Press, p. 34; and Lindner, B. (2011). The WIPO Treaties. In B. Lindner, & T. Shapiro, *Copyright In The Information Society, A Guide to National Implementation of the European Directive* (pp. 1-24). Cheltenham: Edward Elgar, p. 11.

of broadcasters' related rights. Besides, if one objective of the protection of broadcasters is fighting against the piracy of pre-broadcast, during broadcast and post-broadcast signals, this objective could not be achieved merely by updating or granting new neighboring or related rights to broadcasters. Broadcasters use TMPs with their expenses to safeguard their program-carrying signals pre-broadcast, during broadcast and post-broadcast, without effective protection of TPMs through remedying or sanctioning circumventive measures in national legislation and international instruments, the protection of broadcasters' rights would be incomplete and frustrated.

National legislation, somewhat predictably, have offered different approaches in terms of the scope and form of protection, with these differences covering both right-based and signal-based approaches. Otherwise updating the broadcasters right in the digital era makes no sense, since almost all stages and methods of broadcast piracy are associated with circumventing of the TPMs.

In regard the scope and form of protection of TPMs the question is that whether such scope and protection should go further than the WCT and WPPT. Is it necessary to cover TPMs for access control, copying control and preparatory works and services used for circumvention of TPMs including promoting and marketing, supplying, manufacturing and importing of the circumventive devices? The proponents' reason to extend the scope of protection to the preparatory work is that the circumventive measures should be controlled from the source and the experience of implementation of WCT and WPPT in national legislations proved that the extent of protection of TPMs in the WCT and WPPT provisions is not sufficient for this task. WCT and WPPT provisions on the protection of technological protection measures "manifests a minimal type and only prohibits circumvention of copying controls."[1070] These provisions do not extend to preparatory works that facilitate circumvention of TPMs. Therefore, Contracting Parties to the WCT and WPPT enacted different protective rules in different laws, not necessarily in their national copyright law, to remedy and sanction preparatory circumventive works. These in turn increased disparities in the national laws in regard the scope and form of protection provided by anti-circumventive provisions.[1071] If protection of TPMs in a new international instrument on protection of broadcasting organizations extends to preparatory works, not only will it oblige Contracting Parties of the new treaty to give protection to broadcasters against preparatory works and measures but also it will play a leading role to unify national legislation of the Contracting Parties in future.

ii. Proposed solution on the protection of technological protection measures

The question that comes out of this discussion is whether a mechanism can be found that can protect TPMs and reduce the possible negative impacts of giving protection to broadcasters'

Other comentators criticised the broad effective protection of technological protection mesures and saying that "in the interest of providing effective legal protection for technical devices, users should generally be asked to bring a claim instead of relying on an exception whenever the exception corresponds with a right of users. Wand, P. (2002). So the Knot Be Unknotted- Germany and the legal protection of technological measures . *International Review of Intellectual Property and Competition Law , 33* (3), p. 317.

[1070] Wang, R. L.-D. (2006). DMCA Anti-Circumvention Provisions in a Different Light: Perspectives from Transnational Observation of Five Jurisdictions. *AIPLA Quarterly Journal , 34* (2), p. 235.

[1071] For example the United States Digital Millennium Copyright Act (1998); Australian Copyright Act Amendment (2000); Japanese Copyright Act Amendment (1999) and Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society.

anti-circumventive measures? In a more operational context, how can the SCCR assist in this regard?
Although some commentators claimed that TPMs "could affect functioning of exceptions and uses of works in public domain"[1072] the adoption of a balanced policy towards TPMs in the new broadcasters' treaty could protect broadcasters' TPMs without prejudicing the interests of other right holders or the public.

In regard the protection of TPMs, the new broadcasters' treaty should extend the protection further than the WCT and WPPT, and provide provisions prohibiting the manufacture and trafficking of circumventive devices. Although an agreement on the definition and description of prohibited circumventive acts should be found at an international level, national governments of Contracting Parties should take responsibility for aspects of implementation and enforcement.
Furthermore, protection of TPM used by the broadcasting organizations under the new treaty, should not impede or contradict with the exercise of user's rights as permitted by limitations and exceptions either under the new treaty or under national law on copyright and related rights. Accordingly, in such a circumstances for example for private copying protection of TPM should not prejudice user's rights as permitted by the new treaty or applicable law. Otherwise, as it is the case for copyrighted works[1073] the problem arises, for instance, where circumvention of an access or copy control measure is forbidden by law, but at the same time the new treaty or national law on copyright and related rights declares that teachers, for example, may under certain conditions, make a copy of broadcasts for educational purposes.

In regards the best possible and workable proposal for the scope of protection of TPMs, it would appear that neither the 'minimum approach' of the WCT/WPPT, nor the 'broad approach' of implementing Contracting Parties such as USA and EU would be acceptable to the WIPO Member States.

Besides, in regard to the question of 'access control' it seems that Member States are not willing to compromise on the USA and EU's 'broad approach'. The reason for this is that the 'minimum approach' adopted by the WCT and WPPT does not include an obligation to protect TPMs used for 'access controls', 'circumventive preparatory works' and 'circumventive device trafficking'. Two decades after adoption of WCT and WPPT it has been established that protecting TPMs without sanctioning at least commercial circumventive device trafficking and circumventive preparatory works or business is not an effective method to reduce piracy. Accordingly the new treaty, without an obligation to cover TPMs for 'access controls', 'circumventive preparatory works' and 'circumventive devices' would therefore do little to stop piracy, particularly of the pre-broadcast signal. The reason that the USA and the EU's 'broad approach' could not be agreed upon by the WIPO Member States is that the prevailing tendency in the SCCR is that the protection of TPMs should not be too broad that frustrate the workability of limitation and exceptions provided by the national legislations or the new treaty itself and it should not extend to those subject matters which fall in the public domain. In addition to this, in the opinion of public interest groups and certain developing countries a broader approach would prejudice social goals and public interests including the encouragement of innovation, free flow of information and public

[1072] Goldstein, P., & Hugenholtz. (2010). *International copyright: Principles, law and practice.* Oxford: Oxford University Press, p.334.
[1073] To see examples on copyright issues see: Sterling, J. (2003). *World Copyright law: protection of authors' works, performances, phonograms, films, video, broadcasts, and published editions in national, international and regional law* (2nd ed.). London: Sweet and Maxwell, p. 558.

access to knowledge. We recommend that in order to reach consensus in the SCCR, the new treaty, like WCT and WPPT, should not mandate broadcasters or Contracting Parties to use TPMs for broadcast signals, because it should be left to the freedom of broadcasters whether employ TPMs or not. Protection of broadcasters TPMs should be limited to their effective TPMs. In other words, the main requirement is that the protections provided should be effective not any measure. Specifying a number of direct circumventive acts or measures in the new treaty, e.g. decoding or decryption of signal, should be avoided in order to observe technological neutrality with regard the means of circumventions. Though it should be limited to the commercial and professional infringing circumventive measures not all-inclusive circumventive measures to exclude exercise of limitations and exceptions for example private copying or recording. Protection of TPMs should cover TPMs provided for pre-broadcast signal, during (live) broadcast signal, and post-broadcast signals including rebroadcasting and retransmission of broadcast signal, making available fixation of broadcast signal in physical or material objects e.g. CD and DVD, and in digital networks. In regard the 'preparatory circumventive works' and 'circumventive device trafficking' it seems there is no problem to specify, as examples, major forms of 'commercial' circumventive preparatory works and major forms of 'commercial or professional' circumventive device trafficking. In regard the ways and the means of protection of broadcasters' TPMs, freedom of Contracting Parties to choose appropriate remedies according to their own legal traditions should be respected but remedies must act as a deterrent using sufficient sanctions.

Regarding the scope of protection of the broadcasters' TPMs, it is necessary for the new treaty to adopt a 'moderate approach' exampled by the Australian Copyright Act. Otherwise, current technical and legal developments may result in growing barriers to the access to all types of information, scientific knowledge and information in the public domain.[1074] In addition, to reach consensus in the SCCR on the protection of TPMs, the scope of protection of TPMs should not be so broad as to go beyond the existing copyright and related rights regime and the goal of anti-circumvention provisions should be to provide a supplementary protection in addition to the intellectual property type rights or related rights. As some commentators have pointed out " if the legislative model developed in the USA on anti-circumvention measures and the European approach to data base[1075] become internationalized, access to and fair uses of protected works may be restricted on a global scale."[1076] Based on this proposal in terms of the general language to be used for TPMs provisions, we recommend the new treaty adopt the language used by the WCT and WPPT to keep freedom and flexibility for the Contracting Parties to implement treaty provisions within their relevant national legislations. This means that the new treaty should oblige Contracting Parties to provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by broadcasters in connection with the exercise of their rights under the treaty and that restrict acts, in respect of their broadcast, which are not authorized by the broadcaster concerned or permitted by law. However, it should be stipulated either in the TPMs provision or in the form of an agreed statement to the relevant provision that the obligation of Contracting Parties to provide adequate legal protection and effective legal remedies should include technological measures used for access controls, copying controls and circumventive preparatory works and circumventive device trafficking. Nevertheless, protection of TPMs should be limited to

[1074] Correa, C. M. (2002). Fair use in the digital era. *International Review of Intellectual Property and Competition Law , 33* (5), p. 585.
[1075] The European Council Directive 91/250 of May 14, 1991 on the legal protection computer programs, 1991 OJ EC L 122/42, Article 7(1)(c).
[1076] Ibid, p. 585.

those TPMs that are designed to prevent infringement of the broadcasters' rights in their broadcast signals not against all circumventive measures. Accordingly non-infringing circumvention should be excluded. In addition, application of legal remedies (civil or criminal) should be confined against perpetrators that know or should have known that the device or preparatory services would be used for circumventive purposes. It should be left to the legislation of the Contracting Parties how and in which legal regime to reconcile the underlying conflict or adjust the balance between operability of limitations and exceptions and circumventive exemptions on one hand and workability of anti-circumventive provisions on the other. On the operability and proper functioning of limitation and exceptions where technological protection measures have been adopted by content owners, there are lessons and experiences from the implementation of the WIPO Internet Treaties by their Contracting Parties for example in the law of USA[1077] and European Community (and its Member States),[1078] Japan[1079] and Australia[1080] that can assist WIPO Member States to analyze this matter and remove development concerns and public interest issues in their national legislation.[1081] The important thing is that the new treaty should ensure that with the effective protection of TPMs used by broadcasting organizations, the appropriate application of the limitations and exceptions and fair use would be preserved and would remain intact at national and international levels.

III. Protection of rights management information

The protection of rights management information (RMI) is another important issue to be considered during the drafting of the new broadcasters treaty, though as the Chairman of the SCCR acknowledged in the seventeenth session, there is still no consensus on the provisions of this protection.[1082]

In principle, broadcasting organizations input their RMI through electronic and digital technologies into their pre-broadcast, broadcast and post-broadcast signals. Entering or inserting this information, either in visible or invisible formats, is done so for identification purposes, as such information assists broadcasting organizations to monitor and verify whether their pre-broadcast signals and broadcasts were exploited, either for rebroadcasting and retransmission or for post-fixation purposes, without their authorization. Unauthorized

[1077] USA Digital Millennium Copyright Act (October 28, 1998), 17 U.S. Code § 1201 - Circumvention of copyright protection systems.

[1078] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society. According to one comment, "Article 6 of the Directive by including both access and copy control mechanisms requires legal protection of technological measures beyond the WIPO Internet Treaties minima". *See* Goldstein, P., & Hugenholtz. (2010). *International copyright: Principles, law and practice.* Oxford: Oxford University Press, p.336.

[1079] Australian Copyright Act 1968 as amendment in 2003, Section 10 (1).

[1080] Japanese Copyright Law as amended in 1999, Article 2(xx).

[1081] 17 U.S. Code § 1201 (d), 1201 (e), 1201 (f), 1201 (g), 1201 (j) provide several exemptions from liabilities for circumventive measures. Also § 1201(c)(1) titled "Other Rights, Etc., Not Affected" provides that "nothing in this section shall affect rights, remedies, limitations, or defenses to copyright infringement, including fair use, under this title. Article 6 (4) of the E.C. Information Society Directive provides that " …Member States shall take appropriate measures to ensure that right holders make available to the beneficiary of an exception or limitation provided for in national law in accordance with Article…. the means of benefiting from that exception or limitation, to the extent necessary to benefit from that exception or limitation and where that beneficiary has legal access to the protected work or subject-matter concerned."

[1082] WIPO Document SCCR/ 17/Info/1, Informal paper prepared by the chairman of the Standing Committee on Copyright and Related Rights (SCCR) according to the decision of the SCCR at its 16th session of November 3, 2008, para 33.

persons not only can manipulate such information through deletion, modification and otherwise [1083] but also can attach such manipulated information to the unauthorized rebroadcasting and retransmission of broadcast or to unauthorized copies of fixed broadcasts. Therefore, the broadcasters' RMI and their effective legal protection have a supplementary character for protection of broadcasting organizations against unauthorized exploitation of their broadcasts and enforcement of their rights. In addition, this information would assist to achieve effective international administration of the right of content owners and broadcasters.

The WCT[1084] and WPPT[1085] were the first international instruments that introduced protection of RMI.[1086] Indeed, as a supplementary protection, this protection is the second obligation, imposed by the WCT and WPPT, that requires Contracting States to protect electronic RMI against knowing and unauthorized removal or tempering that induces or enables infringement of economic or moral rights."[1087] In the case of copyrighted works, performances and phonograms, right holders often add this information to copies of the works, in order to be able to trace copies of the work for example.[1088] RMI, according to the WIPO Glossary of Copyright and Related Rights Terms, and within the context of Article 12(2) of the WCT and Article 19(2) of the WPPT is:

"Information which identifies the work, the author of the work, the owner of any right in the work, the performer, the performance of the performer, the producer of the phonogram, the owner of any right in the performance or phonogram, or information about the terms and conditions of use of the work, the performance or phonogram, and any numbers or codes that represent such information, when any of these items of information is attached to a copy of a work, a fixed performance or a phonogram or appears in connection with

---

[1083] Lewinski, S. v. (2008). *International Copyright Law and Policy.* Oxford: Oxford University Press, No.17.99

[1084] WCT, Article 12. Obligations concerning Rights Management Information

(1) Contracting Parties shall provide adequate and effective legal remedies against any person knowingly performing any of the following acts knowing, or with respect to civil remedies having reasonable grounds to know, that it will induce, enable, facilitate or conceal an infringement of any right covered by this Treaty or the Berne Convention:

(i) to remove or alter any electronic rights management information without authority; (ii) to distribute, import for distribution, broadcast or communicate to the public, without authority, works or copies of works knowing that electronic rights management information has been removed or altered without authority.

(2) As used in this Article, "rights management information" means information which identifies the work, the author of the work, the owner of any right in the work, or information about the terms and conditions of use of the work, and any numbers or codes that represent such information, when any of these items of information is attached to a copy of a work or appears in connection with the communication of a work to the public.

[1085] WPPT, Article 19 Obligations concerning Rights Management Information.

(1) Contracting Parties shall provide adequate and effective legal remedies against any person knowingly performing any of the following acts knowing, or with respect to civil remedies having reasonable grounds to know, that it will induce, enable, facilitate or conceal an infringement of any right covered by this Treaty:

(i) to remove or alter any electronic rights management information without authority;

(ii) to distribute, import for distribution, broadcast, communicate or make available to the public, without authority, performances, copies of fixed performances or phonograms knowing that electronic rights management information has been removed or altered without authority.

(2) As used in this Article, "rights management information" means information which identifies the performer, the performance of the performer, the producer of the phonogram, the phonogram, the owner of any right in the performance or phonogram, or information about the terms and conditions of use of the performance or phonogram, and any numbers or codes that represent such information, when any of these items of information is attached to a copy of a fixed performance or a phonogram or appears in connection with the communication or making available of a fixed performance or a phonogram to the public.

[1086] Article 12(2) of the WCT and Article 19(2) of the WPPT.

[1087] Rikeston, S., & Ginsburg, J. C. (2006). *International Copyright and Neighbouring Rights* (Second ed.). Oxford University Press, p. 965.

[1088] Torremans, P. (2010). *Holyoak & Torremans intellectual property law.* Oxford: Oxford Uinversity Press, p. 260.

the communication of a work to the public, the communication or making available of a fixed performance or a phonogram to the public."

The European Community's InfoSoc Directive also defined the expression 'rights management information' as any information provided by right holders which identifies the work or other subject-matter, the author or any other right holder, or information about the terms and conditions of use of the work or other subject-matter, and any numbers or codes that represent such information.[1089]
In the national level, the USA was among the first countries to adopt legislation on protection of RMI[1090] following its adherence to the WCT and WPPT.[1091] The European Community also obliged its Member States to give such protections to authors and right holders through the InfoSoc Directive.[1092]

The electronic RMI, which broadcasting organization use, consists different data or information. This information is inserted during the different stages (pre-broadcast, pre-broadcast, broadcasting and post-broadcast) and includes or specifies the names of broadcaster, copyright or related right holder, television program, running time, release date, point of transmission, broadcasting and reception coverage area of the broadcast signals, permissibility of rebroadcasting, retransmission and copying of the broadcasted program. At present, broadcasting organizations insert these identification information mainly either by adding metadata that accompany a broadcast signal or placing watermarks that rely on embedded metadata.[1093]

The WCT and the WPPT have obliged Contracting States to give adequate and effective legal remedies against the deletion or frustration of this information. Since unauthorized persons, either knowingly or despite having reasonable grounds to know, remove and/or alter electronic RMI, or distribute, import for distribution the protected subject matters knowing that electronic rights management information has been removed or altered without authority. Therefore, they induce, allow, accelerate or even hide infringement of the rights protected.

Like the protection of broadcasters' TPMs, WIPO Member States have proposed different solutions to the question of RMI.[1094] The majority of the above-mentioned proposals have

[1089] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society, Official Journal L 167, 22 June 2001, Article 7(2).
[1090] USA Copyright Act, Section 1202(a).
[1091] Sterling, J. (2003). *World Copyright law: protection of authors' works, performances, phonograms, films, video, broadcasts, and published editions in national, international and regional law* (2nd Edition ed.). London: Sweet and Maxwell, No. 13.61.
[1092] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society, Official Journal L 167, 22 June 2001, Article 7.
[1093] Dopplick, R. (2007 June). Proposed WIPO Treaty on the Protection of the Rights of Broadcasting Organizations: Privacy Implications of Fighting Digital Pirates, pp. 7 – 8.
[1094] Proposal made by the delegation of Switzerland for a Protocol on the Protection of the Rights of Broadcasting Organizations Under the WIPO Performances and Phonograms Treaty, WIPO Document SCCR/2/5, Article 15; Proposal by Argentina, WIPO Document SCCR/3/4, Article 9; Proposal submitted by the European Community and its Member States, WIPO Document SCCR/6/2, Article 14; Proposal submitted by Honduras, WIPO Document SCCR/8/4, Article 9; Proposal submitted by the United States of America, WIPO Document SCCR/8/7, Article 11; Consolidated text for a treaty on the protection of broadcasting organizations prepared by the Chairman of the Standing Committee on Copyright and Related Rights in cooperation with the Secretariat, WIPO Document SCCR/11/3 Article 17; Revised consolidated text for a treaty on the protection of broadcasting organizations prepared by the Chairman of the Standing Committee on Copyright and Related

provisions on the protection of RMI in the similar language, concept and scope that was used in both the WCT and WPPT.[1095] Similarly as discussed on the protection of t TPMs, the protection of RMI in the WCT and WPPT that were proposed by the WIPO Member States in the majority of proposal on the new broadcasters treaty does not mandate inclusion or insertion of the rights management information either to broadcasting organization or to future contracting parties of the new treaty. If the new treaty adopts the methods of WCT and WPPT, it means broadcasting organization's rights management information would be protected if and only they are inserted in the broadcasts. In other words, they are protected "when attached to a copy or appearing in connection with the communication or making available to the public of a work or other subject matters"[1096] like broadcasts Accordingly, there would not be any standardization of technologies that could be used for insertion of rights management information within the future contracting parties' legislation. Besides, this does not grant any intellectual property type rights to the broadcasting organizations and it fully corresponds to the signal-based approach to draft the new treaty. Broadcasting organizations are agreed with the same language used in the Article 12(2) of the WCT and Article 19(2) of the WPPT. In addition, other right holders groups attending the WIPO SCCR agreed to include the protection of rights management information in the new treaty with the same concept and scope of protection provided by the WCT and WPPT.[1097] They emphasized that the rights management information (RMI) plays an important role in the digital market place and should benefit all rights holders alike. They also found it essential to keep Article 15 as they were formulated in the Draft Basic Proposal,[1098] carrying forward the elements and

---

Rights in cooperation with the Secretariat, WIPO Document SCCR/12/2, Article 17; Second revised consolidated text for a treaty on the protection of broadcasting organizations prepared by the Chairman of the Standing Committee on Copyright and Related Rights in cooperation with the Secretariat, WIPO Document SCCR/12/2 Rev.2, Article 17; Draft basic proposal for the WIPO treaty on the protection of broadcasting organizations including a non/mandatory appendix on the protection in relation to webcasting prepared by the Chair of the Standing Committee on Copyright and Related Rights in cooperation with the Secretariat, WIPO Document SCCR/14/2, Article 15; Revised draft basic proposal for the WIPO treaty on the protection of broadcasting, prepared by the Chair of the Standing Committee on Copyright and Related Rights in cooperation with the Secretariat, WIPO Document SCCR/15/2, Article 20; Draft treaty on the protection of broadcasting organizations Proposal presented by the Delegations of South Africa and Mexico, WIPO Document SCCR/23/6, Articles 10; Proposal by the Delegation of Japan "Renewal Version of revised draft basic proposal for the WIPO treaty on the protection of broadcasting (SCCR/15/2 Rev)", WIPO Document SCCR/24/3, Article 17; Draft treaty on the protection of broadcasting organizations, Joint Proposal by the Delegations of South Africa and Mexico, WIPO Document SCCR/24/5, Article 10; Working document for a treaty on the protection of broadcasting adopted by the Standing Committee on Copyright and Related Rights(SCCR), WIPO Document SCCR/24/10 Corr, Articles 12 and 13; and WIPO Document SCCR /27/2 Rev, Working document for a treaty on the protection of broadcasting organizations prepared by the Secretariat of March 25, 2014, Articles 12 and 13.

[1095] Except the Proposal submitted by the Delegation of Singapore, (WIPO Document SCCR/11/2) that did not proposed protection of rights management information.

[1096] Lewinski, S. v. (2008). *International Copyright Law and Policy.* Oxford: Oxford University Press, No. 17.99.

[1097] WIPO Document SCCR/15/4, Statements from intergovernmental and non-governmental organizations, prepared by the WIPO Secretariat of July 19, 2006, Joint Position of Rights Holder Groups consisted the European Federation of Producers Collecting Societies for Audiovisual Private Copying (EUROCOPYA), The European Film Companies Alliance (EFCA), The International Federation of Film Distributor Associations (FIAD), The International Federation of Film Producers Associations (FIAPF), The International Confederation of Music Publishers (ICMP/CIEM), The International Federation of the Phonographic Industry (IFPI), The Independent Film and Television Alliance (IFTA) and the Independent Music Companies Association (IMPALA).

[1098] WIPO Document SCCR/14/2, Draft basic proposal for the WIPO treaty on the protection of broadcasting organizations including a non-mandatory Appendix on the protection in relation to webcasting prepared by the Chair of the Standing Committee on Copyright and Related Rights in cooperation with the Secretariat of February 8, 2006.

standards expressed first in the 1996 WIPO Treaties. In their opinion, any change away from this approach would have possibly unintended effects on the interpretation of the WPPT, WCT, and their implementation under national law for all rights holders, including broadcasting organizations.[1099]

The proposal on the protection of RMI in the current working document of the SCCR[1100] corresponds to the relevant provisions of the WCT and WPPT and was originally adopted from the official proposals submitted by countries from both developed and developing countries including Argentina[1101], Egypt[1102], the European Community and its Member States,[1103] Honduras,[1104] Kenya,[1105] Switzerland,[1106] the United States of America,[1107] and Uruguay.[1108] Consequently, it seems that the best model of obligations concerning RMI as it was proposed in the above-mentioned proposals is following *mutatis mutandis* the corresponding provisions of Article 19 of the WPPT in the language mentioned below. With the exception of the following wording amendments in order to adapt it to the context of the protection of broadcasting organizations and to cover all relevant uses of broadcasts.

Obligations Concerning Rights Management Information
(1) Contracting Parties shall provide adequate and effective legal remedies against any person knowingly performing any of the following acts knowing, or with respect to civil remedies having reasonable grounds to know, that it will induce, enable, facilitate or conceal an infringement of any right covered by this Treaty:
(i) to remove or alter any electronic rights management information without authority;

Article 15. Obligations Concerning Rights Management Information
(1) Contracting Parties shall provide adequate and effective legal remedies against any person knowingly performing any of the following acts knowing, or with respect to civil remedies having reasonable grounds to know, that it will induce, enable, facilitate or conceal an infringement of any right covered by this Treaty:
(i) to remove or alter any electronic rights management information without authority;
(ii) to distribute or import for distribution fixations of broadcasts, to retransmit or communicate to the public broadcasts, or to transmit or make available to the public fixed broadcasts, without authority, knowing that electronic rights management information has been without authority removed from or altered in the broadcast or the signal prior to broadcast.
(2) As used in this Article, "rights management information" means information which identifies the broadcasting organization, the broadcast, the owner of any right in the broadcast, or information about the terms and conditions of use of the broadcast, and any numbers or codes that represent such information, when any of these items of information is attached to or associated with (1) the broadcast or the signal prior to broadcast, (2) the retransmission, (3) transmission following fixation of the broadcast, (4) the making available of a fixed broadcast, or (5) a copy of a fixed broadcast.

[1099] WIPO Document SCCR/15/4, Statements from intergovernmental and non-governmental organizations, prepared by the WIPO Secretariat of July 19, 2006, Joint Position of Rights Holder Groups consisted the European Federation of Producers Collecting Societies for Audiovisual Private Copying (EUROCOPYA), The European Film Companies Alliance (EFCA), The International Federation of Film Distributor Associations (FIAD), The International Federation of Film Producers Associations (FIAPF), The International Confederation of Music Publishers (ICMP/CIEM), The International Federation of the Phonographic Industry (IFPI), The Independent Film and Television Alliance (IFTA) and the Independent Music Companies Association (IMPALA)

[1100] WIPO Document SCCR/27/2 Rev. Working document for a treaty on the protection of broadcasting organizations, prepared by the Secretariat of March 25, 2014, Article 13.

[1101] WIPO Document SCCR/3/4, Proposal submitted by Argentina of July 29, 1999, Article 9.

[1102] WIPO Document SCCR/9/8 Rev, Proposal submitted by Egypt of June 24, 2003, Article 11.

[1103] WIPO Document SCCR/6/2, Proposal submitted by the European Community and its Member States of October 3, 2001, Article 14.

[1104] WIPO Document SCCR/8/4, Proposal submitted by Honduras of August 28, 2002, Article 9.

[1105] WIPO Document SCCR/9/3 Rev, Proposal submitted by Kenya of May 1, 2003, Article 9.

[1106] Proposal by the Delegation of Switzerland for a Protocol on the Protection of the Rights of Broadcasting Organizations Under the WIPO Performances and Phonograms Treaty, WIPO Document SCCR/2/5, Article 15

[1107] WIPO Document SCCR/8/7, Proposal submitted by the United States of America of October 21, 2002, Article 11.

[1108] WIPO Document SCCR/7/7, Proposal submitted by the Eastern Republic of Uruguay of April 17, 2002, Article 16.

(ii) to distribute or import for distribution fixations of broadcasts, to retransmit or communicate to the public broadcasts, or to transmit or make available to the public fixed broadcasts, without authority, knowing that electronic rights management information has been without authority removed from or altered in the broadcast or the signal prior to broadcast.
(2) As used in this Article, rights management information means information which identifies the broadcasting organization, the broadcast, the owner of any right in the broadcast, or information about the terms and conditions of use of the broadcast, and any numbers or codes that represent such information, when any of these items of information is attached to or associated with (1) the broadcast or the signal prior to broadcast, (2) the retransmission, (3) transmission following fixation of the broadcast, (4) the making available of a fixed broadcast, or (5) a copy of a fixed broadcast.

Conclusion

I. Conceptual and technological evolution of broadcasting and piracy

The aim of this thesis was to address 'the possibility of granting new legal protection and intellectual property rights to broadcasting organizations against unauthorized exploitation of their broadcasts'. In order to do this we first outlined the genesis, history and original concepts of the broadcasting industry. Sixty years ago, broadcasting organizations acted as public service foundations and began to transmit broadcasts to the public by conventional analog signal and through terrestrial wireless platforms. The members of the public received these broadcast through transistor radios and, after a time, through television sets displaying black and white pictures. Later, commercial and privately owned companies became involved in broadcasting activities and the industry as a whole. After a few decades, new platforms of broadcasting including satellite broadcasting, webcasting and mobile casting were developed and the industry moved to use new means and methods of broadcasting.

The common feature of all technological platforms and medium, regardless of decade, is that each provides a form of content delivery by providing program-carrying signals to the general public.

The technical, social, cultural and economic analysis of the broadcasting industry in Chapter one explored the positive and negative impacts of the digitization and convergence of communication and information technologies on the industry. Analog signals faced several restrictions in transmission, channeling and also suffered from limited quality of sounds and resolution of images. In contrast, digital signals not only carry more television and radio programs than analog signals, but also allow for the transmission of a signal with better quality in sound and higher resolution in images. Digitization has therefore led to increased opportunities for digital signal production and for the digital transmission of a broadcast signal with the possibility of multiplatform broadcasting and multi channeling. Therefore, Member States of the International Telecommunication Union (ITU) approved that all signal transmissions *via* the analog system should be turned off by the year 2015, although some countries decided to turn off their national analog systems before this deadline. This shift to new broadcasting technology also includes the switch from analog television production to digital production and use of HDTV cameras and other such equipment. The convergence of the information and communication technology has therefore resulted in broadcasting

organizations being able to offer new media services with increased interactivity adding to consumers' choice of both format and content.

After considering the original concepts of the broadcasting industry and the different means and methods of broadcasting we compared these concepts with the current status of the industry and its existing business models and the way they work in the digital age. We came to the conclusion that the broadcasting industry has witnessed a drastic technical, functional and conceptual evolution. The concept of broadcasting is no longer limited only to non-interactive point to multi-point communication by terrestrial wireless signal distribution, which began with the invention of radiotelephony in 1920. Due to the emergence of a global satellite communication system, mobile telephony, cablecasting and worldwide broadband connection, the means, methods and mediums of broadcasting have diversified and the broadcast coverage area has extended. Broadcasting has turned into a truly global business. Therefore, we defined broadcasting as the transmission of radio or television programmes to the public by a broadcasting organization through any medium or platform and regardless of the means of transmission, such as satellite, wire or cable and broadband connection. Broadcasting organizations are no longer confined to a limited number of public service institutions or governmental agencies financed by the public funds and editorially controlled by state authorities. Rather, Commercial and private broadcasting organizations now constitute the majority of today's broadcast market. This, in turn, has caused a change in what was previously considered to be the concept and function of broadcasting, and a need to apply new, 21st century explanations of concepts and functions to the industry's culture, social and economic significance.

Through the course of this research we also discovered various aspects of the means and methods of unauthorized exploitation of a broadcast, more commonly known as broadcast piracy. Seeking to define the concept of broadcast piracy, we examined its technical aspects amongst its different stages, as well as, means and methods employed by so-called 'pirates' and the challenges that piracy poses to the broadcasting industry. We defined broadcast piracy as the 'carrying out of any unauthorized acts or uses of broadcast not permitted by law by any person other than the original broadcasting organization'. We identified that the concept of broadcast piracy is broader than the concepts of piracy in other areas of intellectual property. The reason for this is that with broadcast piracy, in addition to unauthorized use of the live broadcast signal, the act can also encompass other different unauthorized activities and uses of broadcast signal. It can occur in one (or more) distinct stages pre-broadcast; live broadcast (during broadcast); and post-broadcast. Such unauthorized acts include the unauthorized access (interception) and uses of pre-broadcast signal, live broadcast signal and post-broadcast signals, all such activities have negative impacts for the broadcasting industry. The unauthorized exploitation of a broadcast signal may include different uses either not consented to by the original broadcasting organization or not permitted under relevant national legislation or an applicable international binding instrument. It covers unauthorized rebroadcasting, retransmission, fixation of pre-broadcast and live broadcast signals, reproduction of such fixations on any medium and device, finally distribution and making available of those fixations in on demand services through digital networks. We demonstrated how the extraterritorial unauthorized uses of pre-broadcast, live and recorded broadcasts and new techniques and forms of broadcast piracy have come to threaten the existence of the broadcasting industry.

Finally, at the end of the first Chapter, we identified three major challenges broadcast piracy posed; inefficiency of the technological solutions; legal challenges; and its economic impact. We realized that technological solutions alone are not sufficient to prevent all the different

types and models of the broadcast piracy. Piracy not only devalues the broadcast right of content owners, but also lowers a broadcaster's advertising revenues. It also endangers creativity, entrepreneurial works and the investment needed to produce and broadcast premium content. The detailed technical analysis of the industry, including of the different broadcasting platforms and various methods and models of broadcast piracy, has guided us to this important conclusion that in order to protect broadcasting organizations against broadcast piracy the technical aspects of the issue should be precisely observed and any new norm setting must conform to the relevant specific technical features in question. Since, it drastically affects the scope of rights and protections to be conferred to broadcasting organizations within the national legislation or in an international policy-making.

II. Examination of justifications of protection

In the second Chapter, we reviewed existing justifications for the protection of broadcasting organizations in the context of intellectual property rights. We considered whether the technical, functional and conceptual development of the broadcasting industry allowed for new justifications for protection of broadcasting organizations to be made. If new justifications exist, do such justifications assist in the updating or granting of new rights and protections to broadcasting organizations? We recognized that the extent of the broadcasters' entrepreneurial works and investments made in order to utilize new information and communication technologies have increased and that new aspects of creativity exist in various broadcasting activities. These developments seem sufficient to go beyond the traditional boundaries of the international intellectual property law, which protect broadcasting organizations. Creativity in some areas of broadcasting can be considered to be at such an extent that it not only justifies the granting of new intellectual property type rights to broadcasting organizations but also in some areas may justify a complete 'regime change' in the protection of broadcasting organizations.

As we have seen, during the last two decades the number of intellectual property right holders has increased as the number of subject matter considered to be intellectual property has increased. Furthermore, new rights and protections have been conferred to authors, performers and producers of phonograms by new international instruments. These in turn were justified as being necessary to face challenges posed by the new technologies or to cover new areas of innovation.

In general, in the context of copyright and related rights (including the protection of broadcasting organizations) there are a number of justifications and rationales for the granting of intellectual property rights. Copyright and related rights have no common nature, but do enjoy similar rationales. These rationales are used to justify their initial recognition, gradual development and reconfiguration of their rights and protections. The updating of existing rights and protections or granting new intellectual property rights occurs either through revision of existing treaties or *via* the adoption of a new international instrument. In the latter instance,, we can refer to adoption of WCT for the protection of authors and WPPT, which recognized new intellectual property type rights and supplementary protections for performing artists and phonogram producers in order to comply with the necessities of these professions of the digital age.

The history of intellectual property law and its development has taught us that nobody can draw a definitive boundary around the protection of creativity, innovation and limit default intellectual property rights and protections. We came to the conclusion that the same is true

with broadcasting organizations. In the age of the digital, the governance of new information and communication technology has doubtlessly affected the broadcasting industry as well as increasing their creative services and posing new challenges. In Chapter two we concluded that almost all the justificatory arguments and rationales that are made with regard to copyright for authors and related rights for performers and producers of phonograms are similarly true with broadcasting organizations. These justificatory arguments and rationales could therefore also be applied to update or grant new rights and protections to broadcasting organizations. Nonetheless, to reach a global approach on the adequacy and efficiency of broadcaster's intellectual property protection, there is an urgent need to do a reassessment of rationales and to take into account different views on the relevant justificatory arguments. In doing so, we saw that there are some areas to provide new justifications for improved protection of broadcasters under existing intellectual property rights regime. Through the discussions covered within the second Chapter we attempted to answer the question of whether there is any place to present new justificatory arguments to update existing rights or alternatively to create new intellectual property rights and protections for broadcasting organizations. We concluded that updating or granting new intellectual property type rights to broadcasting organizations would foster substantial investment in the industry and expand broadcast network infrastructures. This, in turn, would encourage broadcasters to use modern communication and information technology and provide new innovative broadcast services to the public. As we referred above, updating the existing rights or granting new rights and protections in international intellectual property law has already taken place for authors through the WCT and performing artists and producers of phonograms through the WPPT. This has not yet happened for broadcasting organizations. The Rome Convention (1961) provided protection to phonogram producers and broadcasters due to the investment these respective groups made and the technical efforts they employed in recording and broadcasting. Afterwards, due to the technological revolution in the recording industry and based on the fact that the Rome Convention was based on granting minimum rights and protections, the WPPT granted performers and producers of phonograms new intellectual property type rights and supplementary protections. Again, the rationales behind granting new intellectual property rights and protections to the phonogram producers by the WPPT was the protection of their entrepreneurial works, investments, use of skilled manpower to achieve the best recording quality and using new technology to increase the storage capacity of the phonograms and other mediums.

As the existence of any level of originality or any degree of creativity (intellectual creation) in the phonograms and broadcasts was not set as a prerequisite to give intellectual property type rights to broadcasters (by the Rome Convention) and to producers of phonograms (by the Rome Convention and WPPT); we realized that the same could equally, or with minor difference, be applied to give new rights and protections to broadcasting organizations in a round of new international norm setting. In fact the justifications for granting intellectual property rights to broadcasters that were presented by the academic scholars and law doctrines during first decades after the invention of radio broadcasting in 1920 are strengthened by the existing realities and developments in broadcasting that have happened since. Although early justificatory arguments for broadcasters' intellectual property rights were due to their role in making works and other content available to the public, and their interests in controlling the transmission and retransmission of their broadcasts justified their rights,[1109] this initial argument is strengthened and supported by new justifications. For, the

[1109] World Intellectual Property Organization (WIPO), Basic notion of copyright and related rights, Available at: www.wipo.int/export/sites/www/copyright/en/activities/pdf/basic_notions.pdf, para 53, last visited December 2014.

role and functions of broadcasting organizations have changed from the early years of broadcasting, broadcasters have now gone far beyond these initial and primitive functions. In addition, we realized that the inefficiency of the existing international binding instruments to effective protection of fair and legitimate interests of broadcasting organizations is a strong justification for a new international norm setting. Thus attempts to update or grant new rights and protections to broadcasting organizations should be based on new justificatory arguments related to the new missions, functions and services of the industry. Such justifications should be in compliance with the present status of broadcasting industry and consequences of the convergence of new communication and information technologies. It seems that justificatory arguments to grant rights and protections to broadcasting organizations in the digital age need to be precisely reviewed with a comprehensive approach. Developments such as the new missions and functions and more importantly the innovations and enhanced creativity used in broadcasting activities should be taken into account in any new norm setting. Merely relying on the original justifications would not be satisfactory for all WIPO Member States to grant new intellectual property type rights and other supplementary protections to broadcasting organizations.

At the end of this discussion we concluded that granting new rights and protections to broadcasting organizations within the framework of the current international regime of protection of related rights is justified. We concluded this despite the fact that we found that in these 21st century broadcasting organizations there can also be found sufficient reasons to justify the granting of full copyright-type protections.
At present, no regime change in the current international protection of broadcasting organization is needed. The preference of this author would be to maintain the issue of protection of broadcasting organizations within the concept of traditional sphere of the international related rights. Updating the current intellectual property type rights of broadcasting organizations or granting new rights and protections does not depend on the existence of creativity and originality in broadcasting activities and services. Nevertheless, we can use the presence of creativity and the existence of originality in many broadcasting activities and services to give greater intellectual property-type rights to broadcasters within the concept of international related rights. Justifications of the protection of broadcasting organizations under related rights are protection of broadcasters' investment and entrepreneurial works can act as a sufficient basis to grant new intellectual property-type rights to them.

III. Analysis of the international and regional instruments

In Chapter three, our focus turned to an in-depth analysis of the main international and regional instruments that deal with the protection of broadcasting organizations. Amongst the international instruments we examined were the Rome Convention, the Brussels Satellite Convention, the WTO TRIPS Agreement, the European Agreement on the Protection of Television Broadcasts 1961 (EAT) and the European Convention Relating to Questions on Copyright Law and Neighboring Rights in the Framework of Trans-frontier Broadcasting by Satellite (European Satellite Convention) (1994). The importance of such a comparative study was in finding the differences that exist between these international instruments regarding the model, means and nature of rights and protections granted to broadcasting organizations. Whereas some instruments, particularly the Rome Convention have sought to protect these organizations through the granting of a small number of intellectual property type rights, other instruments such as the Brussels Satellite Convention did not recognize or

grant any specific rights to broadcasters, but rather imposed obligations on its Contracting Parties to ban the unauthorized distribution of satellite broadcast signals. The Brussels Convention requires that the Contracting Parties take adequate measures to prevent the distribution, emanating from or within its territory, of any program-carrying signal, by any distributor for any third party for whom it was not intended.

The TRIPS Agreement gives enough freedom to the WTO Members to decide whether to protect broadcasting organizations or not. The Agreement provides that broadcasting organizations shall have the right to prohibit unauthorized fixation, reproduction of fixations, and the rebroadcasting by wireless means of broadcasts, as well as the communication to the public of television broadcasts of the same. However, where WTO Contracting Parties do not grant such rights to broadcasting organizations, they shall provide owners of copyright in the subject matter of broadcasts with the possibility of preventing the above acts, subject to the provisions of the Berne Convention. Other differences exist between these instruments are regarding the technical platforms, which each instrument cover and differences, which exist in regard the scope of application of the proposed protections.

The current international and regional instruments have followed a technology specific approach. They are technology dependent instruments intended to address specific technical platforms of broadcasting which existed at the time of their ratification. They only covered the scope of application of that time. Accordingly, they do not cover, for example, the unauthorized retransmission of broadcast signals over the Internet and computer networks.

Through the above analysis, we realized the following conclusions. Firstly, the current international intellectual property law has been shaped following the gradual growth in the relevant technology and the growing threats to the industry. Secondly, updating the current international regime of protection slowed due to convergence of information and communication technology and the effects of digitization. Thirdly, the convergence, in fact influenced the whole existing regime of protection of broadcasting organizations. It has helped create new means and methods of broadcast piracy that the current regime of protection is not set up to address. Fourthly, it has raised major questions regarding the basic concepts of the industry such as what is a broadcast and broadcasting? And who could be a broadcaster or broadcasting organization? All of which raises the further question of whether the scope of application of the current regime of protection could or should be extended, for example, to the Internet and other computer networks? Finally, we explored the ambiguities in the existing instruments regarding the protection of new activities and services of broadcasting organizations as well as the protection of pre-broadcast signal and the placing of a broadcasted program into on-demand services and other new media services. The current regime of protection does not encompass all current activities and services which broadcasting organizations provide to the public as part of their normal activities. Therefore, via a realistic efficiency assessment of the current regime we realized that and the type and level of protection that exists does not meet the considerable changes and developments of the broadcasting industry and do not address the new forms and models of broadcast piracy. These set of instruments, either individually or even as a whole do not grant efficient protection to broadcasting organizations. For example, when the Rome Convention came into existence, communication technology was premature and only conventional traditional broadcasting (based on wireless, point to multipoint dissemination of broadcasts) was considered to be broadcasting. By the end of the 20th century, the realities of the industry had changed and the notion of broadcasting encompassed both wired and wireless transmission of broadcast signal. The technical, regulatory nature of broadcasting and an audience's demand

of the broadcasting industry had also changed as well as the business models broadcasters adopted.

Technical platforms being used to disseminate broadcast signal to the public or have begun to develop and improve. As it develops to a greater area, the growing contentious issue is that of cross border piracy and the unauthorized exploitation of broadcast signal. With a lack of an updated international instrument national legislation and regional instruments inevitably grant rights and protections to broadcasters differently in a non-uniform manner that are often applicable only within national territory or within the specific region. We acknowledge that although new technologies and digitization has brought numerous advantages to broadcasting organizations, it has also resulted in increased challenges of an extraterritorial nature and in serious negative effects to broadcasting organizations. In contrast to piracy of other intellectual property subject matters, broadcast piracy and its relevant technical and legal aspects remain highly complex and mostly undiscovered.

In the second part of Chapter three we discussed the main regional instruments that granted updated rights and protection to broadcasting organizations. These instruments include the Cartagena Agreement Decision No. 351 (1993), the North American Free- Trade Agreement (NAFTA) (1993) and finally the relevant European Union Directives i.e. Rental and Lending Rights Directive (1992), Satellite and Cable Directive (1993), Term Directive (1993) and Information Society Directive 2001. Although these regional instruments and directives are only applicable within a specific region, they have been successful in granting of updated protection to broadcasting organizations. Either individually or collectively, they can be used as regional experiences to update the international regime of the protection of broadcasting organizations as much as possible in an effective and uniform manner.

IV. Initiatives for a new WIPO broadcasters' treaty

In 1998 WIPO began discussions regarding the protection of broadcasting organizations. The task of preparing a new draft treaty on the protection of broadcasting organizations was assigned to its SCCR, which was established in the same year.

The context to these discussions can be described as being the effect that globalization had had on communication and information systems and the convergence of these technologies. This convergence had brought with it ambiguities regarding the new nature of a broadcast, of broadcasting and of broadcasting organizations. Broadcasting had changed dramatically from its original function as being a simple and direct transmission of a signal to the public in a particular region or country. Digitization, multi platform broadcasting with multi channeling, and new business models with global coverage of broadcast signal had all changed the landscape of the now-global broadcasting industry. Broadcasters now provided new services to audiences in order to respond to their new demands. Accordingly, broadcasters feel strongly that the existing international legal regime of protection is no longer sufficient and fails to protect their investment and entrepreneurial works from broadcast piracy. Therefore, they requested the WIPO Member States to begin work on preparation of a new treaty on the protection of broadcasting and cablecasting organizations.

However, the above-mentioned development of the industry raised important questions for the WIPO Member States including, who is a broadcaster? What is broadcasting? Which activities and services provided by organizations can be considered to be broadcasting? How

can broadcasting organizations be protected effectively by a new broadcasters' treaty? And, do all broadcasting activities and services need intellectual property-type protection under copyright or related rights regime? If answer to the latter question is affirmative, should the nature of rights or protections be the same or vary? In addition, in granting rights and protections to broadcasting organizations, should their broadcast signals in various platforms, i.e. terrestrial, satellite, cable, mobile and the Internet platform, be treated differently? Or, should the level of protection vary depending on the means and platforms of broadcasting?

In this regard, while there was a clear consensus between almost all WIPO Member States on the necessity of adoption of a new international treaty on protection of broadcasting and cablecasting organizations, differences remained regarding answers to the above questions and these differences have caused the prolongation of the discussions and negotiations within the framework of SCCR sessions and WIPO General Assembly meetings. The discussions have now lasted for more than 26 years. During this time the WIPO Member States have proposed numerous draft proposals (in treaty language) but have disagreed on the objectives, the object of protection, the scope of protection (beneficiary) and the scope of application of the new treaty. The differences that have appeared on the type, level and means of protections have resulted in the emergence of two major approaches: the signal-based approach and the right-based approach. In 2006, the WIPO General Assembly decided to set a condition that a diplomatic conference for the new treaty would only be convened after agreement was achieved on the above subjects.[1110] Hence, the WIPO Member States are currently seeking solutions to solve the disagreements on the above issues, disagreements that we discussed in both Chapters four and five of this thesis.

V. Determination of fundamental elements of the new treaty

In Chapter four first we sought to identify the problems raised in the SCCR then to propose solutions towards reaching agreements. Based on the reports of the SCCR sessions, WIPO General Assembly meetings and technical analysis of the issues, we found that the object of protection is and should be the same object of protection of the Rome Convention and the WTO TRIPS Agreement i.e. the 'broadcast'. We realized that we can define 'broadcast' as a 'program-carrying signal' or 'signal', which carries television programs or content. 'Signal' merely as a 'conveyor' or 'carrier' - in the context of telecommunication- or without the content, which it carries, is not and could not be the object of protection in the context of the current international intellectual property law. We proved that this notion of 'broadcast' is the same as 'broadcast signal' or 'program-carrying signal'. It does not prejudice the content of that signal and its protection under copyright law, for although, in this sense, the 'broadcast' includes the content, it is not content in its original form. The content used in the broadcast or carried by broadcast signal is a converted form of the content, which has been converted into collocated electronic signals then transmitted to the public. For, the original content itself

[1110] Decision of the WIPO General Assembly in 2006:
"(i) The General Assembly approves the convening of the Diplomatic Conference on the Protection of the Rights of Broadcasting Organizations under the conditions set out in paragraph (iv) … The scope of the Treaty will be confined to the protection of broadcasting and cable casting organizations "in the traditional sense".
(iv)… It is understood that the sessions of the SCCR should aim to agree and finalize, on a signal-based approach, the objectives, specific scope and object of protection. The Diplomatic Conference will be convened if such agreement is achieved. If no such agreement is achieved, all further discussions will be based on document SCCR/15/2." See: WIPO doc WO/GA/33/10 Report adopted by the WIPO General Assembly, Thirty-Third (16th Extraordinary) Session, Geneva of October 3,2006, 2006, para 107.

technically could not be reached or transmitted to the public without being converted into signal.

We explored firstly the objectives of such a treaty as being setting up a worldwide standard or model for harmonization of protection of broadcasting organizations.

Secondly, we looked at how broadcasting organizations expanded their broadcasting activities over new platforms and mediums, in addition to this how they adopted new business models and provide new services for which the current international regime of protection does not give them effective protection. On the other hand, we identified the growing problem of cross-border broadcasting and the resulting problem that national legislation could not be applied in other countries or be enforced outside the territorial jurisdiction. Therefore after revisiting the existing regime of the protection of broadcasting organizations, the restructuring or reconfiguration of existing rights through a new self-standing treaty is felt necessary moving forwards. A new treaty would be a global intellectual property policymaking tool that could assist in the goal of harmonization of the relevant national laws. In turn, approximation of different national law regarding the protection of broadcasting organizations would be an important element for internationalization of copyright and related rights.

Thirdly, the existing international regime of protection should be updated and modernized in the fight against broadcast piracy and other problems that are global in nature. Broadcast piracy is a global challenge, which needs a globally harmonized solution. Thus, in order to eliminate different broadcast piracy, the objective should, therefore, be to provide adequate and effective legal protection for broadcast signal against unauthorized commercial exploitation. To this end an international uniform system of rights and protections is needed. If it maintains sufficient flexibilities for implementation in national law, the new treaty (although unable to harmonize all aspects of protection of broadcasting organizations) would establish some sort of harmonization wherever it is possible and necessary.

With regard to of the scope protection and beneficiaries of the new treaty throughout the first decade of the WIPO SCCR negotiations (1998-2005), the Delegation of the USA advocated the inclusion of webcasting organizations within the beneficiaries of the protection, but this idea was not welcomed by other delegations. At present the scope of protection is less disputed and there is a clear consensus on limiting the beneficiaries of the new treaty to broadcasting organizations and cablecasting organizations. Accordingly, any other real or legal persons that carry out broadcast-like activities are proposed to be excluded from the scope of protection of the new treaty.

Concerning the scope of application of the new treaty there exists ambiguities and differences between WIPO Member States, as there were doubts as to the possible extension of protection to other persons or entities. We examined this issue in Chapter four and proved that this important issue in fact relates to the technological platforms of broadcasting and not to the determination of beneficiaries of the new treaty. While we explained the matter of different platforms used for broadcasting, we demonstrated that the best solution for the scope of application of the new treaty would be for the adoption of a technological neutral approach. In other words, broadcasting organizations and their broadcast signal should be protected on all technological platforms. Otherwise, drafting a technology dependent treaty would make the new treaty impractical as soon as new technological platforms were developed; likewise, a new treaty would not be able to enforce the rights of broadcasting

organizations over all mediums. Besides, as "making laws which had no realistic prospect of enforcement would risk diminishing the legitimacy of the entire national system of laws"[1111] we have found that the new treaty needs to regulate the unauthorized exploitation of a broadcast signal over the Internet transmission and all other computer networks. In this regard we explained that broadcasting organizations use the Internet for the following purposes:

a. Simultaneous and unchanged transmission of broadcast programs (simulcasting) over the Internet
b. Near-simultaneous and unchanged transmission of broadcast programs over the Internet
c. Deferred linear transmission of broadcast programs
d. On-demand transmission of broadcast programs (catch-up) and program related materials (showing material previously broadcasted) over the Internet
e. Internet originated linear transmission (webcasting) known as online-only transmissions, original webcasting and web-originated transmission by a broadcasting organization.

We stated that such activities are not regulated in much national legislation and without a proper international treaty, online broadcast piracy using the Internet and any other global communication networks would remain unresolved. As Chris Reed rightly pointed out there are two interlinked questions; "whether it was proper for any national government to claim to apply its laws to the trans-global communications mechanism which was the Internet; and whether such laws could actually be enforced against online activities."[1112] Protection of broadcasting activities over the world web or the Internet does not mean that all webcasters or webcasting organizations would become beneficiaries of the new broadcasters' treaty. Rather it means that, as a fundamental principle, the scope of application of the new treaty should cover all broadcast signals across all media and all distribution platforms. There should be no distinction among transmission media and methods of signal transmission and all existing and foreseeable future developments of both technology and business models of the industry should be taken into account.

Finally, the anti-signal piracy function of the new treaty would have relevance to the scope of application. Currently broadcast piracy usually occurs through one or more of the following platforms or mediums:

i. Unauthorized traditional rebroadcasting by other broadcasting organizations (by wire and wireless terrestrial and satellite, and cablecast)
ii. Unauthorized retransmission of broadcast over Internet and any other computer networks (simultaneous, near-simultaneous, deferred and delayed)
iii. Unauthorized making available fixation of broadcast over Internet and any other computer networks

Whilst discussing the various types and stages of broadcast piracy, we proved that broadcast piracy may occur prior to broadcast, during broadcast and post-broadcast and all may be conducted on the Internet and any other platforms. Therefore, we recommended not limiting the scope of application of the new treaty to a particular type or stage of piracy or over a specific platform. Otherwise the anti-piracy function of the new treaty would be impracticable. All identified categories of broadcast piracy can be carried out through both traditional and new platforms meaning that broadcasting organizations risk suffering the same fate as authors, performers and producers of phonograms. There is no difference between the unauthorized exploitation of copyrighted works, performances, phonograms and the unauthorized exploitation of broadcast signals on the Internet and other networks.

[1111] Reed, C. (2012). *Making laws for cyberspace.* Oxford: Oxford University Press, p. 5.
[1112] Ibid.

VI. Scope of rights and protections

In relation to the scope of potential rights and protections to be granted, we examined three issues in Chapter five. The first issue was an analysis of both a signal-based approach and a right-based approach that were both raised during the course of the WIPO SCCR negotiations and the consequences of these respective approaches on the scope of potential rights of the new treaty. The second issue was in regard to the possible models of protection and proposing the best model of protection in the new treaty. Finally, we presented proposals on new rights and protections with proposals on the desirable nature of those rights and protections.

a. Signal-based approach and right-based approach

With regard to the signal-based approach and the right-based approach; we extensively discussed these approaches in Chapter five. These approaches originated from the discussions of the WIPO Member States during SCCR negotiations after the WIPO General Assembly passed its decision in 2006.[1113] In fact, since 2006, these approaches have influenced all discussions at WIPO meetings regarding the objectives and scope of application of the new treaty. These approaches have also influenced the thinking on choosing a desirable model and nature of rights and protections of any new treaty.

Since the beginning of the discussions on the protection of broadcasting organizations from within the framework of WIPO activities there was no discussion regarding pursuing a particular approach for the way forward in the area of protecting the broadcast signal against piracy. The reason for this was that nobody was in doubt that broadcasters enjoy related rights over their broadcast signals and the rationale for a new treaty was that the Rome Convention could not be considered adequate to protect broadcasters from the new challenges posed by the convergence of information and communication technology as well as the very real threat now posed by piracy. The decision of the WIPO General Assembly in 2006 marked the beginning of more serious discussions on the 'signal-based' and 'right-based' approaches, which took place in the subsequent SCCR meetings. Since the first post-2006 SCCR session, the differences in interpretation of the decision handed down by the General Assembly and the concept of 'signal-based' has continued until now. Therefore, we discussed these two approaches in Chapter five, and sought to understand the reasons behind these approaches and the different interpretations of the decision of the General Assembly in order to offer our recommendations on this important issue.

Proponents of the so-called signal-based approach believe that the main objective expected from the new WIPO broadcaster treaty should be to reinforce broadcasters against the piracy of their signals. Therefore, only their signal or 'broadcast program-carrying signals' disseminated by or on behalf of these organizations to the public should be protected against any unauthorized exploitation or piracy. Such an updated or new protection should be limited to the broadcaster's program-carrying signals, which they broadcast to the public during the transmission of the broadcast signal. For, technically speaking, signal only exists during its broadcast. After the audience has received signal it disappears. Accordingly what has been fixed or recorded during the broadcast is content and not the signal. Therefore, protection of a live broadcast signal does not require the granting of a new set of exclusive intellectual

---

[1113] WIPO doc WO/GA/33/10 Report adopted by the WIPO General Assembly, Thirty-Third (16th Extraordinary) Session, Geneva of October 3,2006, 2006, para 107.

property type rights and post fixation rights to broadcasting organizations. For anti-signal piracy function, the adoption of a defensive protection approach and confining the signal - as the object or subject matter of protection – to the live broadcast signal would be in proponents' opinion sufficient. The new treaty should grant broadcasting organizations the right to prevent or prohibit unauthorized exploitation of their live broadcast signal. In their view, extending protection provided by the new treaty to pre-broadcast signal and post-broadcast signal would be contrary to the mandate handed down by the WIPO General Assembly in 2006 and reaffirmed in the year 2007. In addition, granting broadcasters a new set of exclusive IP rights or even protection through protection of digital rights management (DRM) and/or technological protection measures the new treaty would go far beyond the stated objective and would overlap with the rights of other right holders. It would create a new layer of intellectual property rights on top of copyright that would harm both consumers and copyright holders. The rationale for this is that broadcasters merely transmit the content produced by other right holders via their emitted signals, they do not necessarily, or indeed in the majority of cases, play a role in creation or production of the content. Intellectual property rights are for intellectual creation, whereas signals are not creative as they are transient and electronically produced carrier waves. Signals could not exist in a fixed or recorded format and any protection related to fixation or post-fixation activities is protecting something that did not exist after being perceived by audiences. What is fixed, however, is content, which is already owned by someone else. Finally, creating new copyright-like rights for broadcasting organizations would possibly also extend to webcasters and simulcasters; which would be highly contentious in the eyes of other right holders and proponents of the public interests.
Through the analysis of the signal-based approach in its strict sense it seems that the proponents of the signal-based approach in its strict sense have not drawn a precise demarcation line between the notion of copyright and the notion of a broadcaster's neighboring rights. If the new treaty follows this approach it would have numerous practical impacts. Firstly, it would only protect current or flowing broadcast (to the public) signal and would limit the object or subject matter of protection to the live (current of flowing) signal intended for the direct (non-interactive) reception of the public. Secondly, the nature of protection to be conferred to broadcasters would not be in the form of a positive exclusive intellectual property type rights. This means that broadcasters should be given defensive protections through the right to prevent or prohibit unauthorized exploitation of live broadcast signal. Thirdly, the duration or terms of protection of the broadcast signal would be limited to when the signal is current (i.e. flowing during the broadcast). There would be no protection of signal when it is being received. Accordingly, the new treaty could not provide any post fixation rights or protections for broadcasting organizations in contrary to the Rome Convention, assigning any terms of protection for broadcast signals would make no sense. Finally, protection should only be confined to the broadcast signal, not to any other signal transmission over the Internet or other computer networks. Thus, any point-to-point transmission, putting in on-demand or interactive services of fixed broadcast and non-simultaneous retransmission of fixed broadcast would be excluded from the scope of application of the new treaty. To the proponent of this strict sense of the signal-based approach, these instances would not be considered broadcasting. Therefore we would not recommend this approach to the new treaty.

Another approach is the right-based approach. Proponents of this approach viewed that the anti-broadcast piracy function of the new treaty necessitates updating the existing rights and protections recognized by the existing international instruments, particularly those recognized by the Rome Convention and the WTO TRIPS Agreement. For proponents of this approach the new treaty should create new intellectual property type rights and protections for

broadcasting organizations. Piracy of broadcast signal would make sense if there were rights over the broadcast signal; there would not be piracy where there are not rights for broadcasting organizations. Protection of signal even with the objective of preventing signal piracy does not impede granting intellectual property type rights to broadcasting organizations in regard their broadcast signal. In the opinion this approach, the term 'right' remains the basic notion or fundamental concept of 'neighboring or related rights' that was recognized by the Rome Convention in 1961 and subsequently by the WPPT and most recently by the Beijing Treaty of 2012.

To the proponents of this approach, in contrast to the original authorship or copyright regime in which its copyright is conditional upon the existence of a certain degree of originality, the protection of broadcasters' related rights is owed to those broadcasters' entrepreneurial works, investment, and technical expertise and efforts to broadcast to the public. In addition to this and in similarity to other related rights treaties, protection of broadcasting organizations with the right-based approach follows the same rationale and justificatory arguments as the broadcaster's neighboring rights (although much stronger rationales) as it were existed at the time of the Rome Diplomatic Conference in 1961. As it was the case for protection of performing artists and producers of phonograms by WPPT, the proposed new treaty must place its focus on the fundamental need to give new rights and protections to broadcasters owing to the development of digital technology and new challenges posed by piracy. Therefore the center of reasoning of the right–based approach lies in its definition, which provides for the subject matter of protection of broadcaster's rights namely the broadcast. Broadcast in this approach being understood to be the electronically generated signal, which transports radio or television programs for reception by the public, irrespective of the origin of such programs or the ownership of the content thereof. Indeed the broadcast is the fruit or the final output of a broadcaster's entrepreneurial, organizational, technical and economic effort, which it has invested in the program that it's broadcasting or transmitting. It is similar to the output of the entrepreneurial efforts of a phonogram producer, which is a phonogram. Further, in response to criticisms of the right-based approach (within the notion of related rights), its supporters tried to outline the divide, which exists between the broadcast content and broadcast signal. Hence, although an extensive part of broadcast content is protected under copyright of authors or related rights of performing artists or phonogram producers, it is practically possible to distinguish the copyright of authors to the content from the rights of a broadcasting organization to their broadcast. Therefore, a treaty without well-known enforceable intellectual property type rights is likely to be considered insufficient to act as the basis for international protection of broadcasting organizations. Accordingly, in the opinion of this approach it would be necessary that the new broadcaster's treaty accept the approach of the Rome Convention on broadcaster's rights with some additional or the 'Rome-plus' elements.

With regard to the nature of rights and protections, many delegations from countries with a civil law tradition have stated that they give broadcasters several exclusive intellectual property type rights akin to the Rome Convention. Protecting broadcasters with intellectual property rights is well established and works well without contradiction with the rights of other right holders. Accordingly, many of these delegations believe a new treaty should include Rome-plus elements and the protection should not be less than those offered by the Rome Convention. In their opinion, a 'signal-based protection' means only that it is the assembly of the broadcast content and the transmission of that content which causes the protection, as opposed to the protection of the transmitted content. In order to give effective protection to broadcasting organizations it is essential that the new treaty not only protect

pre-broadcast signal, but also recognize post-fixation rights, as established both in the Rome Convention and the TRIPS Agreement. Therefore, the right of reproduction of fixation of a broadcast, the right of a deferred retransmission, (which is a non-simultaneous retransmission of fixation of a broadcast by any means and on any platform) and the right to make available a fixation made from a broadcast for interactive on-demand services were considered important elements in an effective legal safeguarding of the broadcasting organizations' legitimate economic interests.

Through the analysis of right-based and signal-based approaches it would appear that there is no difference between the two approaches in terms of object or subject matter of protection. As it is technically proved, the broadcast signal consisting of content can be captured, fixed (recorded) and reproduced after broadcast. Based on the notion of related rights that is well established in international related rights treaties; there is no contradiction between rights of authors over the content and the related rights of a broadcaster over their broadcast signals. Copyright and related rights are independent from each other and each has its specific subject matter or object of protection. This is the reason that all existing treaties on protection of the related rights have a copyright safeguard or non-prejudice clauses, for example, Article 1 of the Rome Convention, Article 1(2) of the WPPT and Article 1(2) of the Beijing Treaty. All such treaties have a provision that the protection granted by them shall leave intact and shall in no way affect the protection of copyright in literary and artistic works or be interpreted as prejudicing such protection.

Therefore, we recommend the new broadcasters' treaty follow the right-based approach. As with the 'signal-based approach', the initial concept of the 'right-based approach' includes the notion of broadcasters' related rights. However, the term 'right-based approach' was not used in any SCCR session before the WIPO General Assembly in 2006. It was only after the WIPO General Assembly of 2006 that proponents of the signal-based approach called the supporters of broadcaster's related rights as proponents of the 'right-based approach'. In fact the mandate of the WIPO General Assembly is not in contradiction to the protection of broadcaster's related rights in their broadcast. In addition, the signal-based approach should be interpreted in such a way that the protection of broadcasting organizations only extends to their broadcast signal and not to the underlying content. Granting new related rights to broadcasting organizations is therefore fully consistent with the signal-based approach as mandated by the WIPO General Assembly. For, that mandates neither sought to overrule the protection of broadcasting organizations within the notion of related rights, nor ruled that the mechanism of the broadcaster's protection should be the model of protection established by the Brussels Satellite Convention. Indeed the rights, such as rights of fixation, retransmission, reproduction and making available fixations made from broadcast, are not only compatible with protection of broadcast signal but are also indispensable in protecting broadcasting organizations against various types of broadcast piracy.

b. Proposal on the model of protection

In order to recommend the desirable model of protection we compared protective mechanisms and the nature of rights and protection in other relevant treaties, since each existing treaty in the field of international intellectual property law employed different protective mechanisms or model of protection to protect authors, performers, producers of phonograms and broadcasters. In this thesis we discussed three models of protections introduced by the Rome Convention, the Brussels Satellite Convention and the WPPT respectively.

The Rome Convention model is the oldest model of protection of broadcasting organizations within the context of private international law. It is a technology-specific or a technology-dependent treaty, which grants broadcasters specific intellectual property type rights known as related rights. Such rights include broadcasters' rights to authorize or prohibit rebroadcasting, reproduction, fixation and communication to the public of their broadcast. Based on such a model of protection, the new broadcasters' treaty could act as a 'Rome-Plus' treaty. As a standalone treaty, it could not only update the existing related rights of broadcasting organizations provided by the Rome Convention, but also it could grant new intellectual property type rights conforming to broadcasters' new business models and the new services and requirements of the digital age. The significance of the Rome Convention model is that as of January 2015, the Convention has 92 countries that are Contracting Parties, which grant related rights to broadcasting organizations in their country. As well as this, 161 countries are party to the WTO TRIPS Agreement, which requires protection for broadcasting organizations. In addition there are other countries (for example Iran) that, though not contracting parties to the Rome Convention, have accepted related rights in their legal tradition and grant the Rome model of related rights to broadcasting organizations. Therefore, the WIPO Member States can accept the Rome Convention model of protection as a well-established worldwide standard or model of protection within existing international intellectual property law.

The second model of protection is that of the Brussels Satellite Convention model. The Brussels Satellite Convention is a convention within the context of the public international law. It does not grant any specific intellectual property type rights to broadcasting organizations; rather it imposes an obligation on its Contracting Parties to ban unauthorized distribution of satellite broadcast signals by adopting adequate measures in their national law. In contrary to the Rome Convention, the Brussels Satellite Convention has not been accepted as a worldwide model of the protection of broadcasting organizations within the public international law. As such, it has only 37 contracting parties as of January 2015.

The third model of protection is the WPPT model. In Chapter five we recommended the model of protection provided by the WPPT as being best model of protection of the new treaty. For, like the Rome Convention, the WPPT is also considered as a related rights model of protection. The WPPT model of protection is the most suitable model of protection to be adopted in the new broadcasters' treaty, since it is a technology neutral treaty with a well-developed related rights model of protection that not only has updated the existing related rights of performing artists and producers of phonograms, but also grants them new intellectual property type rights such as the right of distribution and the right of making available to the public. It also recognizes the protection of technological protection measures and rights management information as specific supplementary and non-intellectual property type protections. In our proposals on new rights and protections of broadcasting organizations, we demonstrated how a treaty with a well-developed related rights model and other specific supplementary protections can solve controversial issues, such as the protection of pre-broadcast signals, and also assuage concerns on possible interference of broadcasters' rights with the rights of other right holders. The advantage of the WPPT model of protection is that it is a successful related rights instrument within the context of international intellectual property law. As of January 2015, it had 94 Contracting Parties. As a modern model of protection, the WPPT could approximate and harmonize the protection of performers and producers of phonograms within the national law of its contracting parties. If the new broadcasters' treaty adopts the WPPT model of protection as a standalone treaty, it could be open to all WIPO Member States and be complementary to the rights granted by the

Rome Convention and the WTO TRIPS Agreement without prejudicing other rights and obligations granted other existing treaties.

c. Proposals on new rights and protections

Based on the above findings and reasoning, in Chapter five we concluded that existing broadcaster's rights and protections deserve to be revisited. This is because no common international rule exists to fight against broadcast piracy, and as technology continues to develop updating the rights and protections of broadcasting organizations becomes more and more necessary. We were convinced that there is a possibility of granting new intellectual property rights and supplementary non-intellectual property protections to broadcasting organizations against unauthorized exploitation of their broadcasts. The existing international legal regime of protection of the broadcasting organizations needs to be restructured and reconfigured to deal with new challenges of the broadcasting industry, including new means, methods and stages of broadcast piracy. In addition, the legal infrastructure should be enhanced to comply with new business models adopted by broadcasters; and new broadcast services provided in the digital age. Therefore, at the end of Chapter five, we recommended the following rights to be included in the new broadcasters' treaty; (1) the right of fixation of broadcast, (2) the right of reproduction of fixation of broadcast, (3) the right of distribution of fixation of broadcast, (4) the right of rebroadcast, (5) the right of retransmission to public, (6) the right of communication to the public of broadcast, and (7) the right of making available to the public the fixation of broadcast. The proposed non- intellectual property type protections include (1) the protection of pre-broadcast signals, (2) technological protection measures, and (3) rights management information.

In order to propose new rights and protections in the new treaty, we realized that the new rights and protections should be established in a way that they do not necessitate major renovation to the fundamental policies and structure of the legal regime of protection of broadcasting organizations in the national legislation. As a new global intellectual policy making tool, the new treaty should aim to achieve a maximum level of implementation in national legislations and efficient enforcement at the international level. In establishing new rights and protections, the new treaty should not differentiate between traditional notions of broadcasting and new broadcasting activities and services; nor should it discriminate between different technological platforms and different stages of piracy. Otherwise its anti-piracy functioning would not properly work. In addition, in contrast to the Rome Convention, which is a technology-dependent treaty, the new treaty should follow a technology-neutral approach in order to encompass all existing and future broadcasting technologies. Moreover, to promote cultural diversity, freedom of expression and public interest, the balance of rights and protections granted to broadcasting organizations with regard to other right holders and overall public interest should be maintained. This could be done through the inclusion of appropriate and flexible provisions in limitations and exceptions or/and non-prejudice clauses. The significance of the new treaty is that there are many countries that still had not approved modern rules, which help to protect broadcasting organizations. In the absence of an international binding instrument, divergent law will continue in the various national legislations, thus creating ongoing disharmony in international intellectual property law. Therefore, a new international norm setting with the above objectives and characteristics will play a pivotal role in the standardizing of national law on the protection of broadcasting organizations.

Drafting a new treaty in a flexible manner would enable it to take into account the different approaches that currently exist in different national legislation. Establishing as much as is possible a worldwide standard or model of protection for broadcasting organizations must be done in a manner which would give proportional freedom to its future contracting parties. Such freedom might consist of the discretion and ability of contracting parties to choose the nature of their rights and protections, the possibility to limit the application of certain rights and protections or the setting of conditions for their application and finally the ability to grant specific rights or protections on a non-mandatory or optional basis.
In addition to this, in proposing new rights and protections we concluded that though giving new intellectual property type rights and protections was necessary for the effective protection of broadcasting organizations, this mechanism does not represent the sole available solution for protecting broadcasting organizations. Based on the WIPO SCCR reports, the creation of a long list of new intellectual property type rights was not an acceptable solution for all WIPO Member States. Therefore, we proposed that other supplementary mechanisms or non-intellectual property type protections that could better protect broadcasting organizations be introduced. These supplementary protections include the protection of the controversial issue of pre-broadcast signal, the protection of a broadcaster's technological protection measures and the protection of rights management information. We recommended these supplementary and non-intellectual property type protections be applied with a medium level of discretion for national law to determine the ways and the means of the protection offered.

Consequently, we recommended new rights and protections each with a possible solution that could reach agreement in the WIPO SCCR negotiations. The recommended rights and protections are divided into three different categories depending on the level of discretion that would be left for future contracting parties to the new treaty. National lawmakers would have low, medium or high level of discretion to grant new rights and protection or implement the provisions of the new treaty in their respective national law depending on the particular right. Such discretion would be available through three mechanisms. The first mechanism would be the selection of the nature of individual mandatory rights and protections to be conferred. The meaning behind this is that although it seems there is consensus about granting mandatory rights or protection, WIPO Member States continue to disagree on the nature of the specific rights i.e. whether to grant the exclusive right to authorize or to grant the right to prohibition or prevent certain acts. The second mechanism relates to the discretion to set conditions under which a specific mandatory right or protection may be exercised or to determine the ways and means of implementation of the specific mandatory right in national legislations. Finally, the third mechanism relates to the ability or discretion of a contracting party to grant a specific right or protection on a non-mandatory or optional basis or to apply such a right in respect of certain communications or to limit its application in some other way. In addition, new rights and protections with above three levels of discretion may be based on national treatment and the principle of reciprocity. Broadcasting organization of a contracting party that its legislation so permits and to the extent permitted by the contracting party where this protection is claimed may claim the new rights and protections.

a. Specific rights with the low level of discretion for national law

This refers to specific rights that, though in essence are agreed and thought mandatory by the WIPO Member States, continue to cause minor disagreement on the precise nature of those rights. The rights in question are right of rebroadcasting, and the right of simultaneous and

near-simultaneous retransmission over the Internet (simulcasting) and other medium that focus on the core issues of broadcast piracy known as live broadcast piracy. Due to the fact that the WIPO Member States share common views on these issues and high level of consensus exists on the rights itself, we proposed a solution with a low level of discretion for future contracting parties. Based on this solution, the contracting parties would not be given much room for manoeuvre when implementing them in their national legislation except to grant the 'exclusive right to authorize' or adopt a defensive approach and grant the 'right to prohibit' unauthorized rebroadcasting and unauthorized simultaneous and near-simultaneous retransmission over the Internet (simulcasting) and any other medium.

b. Specific rights and protections with the medium level of discretion for national law

These rights and protections include those rights and protections that, though in essence are agreed to by the majority of the WIPO Member States, there remain disputes in regard the setting of conditions under which a specific right or protection may be exercised. They consist of the protection of technological protection measures, the protection of rights management information, the right of deferred or non-simultaneous (time-delayed or not limited in time) retransmission of fixed broadcast and the making available of fixed broadcast over the Internet and other mediums. The latter examples encompass the post-fixation rights i.e. the transmission of a fixed or pre-recorded broadcast signal that fully depend on the existence and availability of fixed or pre-recorded broadcast. This category of rights consists of (1) the right of fixation of broadcast, (2) the right of reproduction of fixation of broadcast, (3) the right of distribution of fixation of broadcasts, (4) the right of making available of fixed broadcast over the Internet and other medium in such a way that members of the public may access it from a place and at a time individually chosen by them. These rights aim to protect broadcasting organizations against the post-broadcast piracy or unauthorized exploitation of their recorded broadcast. We proposed that these rights be applied with a medium level of discretion for national law. Contracting parties would not only be able to choose the nature of rights i.e. the exclusive right to authorize or the right to prohibit, but could also set conditions in their national law under which the selected right may be exercised or to determine the ways and means of implementation of the specific mandatory right in national legislations. Particularly, in regard to the right of making available of fixation of broadcast, the proposed solution would be (exceptionally) drafted free from any specific legal characterization. Therefore it would give freedom to Contracting Parties to characterize and implement it in a way, which they deem appropriate in their national law.

c. Rights and protection with the high level of discretion for national law

Finally, we proposed solutions on rights and supplementary protections with a high level of discretion for national law. These include the right of communication to the public and the protection of pre-broadcast signals. The reason for the high level of sensitivity for national law is that WIPO Member States have divergent views on the inclusion of these issues within the scope of protection of the new treaty and still no consensus exists on its nature and scope of protection. The contracting parties to the new broadcasting treaty may, therefore, grant these rights and protection on a non-mandatory basis, or, they can apply them only in respect of certain communications, or limit its application in some other way, or, if they should so choose, they could not apply these rights and protection at all.

Bibliography

Actes de la Conférence de Berlin 1908. (1909). Berne: International Office.

Akester, P. (2006, April and June). The Draft WIPO Broadcasting Treaty and its Impact on Freedom of Expression. *Copyright Bulletin* .

Anderson, N. (2008, February 22). *Google argues against calling IP addresses "personal data*. Retrieved October 5, 2014 from www.arstechnica.com: Anderson, Nate, Google argues against calling IP addresses "personal data" See: http://arstechnica.com/tech-policy/news/2008/02/google-no-black-and-white-regulation-of-ip-addresses.ars (Last visited October 2011).

Andrés, A. R.-1. (2006). Software piracy and Income Inequality . *Applied Economics Letters , 13* (2), 101-105.

Aplin, T., & Davis, J. (2009). *Intellectual Property Law, Text and Materials* . Oxford: Oxford University Press.

Armstrong, R. (2010). *Broadcasting Policy in Canada.* University of Toronto Press.

Asbell, M. D. (2006). *Progress on the WIPO Broadcasting and Webcasting Treaty.* From Cardozo Art and Entertainment Law Journal: http://cardozoaelj.com/wp-content/uploads/Journal%20Issues/Volume%2024/Issue%201/Asbell.pdf

Asia- Pacific Institute for Broadcasting Development (AIBD). (n.d.). *Defining public service broadcasting*. Retrieved October 3, 2014 from Asia- Pacific Institute for Broadcasting Development (AIBD): www.aibd.org.my/node/94

Banerjee, I., & Seneviratne, K. (2005). *Public service broadcasting: A Best Practice Sourcebook.* Paris: UNESCO.

Barczewski, M. (2011). From hard to soft law- A requisite shift in the international copyright regime? . *International Review of Intellectual Property and Competition Law , 42* (1), 40-54.

Barczewski, M. (2011). From Hard to Soft Law- A Requisite Shift in the International Copyright Regime? *International Review of Intellectual Property and Competition Law , 42* (1), 40- 55.

Bently, L., & Sherman, B. (2001). *Intellectual Property Law.* Oxford: Oxford University Press.

Bently, L., & Sherman, B. (1999). *The Making of Modern Intellectual Property Law: The British experience 1760- 1911* . Cambridge University Press.

Blakeney, M. (1996). *Trade Related Aspect of Intellectual Property rights: A Concise Guide to the TRIPS Agreement.* London: Sweet & Maxwell.

Blanco Labra, V. (1978). The three subjects protected by the Rome Convention. *Copyright , 91* (1), 27-33.

Borghi, M. (2011). Chasing Copyright Infringement in the Streaming Landscape. *International Review of Intellectual Property and Competition Law , 42* (3), 316-343.

Cornish, W., & Bently, L. (2000). "United Kingdom". In P. Geller, & M. Nimmer, *International Copyright Law and Practice* (Vol. 2). New York: Matthew Bender.

Correa, C. M. (2002). Fair use in the digital era. *International Review of Intellectual Property and Competition Law , 33* (5), 571-585.

Costa, J. F. (1976). Some reflexions on the Rome Convention. *Copyright , 89* (3), 79-83.

Craig, C. J. (2013). Technology Neutrality: (Pre) Serving the Purposes of Copyright Law. In M. Geist, *The Copyright Pentalogy: How the Supreme Court of Canada Shook the Foundations of Canadian Copyright Law* (pp. 272-305). Ottawa, Canada: University of Ottawa Press.

Crisell, A. (2012). *An Introductory History of British Broadcasting* (2nd Edition ed.). London: Routledge.

Croella, C. (2012). Broadcasting and Sport. *International Conference on the strategic use of intellectual property by the sport industry.* RIO de Janeiro: Brazil National Industrial Property (INPI).

Davies, G. (1979). The Rome Convention 1961: a brief summary of its development and prospects. *European Intellectual Property Review , 1*, 154-159.

De Castro, J. O., & Shepherd, D. A. (2008). Can Entrepreneurial Firms Benefit from product Piracy? *Journal of Business Venturing , 23* (1), 75-90.

Dizard, W. (2000). *Old Media New media: Mass Communication in the Information Age,* ((3rd Edition ed.). New York: Longman .

Documents de la Conférence réunie à Bruxelle du 5 au 26 juin 1948. (1951). Berne: International Office.

Dopplick, R. (2007 June). Proposed WIPO Treaty on the Protection of the Rights of Broadcasting Organizations: Privacy Implications of Fighting Digital Pirates.

Drier, T. (2013). Online and its effect on the "Goods" versus "Services" distinction. *International Review of Intellectual Property and Competition Law , 44* (2), 137-139.

Electronic Frontier Fundation. (2006, September 6). *Statement concerning the WIPO Broadcast Treaty* . Retrieved October 26, 2014 from www.eff.org: https://www.eff.org/document/statement-concerning-wipo-broadcast-treaty

Eleni Synodinou, T. (2012). The principle of technological neutrality in European copyright law: Myth or reality? *European Intellectual Property Review* (9), 618-627.

European Audiovisual Observatory. (2013). *2013 Year Book, Television, cinema, video and on-demand audiovisual services in 39 European States* (Vol. 1). Strasbourg: European Audiovisual Observatory.

European Audiovisual Observatory. (2007). *European Audiovisual Observatory, Yearbook"Trends in European television"* (Vol. 2). Strasbourg, France: European Audiovisual Observatory.

European Broadcasting Union (EBU). (2010, September 8). *Ten things you need to know about hybrid broadcast broadband*. Retrieved October 4, 2014 from www.ebu.ch: https://tech.ebu.ch/docs/events/ibc10/presentations/ebu_ibc10_hbb.pdf

European Broadcasting Union (Legal Department). (2001, May 3). *Why should the right also cover pre-broadcast program-carrying signals?* Retrieved May 20, 2012 from www.ebu.ch: www.ebu.ch/CMSimages/en/leg_t_broadcasters_neighbouring_right_signals_tcm6-4351.pdf

European Broadcasting Union. (2007). *A selection of Articles and Speeches by Werner Rumphorst.* Geneva.

European Broadcasting Union. (2007). The broadcaster's neighbouring right: Impossible to understand? In W. Rumphorst, *2007, A selection of Articles and Speeches by Werner Rumphorst* (pp. 171-177). Geneva.

European Commission. (2012, 12 04). *Public Service Broadcasting*. Retrieved October 4, 2014 from Audiovisual and Media Policies: http://ec.europa.eu/archives/information_society/avpolicy/reg/psb/index_en.htm

F. Kurose, J. a. (2008). *Computer Networking, A Top-Down Approach* (8th Edition ed.). Boston: Pearson Education Inc. .

Farlex. (n.d.). *The Free Dictionary*. Retrieved October 3, 2014 from The Free Dictionary: http://www.thefreedictionary.com/broadcast

Federal Office of Communication. (2012, 10 18). *Registration obligation for radio and television broadcasters*. Retrieved October 4, 2014 from Federal Office of Communication: http://www.bakom.admin.ch/themen/radio_tv/01107/02357/index.html?lang=en

Ficsor, M. (1981). *Guide to the Rome Convention and to the Phonograms Convention* (Vol. 617 (E)). Geneva: World Intellectual Property Organization.

Ficsor, M. (2002). *The Law of Copyright and the Internet, The 1996 WIPO Treaties, their Interpretation and Implementation* . Oxford, UK: Oxford University Press.

Fisher, W. (2001). Theories of Intellectual Property. In S. R. Munzer, *New essays in the legal and political theory of property* (pp. 168-200). Cambridge University Press.

Ganter, M., Matzneller, P., & Scheuer, A. (2010). Relevant International and European Law. In S. Nikoltchev, *IRIS plus, New Services and Protection of Broadcasters in Copyright Law* (pp. 38-45). Strasbourg, France: European Audiovisual Observatory.

Geravis, D. J. (2003). *The TRIPS Agreement: Drafting, History and Analysis* (2nd Edition ed.). London: Sweet & Maxwel.

Ginsburg, J. (n.d.). The (new) right of making available to the public. *Columbia Law School Public Law & Legal Theory Working Paper Group, Paper Number 04-78* . Columbia Law School.

Goldstein, P., & Hugenholtz. (2010). *International copyright: Principles, law and practice.* Oxford: Oxford University Press.

Guibault, L., & Melzer, R. (2004 November). The legal protection of broadcast signals. *IRIS Plus, Legal observations of the European Audiovisual Observatory* (10), pp. 2-8.

Gurry, F. (2008, November 24-25). *Conference on the Collective Management of Copyright and Related Rights in Europe Brussels* . Retrieved October 04, 2014 from www.wipo.int: www.wipo.int/about-wipo/en/dgo/speeches/gurry_brussels_08.html

Hagen, G. R. Technological nutrality in Canadian copyright law. In M. Geist, *The Copyright Pentalogy: How the Supreme Court of Canada Shook the Foundations of Canadian Copyright Law.*

Havocscope LLC. (n.d.). *Cable Piracy Market Value: $8.5 Billion in COUNTERFEIT GOODS*. Retrieved October 8, 2014 from www.havocscope.com: http://www.havocscope.com/cable-piracy-market-value/

Haynes, R. (2005). *Media rights and intellectual property.* Edinburgh: Edinburgh University Press.

Head, S. (1985). *World Broadcasting System: A Comparative Analysis.* California: Wadsworth Publishing Company.

Helberger, N. (1999). *Neighboring rights protection of broadcasting organization: Current problems and possible lines of action.* Strasbourg: Council of Europe, Doc. No. MM-S- PR (1999) def.

Hettinger, E. C. (1989). Justifying intellectual property. *Philosophy & Public Affairs* , 31-52.

Heymann, L. (2006). Inducement as Contributory Copyright Infringement: Metro-Goldwyn-Mayer Studio Inc. v. Grokste, Ltd. *International Review of Intellectual Property and Competition Law , 37* (1), 31- 46.

Hinduja, S. (2008). Deindividuation and internet software piracy . *CyberPsychology & Behavior , 11* (4), 391-398.

Hinze, G. (2009). The WIPO Broadcasting Treaty: Why Granting Intellectual Property Rights to Information Distributors will Harm Innovation and the Free Flow of Information on the Internet. *Computer and Telecommunication Review , 15* (8), 171-175.

How to watch pay TV channels for free. (2012, October 26). Retrieved September 24, 2014 from http://psf.hubpages.com: http://psf.hubpages.com/hub/How-to-watch-pay-TV-channels-for-free-Piracy-in-digital-TV-broadcasting on Twitter

Hugenholtz, B., Eechoud, M. v., Gompel, S. v., Helberger, N., Guibault, L., Steijger, L., et al. (2006). *The Recasting of Copyright & Related Rights for the Knowledge Economy*. Amsterdam: Institute for Information Law University of Amsterdam.

Hughes, J. (1988). The Philosophy of Intellectual Property . *Georgetown Law Journal* (77).

Ian D., T. (1991). Revision of the Rome Convention: is it necessary and timely? *Copyright Bulletin , XXV* (No. 4).

International Labour Organization, United Nations Educational, scientific and Cultural Organization, and the United International Bureau for the Protection of Intellectual Property. (1968). *Records of the Diplomatic Conference on the International Protection of Performers, Producers of Phonograms and Broadcasting Organizations* . Ceuterick: Louvain .

International Telecommunication Union (ITU). (2008). *ITU-infoDevToolkit-Glassory, April 2008*. Retrieved October 4, 2014 from ICT Regulation Toolkit: www.ictregulationtoolkit.org/en/Document/3390/Regulation_Toolkit_Glossary_April_2008

International Telecommunication Union (ITU). (2012). *Radio Rgulations (RR) (2012)*. Retrieved February 13, 2015 from www.itu.int: www.itu.int/pub/R-REG-RR-2012

Jain, T. (2008). Broadcaster's right under copyright law. *Icfai University Journal of Intellectual Property Rights. Available at SSRN: http://ssrn.com/abstract=1098307 , VII* (3), 9-24.

Kant, E. (2005). *Philosophy of Law (Persian Translation translated by Sanei Darre Bidi, Manochehr)* . Tehran: Entesharate naghsho negar Publication.

Kariithi, N. K. (2011). Is the devil in the data? A literature review of piracy around the world . *The Journal of World Intellectual Property , 14* (2), 133-154.

Kerever, A. (1994). Should the Rome Convention be revised and if so, is this the right moment? *Copyright Bulletin , XXV* (No. 4), p. 13.

Koops, B.-J. (2006). Should ICT Regulation be Technology-Neutral? In B.-J. Koops, M. Lips, & C. &. Prins, *Starting points for ICT regulation. Deconstructing prevalent policy one-liners, IT & LAW SERIES* (Vol. 9, pp. 77-108). The Hague: T.M.C. Asser Press.

Kozamernik, F., & Mullane, M. (2005, October 26). *An Introduction to the Internet Radio*. Retrieved October 4, 2014 from www.ebu.ch: http://tech.ebu.ch/docs/techreview/trev_304-webcasting.pdf

Kumaraswami, N. (2007, February 9). *All about webcasts*. Retrieved October 9, 2014 from www.worldstart.com: http://www.worldstart.com/all-about-webcasts/

Kur, A., & Dreier, T. (2013). *European Intellectual Property Law, Text, Cases & Materials*. Cheltenham, UK: Edward Elgar.

Lau, E. K. (2003). An empirical study of software piracy . *Business Ethics: A European Review , 12* (3), 233-245.

Law, J. R. (2008, December). "Making Available": When an Offer to Distribute is Equivalent to Distribution. *Available at SSRN: http://ssrn.com/abstract=1305599 or http://dx.doi.org/10.2139/ssrn.1305599* .

Leslie Smith, F., Wright (II.), J. W., & Ostroff, D. H. (1998). *Perspectives on Radio and Television: Telecommunication in the United States* (4th Edition ed.). US: Psychology Press.

Lewinski, S. v. (2008). *International Copyright Law and Policy.* Oxford: Oxford University Press.

Linder, B. (2011). The WIPO Treaties. In B. Linder, & T. Shapiro, *Copyright in the Information Society, A Guide to National Implementation of the European Directive* (p. 598). United Kingdom: Edward Elgar Publishing.

Lindner, B. (2011). The WIPO Treaties. In B. Lindner, & T. Shapiro, *Copyright In The Information Society, A Guide to National Implementation of the European Directive* (pp. 1-24). Cheltenham: Edward Elgar.

link -listing websites and intellectual property. (n.d.).

Locke, J. (1980). *The Second Treatise on Government.* Indianapolis: Hackett publishing.

Lundi- Smith, R. (2011). ITV broadcasting Ltd & Ors v TV Catch Up Ltd [2010] EWHC 3063 (Ch) (Novenber 25,2010). *Entertainment law review , 22* (3), 99-101.

MacLoughlin, G. .. (2006). The corporation for public broadcasting,Federal funding facts and statutes. In L. R. Lckes, *Public broadcasting in America.* (pp. 1-8). New York : Nova Science Publishers.

Makeen. Copyright in a Global Information Society: The Scope of Copyright Protection under International US, UK, and French Law .

Mamishev, A., & Williams, S. (2009). *Technical Writing for Teams: The STREAM Tools Handbook,* . Hoboken: John Wiley & Sons. Inc.

Masouye, P. (1985). the Rome Convention: Realities and prospects. *Copyright , 21* (9), 296-313.

Matzneller, P., & Yliniva-Hoffmann, A. (2013). Legal Protection of European Broadcasters-Challenges Posed by New Services. *Media Law And Policy , 20* (2), 157-186.

Mcadams, D. D. (2014, July 25). *Viaccess-Orca: 20 Million Watched World Cup on Illegal Streams, 3,200 takedown notices to pirate site owners*. Retrieved September 25, 2014 from www.tvtechnology.com: www.tvtechnology.com/article/viaccess-orca--million-watched-world-cup-on-illegal-streams/271508

McMahon, M. (2014, September 28). *What is a webcast?* Retrieved October 4, 2014 from www.wisegeek.com: http://www.wisegeek.com/what-is-a-webcast.htm

Mendel, T., Kreszentia, D., Siochrú, S. Ó., & Bukley, S. (2008). *Broadcasting, voice, and accountability: a public interest approach to policy, law, and regulation.* University of Michigan Press.

Menell, P. S. (2012 йил 15-February). In Search of Copyright's Lost Ark: Interpreting the Right to Distribute in the Internet Age. *Journal of the Copyright Society of the USA. Available at SSRN: http://ssrn.com/abstract=1679514 or http://dx.doi.org/10.2139/ssrn.1679514* , 1-61.

Miller, M. (2007). The broadcast treaty and its implications for signal piracy in North America. *Business law review* (IV-1), 33-38.

Mobile TV World. (n.d.). *Glossary*. Retrieved October 4, 2014 from www.mobiletvworld.com: www.mobiletvworld.com/page/Glossary.aspx

Munoz Tellez, V., & Waitara, A. C. (2007). A Development Analysis of the Proposed WIPO Treaty on the Protection of Broadcasting and Cablecasting Organizations. *Research Paper* (9), 1-55.

Nicholds, K. (2009). The free jammie movement: Is making a file avaialable to other users over a peer-to peer computer network sifficient to infringe the copyright owner's 17 U.S.C. § 106(3) Distribution right? *Fordham Law Review. Available at SSRN: http://ssrn.com/abstract=1274348 , 78* (2), 984-1028.

Nordemann, W., Vinck, K., Meyer, G., & Hertin, P. W. (1990). *International Copyright and Neighboring Rights Law : commentary with special emphasis on the European Community.* Weinheim: VCH Verlagsgesellschaft.

Ogawa, M. (2006). *Protection of broadcaster's rights.* Leiden: Martinus Nijhoff Publishers.

Oxford. (2009). *Intellectual property law* (3rd ed.). Oxford: Oxford University Press.

Oxford University. (2002). *Oxford English Dictionary* (Fifth edition ed., Vol. 1). Oxford: Oxford University Press.

P2P File Sharing. (2013, April 3). Retrieved March 2, 2014 from www.tech-fac.com: http://www.tech-faq.com/p2p-file-sharing.html

Peitz, M. a. (2006). Why the music industry may gain from free downloading—the role of sampling. *International Journal of Industrial Organization , 24* (5), 907-913.

Pollick, M. (2014, September 2). *What is satellite TV?* Retrieved October 4, 2014 from www.wisegeek.com: www.wisegeek.com/what-is-satellite-tv.htm

Porteus Viana, L. (2012, April 12). *US Government Report: IP Boon To US Economy, Accounts For 40 Million Jobs*. Retrieved October 4, 2014 from Intellectual Property Watch: http://www.ip-watch.org/2012/04/12/us-government-report-ip-boon-to-us-economy-accounts-for-40-million-jobs/

Puddington, A. (2003). *Broadcasting Freedom: The Cold War Triumph of Radio Free Europe and Radio Liberty.* Kentuky: University Press of Kentucky, 2003.

Quran, H. (610 AD). *Chapter 53: AN-NAJM (THE STAR) - Juz' 27*. Retrieved October 8, 2014 from www.parsquran.com: http://www.parsquran.com/data/show.php?quantity=&lang=eng&sura=53&ayat=31&user=eng&tran=1

Rahim, M. M. (1999). Software piracy among computing students: a Bruneian scenario. *Computers & Education , 32* (4), 301-322.

Ramello, G. B. (2010). Intellectual property, social justice and economic efficiency: insights from law and economics . In A. a. Flanagan, *Intellectual property law, Economic and Social Justice Perspective* (pp. 1-23). Cheltenham: Edward Elgar publication.

Rao, P. M. (2008). The Information and Communication Technologies and Enforcement of Intellectual Property Rights: A Relationship, perspective. *The Journal of World Intellectual Property , 11* (2), 105.

Records of the Diplomatic Conference on Certain Copyright and Neighboring Rights Questions,Geneva 1996. (1998). Geneva: World Intellectual Property Organization.

Reed, C. (2012). *Making laws for cyberspace.* Oxford: Oxford University Press.

Reed, C. S. (2006). A trade dress approach to the protection of radio brands. *AIPLA Quarterly Journal , 34* (4), 399-442.

Reed, C. (2007). Taking Sides on Technology Neutrality. *Scripted , 4* (3), 263-284.

Reinbothe, J., & Lewinski, S. v. (2002). *The WIPO Treaties 1996 The WIPO Copyright Treaty and The WIPO Performances and Phonograms Treaty Commentary and Legal Analysis*. London, UK: Butterworths.

Rickeston, S. (1987). *The Berne Convention for the protection of literary and artistic works: 1886-1986.* Lodon, UK: University of London.

Rickeston, S., & Creswell, C. (2001). *The Law of Intellectual property: Copyright, Designs & Confidential information* (2nd Edition ed.). Sydney: Law book Co.

Rickeston, S., & Creswell, C. (1989). *The Law of Intellectual Property: Copyright, Designs& confidential Information* (2nd Edition ed.). London: Butterworths.

Rikeston, S., & Ginsburg, J. C. (2006). *International Copyright and Neighbouring Rights* (2nd Edition ed., Vol. II). Oxford: Oxford University Press.

Ringer, B. (1974). Brussels Diplomatic Conference on the Distribution of Programme-Carrying Signals Transmitted by Satellite, Report. *Copyright* (11), 267-291.

Rivers, T. (2007). *A broadcasters' treaty? published in Copyright Law, A hand book of Contemporary Research.* (P. Torremans, Ed.) Edward Elgar Publishing.

Ross, A., & Livingstone, C. (2012). Communication to the public: part II. *Entertainment law review , 23* (7), 209-213.

Ross, A., & Livingstone, C. (2012). Communication to the public; Part I. *Intertainment law review , 23* (6), 169-173.

Ruijsenaars, H., & Kellezi, P. (2010). Exclusive broadcasting rights for sports events and their limits. In J. De Werra, *Sports and intellectual Property* (pp. 49- 67). Geneva University.

Rumphorst, W. (1993). Protection of broadcasting organizations under the Rome Convention. *Copyright Bulletin , 27*.

Schaumann, N. B. (1983). Copyright Protection in the Cable Television Industry: Satellite Retransmission and the Passive Carrier Exemption . *Fordham law Review* (51), 637.

Shirky, C. (2000, November 24). *What is p2p?* Retrieved September 20, 2014 from www.openp2p.com: http://openp2p.com/pub/a/p2p/2000/11/24/shirky1-whatisp2p.html?page=1

Smith, F. L., Wright (II.), J. W., & Ostroff, D. H. (1998). *Perspectives on Radio and Television: Telecommunication in the United States.* Lawrence Erlbaum Associates.

Smith, G. (2010). Copyright and freedom of expression in the online world. *Journal of Intellectual Property Law & Practice , 5* (2), 88-89.

SopCast Organization. (n.d.). *SopCast Technology*. Retrieved October 8, 2014 from www.sopcast.org: http://www.sopcast.org/info/sop.html

SopCast Organization. (n.d.). *Terms of Service*. Retrieved September 10, 2014 from www.sopcast.org: http://www.sopcast.org/info/terms.html

Speriusi-Vlad, A. (2009). Basic Rules of Protection in the Copyright and Intellectual Property Law: The Nature of the Granted Rights in the Field of Intellectual Property. *Dny práva – 2009 – Days of Law* (pp. 1-27). Brno : Masaryk University.

Sterling, J. (2002). International Codification of Copyright Law: Possibilities and Imperatives . *International Review of Intellectual Property and Competition Law , 33*, 271-293.

Sterling, J. (2000). Philosophical and Legal Challenges in the Context of Copyright and Digital Technology. *International Review of Intellectual Property and Competition Law , 31* (5), 508 - 525.

Sterling, J. (2003). *World Copyright law: protection of authors' works, performances, phonograms, films, video, broadcasts, and published editions in national, international and regional law* (2nd Edition ed.). London: Sweet and Maxwell.

Stewart, S. M. (1989). *International Copyright and Neighbouring Rights* (Second ed.). Butterworths.

Subramanian, D. (2010). The Milieu of Broadcasting Rights: An Indian Perspective. *Entertainment Law Review , volume 21* (issue 1), 25-28.

Sydnor II, T. D. (2009). The Making-Available Right under U.S. Law. *The progress & Freedom Fundation. Available at SSRN: http://ssrn.com/abstract=1367886 , 16* (7).

Tafforeau, P. (2013 йил July). Online music and assessment, a decade after the entry into force of the INFOSOC Directive of 22 May 2001. *Revue Internationale Du Droit D'Auteur* , 5-89.

Taubman, A., Wager, H., & Watal, J. (2012). *A handbook on the WTO TRIPS Agreement.* Cambridge: Cambridge University Press.

Taylor, G. (2006). Grey to Black- Satellite Piracy in Canada . *Canadian Journal of Media Studies , 4* (1), 89-108.

(2006). *The Recasting of Copyright & Related Rights for the Knowledge Economy.* Amsterdam: Institute for Information Law University of Amsterdam.

Thompson, E. (1981). Twenty years of the Rome Convention: some personal reflections. *Copyright , 94* (10), 211-216.

Tom Sheldon and Big Sur Multimedia. (n.d.). *Multicasting*. Retrieved October 4, 2014 from www.linktionary.com: www.linktionary.com/m/multicast.html

Torremans, P. (2010). *Holyoak & Torremans intellectual property law.* Oxford: Oxford Uinversity Press.

Towhidul Islam, M. (2009). Protection of public interests through a human rights framework in the TRIPS Agreement: realities and challenges. *Journal of Intellectual Property Law & Practice , 4* (8), 573- 582.

Tritton, G., Davis, R., Graham, J., Malynicz, S., & Roughton, A. (2008). *Intellectual Property in Europe* (3rd Edition ed.). London: Sweet & Maxwell.

United States Department of Labor, Bureau of Labor statistics. (n.d.). *Occupational Employment Statistic, Broadcasting (except Internet)*. Retrieved June 2, 2010 from United States Department of Labor: www.bls.gov/oco/cg/cgs017.htm

Vousden, S. (2012). Airfield, Intermediaries and the Rescue of EU Copyright Law. *Intellectual Property Quarterly* (4), 311-325.

Walter, M. M. (2010). Article 3 Right of communication to the public of works and right of making available to the public of other subject-matter. In M. M. Walter, & S. V. Lewinski, *European Copyright Law A Comentary* (p. 1555). Oxford: Oxford University Press.

Walter, M. M. (2010). Information Society Directive. In M. M. Walter, & S. V. Lewinski, *European Copyright Law, A commentary* (pp. 921-1142). Oxford: Oxfors Universuty Press.

Walter, M. (2000). The relationship of, and comparison between, the Rome Convention, the WIPO Performances and Phonograms Treaty (WPPT) and the Agreement on Trade-Related Aspects of Intellectual

Property Rights (TRIPS Agreement); the evolution and possible improvement of the protection of the neighboring rights recognized by the Rome Convention . *Copyright Bulletin , XXXIV* (3), 4-43.

Walter, M., & Lewinski, S. v. (2010). *European Copyright Law: A Commentary.* OUP Oxford.

Wand, P. (2002). So the Knot Be Unknotted- Germany and the legal protection of technological measures . *International Review of Intellectual Property and Competition Law , 33* (3), 305-317.

Wang, R. L.-D. (2006). DMCA Anti-Circumvention Provisions in a Different Light: Perspectives from Transnational Observation of Five Jurisdictions. *AIPLA Quarterly Journal , 34* (2), 217-250.

Weber, R. H. (2007). Switzerland. In E. A. Susanne Nikoltchev, *The Public Service Broadcasting Culture IRIS Special* (pp. 29-38). Council of Europe.

What is Internet Key Sharing or Card sharing? . (2012, October 26). Retrieved September 21, 2014 from www.cardsharingguide.blogpot.ch: http://cardsharingguide.blogspot.ch/2012/10/how-to-watch-pay-tv-channels-for-free.html

Whitten, A. (2008, February 22). *Are IP addresses personal?* Retrieved September 15, 2014 from www.googlepublicpolicy.blogspot.com: http://googlepublicpolicy.blogspot.com/2008/02/are-ip-addresses-personal.html

Wijk, v. J. (2002). Dealing with Piracy: Intellectual Asset Management in Music and Software. *European Management Journal , 20* (6), 689-698.

Wood, J. (1994). *History of International Broadcasting.* IET.

World Intellectual Property Organization (WIPO) . (1996). *Implication of the TRIPS Agreement on the Treaties Administered by WIPO (No. 464 (E))* . WIPO publication .

World Intellectual Property Organization (WIPO). (2010). *Basic notion of copyright and related rights*. Retrieved March 2, 2013 from www.wipo.int: www.wipo.int/export/sites/www/copyright/en/activities/pdf/basic_notions.pdf

World intellectual property organization (WIPO). (1978). *Guide to the Bern convention for the protection of literary and artistic works (paris Act, 1971).* Geneva: World intellectual property organization (WIPO).

World Intellectual Property Organization (WIPO). (2003). *Guide to the Copyright and Related rights Treaties Administered by WIPO and Glossary of Copyright and Related Rights Terms* (Vol. 891(E)). Geneva: World Intellectual Property Organization (WIPO).

World Intellectual Property Organization (WIPO). (1981). *Guide to the Rome Convention and to the Phonograms convention.* Geneva: WIPO Publication, No. 617 (E).

World Intellectual Property Organization (WIPO). (1971). *Record of the Intellectual Property Conference of Stockholm, June 11 to 14,1967.* World Intellectual Property Organization (WIPO).

World Intellectual Property Organization (WIPO). (1998). *WIPO world symposium on broadcasting, new communication technologies and intellectual property.* Geneva: World Intellectual Property Organization.

World Intellectual Property Organization. (1884). *Actes de la Conférence internationale pour la protection des oeuvres litéraires et artistiques réunie à Berne du 8 au 19 septembre 1884.* Berne: International Office.

World Intellectual Property Organization. (n.d.). *Protection of broadcasting organizations*. Retrieved 2014 йил 9-February from www.wipo.int: http://www.wipo.int/pressroom/en/briefs/broadcasting.html

World Intellectual Property Organization. (2004). *WIPO Intellectual Property Handbook: Policy, Law and Use (No. 489).* . Geneva: World Intellectual Property Organization.

World Intellectual Property Organization (WIPO). (2012). *WIPO studies on the economic contribution of the copyright industries.* Geneva: World Intellectual Property Organization (WIPO).(2010).

Yang, D. M.-7. (2004). Intellectual property abuses: how should multinationals respond? *Long Range Planning , 37* (5), 459-475.

Yu, P. K. (2006). Five Disharmonizing Trends in the International Intellectual Property Regime .

WIPO documents

I. Reports of meetings

1. WIPO Document SCCR/1/9, Report of the first session of the Standing Committee on Copyright and Related Rights of November10, 1998

2. WIPO Document SCCR/ 2/11, Report of the second session of the Standing Committee on Copyright and Related Rights of May 11, 1999

3. WIPO Document SCCR/3/11, Report of the third session of the Standing Committee on Copyright and Related Rights of December 1, 1999

4. WIPO Document SCCR/4/6, Report of the forth session of the Standing Committee on Copyright and Related Rights of April 18, 2000

5. WIPO Document SCCR/ 5/6, Report of the fifth session of the Standing Committee on Copyright and Related Rights of March 1, 2005

6. WIPO Document SCCR/6/4, Report of the sixth session of the Standing Committee on Copyright and Related Rights of December 20, 2001

7. WIPO Document SCCR/ 7/10, Report of the seventh session of the Standing Committee on Copyright and Related Rights of May 31, 2002

8. WIPO Document SCCR/ 8/9, Report of the eighth session of the Standing Committee on Copyright and Related Rights of November 8, 2002

9. WIPO Document SCCR/ 9/11, Report of the ninth session of the Standing Committee on Copyright and Related Rights of September 1/ 2003

10. WIPO Document SCCR/10/5, Report of the tenth session of the Standing Committee on Copyright and Related Rights of January 31, 2004

11. WIPO Document SCCR/11/4, Report of the eleventh session of the Standing Committee on Copyright and Related Rights of May 1, 2007

12. WIPO Document SCCR/12/4, Report of the twelfth session of the Standing Committee on Copyright and Related Rights of March 1, 2005

13. WIPO Document SCCR/13/6, Report of the thirteenth session of the Standing Committee on Copyright and Related Rights of June 9, 2006

14. WIPO Document SCCR/ 14/7, Report of the fourteenth session of the Standing Committee on Copyright and Related Rights of May 1, 2007

15. WIPO Document SCCR/15/6, Report of the fifteenth session of the Standing Committee on Copyright and Related Rights of May 15, 2007
16. WIPO Document SCCR/S1/3, Report of the first special session of the Standing Committee on Copyright and Related Rights of May 15, 2007
17. WIPO Document SCCR/S2/5, Report of the second special session of the Standing Committee on Copyright and Related Rights of August 31, 2007
18. WIPO Document SCCR/16/3, Report of the sixteenth session of the Standing Committee on Copyright and Related Rights of September 5, 2008
19. WIPO Document SCCR/17/5, Report of the seventeenth session of the Standing Committee on Copyright and Related Rights of March 25, 2009
20. WIPO Document SCCR/18/7, Report of the eighteenth session of the Standing Committee on Copyright and Related Rights of December 1, 2009
21. WIPO Document SCCR/ 19/15, Report of the nineteenth session of the Standing Committee on Copyright and Related Rights of June 28,2010
22. WIPO Document SCCR/20/13, Report of the twentieth session of the Standing Committee on Copyright and Related Rights of December7, 2010
23. WIPO Document SCCR/21/12, Report of the twenty-first session of the Standing Committee on Copyright and Related Rights of June 24, 2011
24. WIPO Document SCCR/22/18, Report of the twenty second session of the Standing Committee on Copyright and Related Rights of December 9, 2011
25. WIPO Document SCCR/23/10, Report of the twenty-third session of the Standing Committee on Copyright and Related Rights of July 20, 2012
26. WIPO Document SCCR/24/12, Report of the twenty-forth session of the Standing Committee on Copyright and Related Rights of July 27, 2012
27. WIPO Document SCCR/25/3, Report of the twenty-fifth session of the Standing Committee on Copyright and Related Rights of January 23, 2013
28. WIPO Document SCCR/SS/GE/2/13/3, Report of the special session of the Standing Committee on Copyright and Related Rights of May 31, 2013
29. WIPO Document SCCR/26/9, Report of the twenty-sixth session of the Standing Committee on Copyright and Related Rights of March 20, 2014
30. WIPO Document SCCR/28/3, Report of the twenty-eighth session of the Standing Committee on Copyright and Related Rights of November 8, 2014
31. WIPO Document WO/GA/32/13, Report the WIPO General Assembly in its twenty-third session (September 26 to October 5, 2005) of October 5, 2005
32. WIPO Document WO/GA/33/10, Report adopted by the WIPO General Assembly, Thirty-Third (16th Extraordinary) Session of October 3, 2006
33. WIPO Document WO/GA/34/16, Report adopted by the WIPO General Assembly, Thirty-Fourth (18th Ordinary) Session of September 24 to October 3, 2007
34. WIPO Document WO/GA/41/18, Report of the forty-first (twenty-first extraordinary) session of the WIPO General Assembly (October 2012) of October 9, 2012

35. WIPO Document A/50/18, Report of the Assemblies of the Member States of WIPO, Fiftieth series of meetings, Geneva, October 1 to 9, 2012 prepared by the Secretariat,
36. WIPO Document SCCR/22/11, Elements for a draft treaty on the protection of broadcasting organizations prepared by the chair of the informal consultation meeting (held in Geneva on April 14 and 15, 2011) of May 30, 2014
37. WIPO Document SCCR/2/10 Rev, Report on the Regional Roundtable for Central European and Baltic States on the Protection of the Rights of Broadcasting Organizations and on the Protection of Databases, held in Vilnius from April 20 to 22, 1999
38. WIPO Document SCCR/3/2, Report of the Regional Roundtable for African Countries on the Protection of Databases and on the Protection of the Rights of Broadcasting Organizations, held in Cotonou from June 22 to 24, 1999
39. WIPO Document SCCR/3/6, Statement adopted at the Regional Roundtable for Countries of Asia and the Pacific on the Protection of Databases and on the Protection of the Rights of Broadcasting Organizations, held in Manila from June 29 to July 1, 1999
40. WIPO Document SCCR/15/4, Statements from intergovernmental and non-governmental organizations, prepared by the WIPO Secretariat of July 19, 2006
41. WIPO Document SCCR/23/9, Report on the Informal Consultations on the protection of broadcasting organizations prepared by the Chair of the informal consultations of January 27, 2012

II. WIPO informatory and sponsored studies

1. WIPO Document SCCR/1/3, Existing international, regional and national legislation concerning the protection of the rights of broadcasting organizations, Memorandum prepared by the International Bureau of September 7, 1998
2. WIPO Document SCCR/7/8, Protection of broadcasting organizations, technical background paper prepared by the WIPO Secretariat of April 4, 2002
3. WIPO Document SCCR/8/INF/1, Protection of Broadcasting Organizations: Terms and Concepts, working paper prepared by the Secretariat of August 16, 2002
4. WIPO Document SCCR/ 17/Info/1, Informal paper prepared by the chairman of the Standing Committee on Copyright and Related Rights (SCCR) according to the decision of the SCCR at its 16th session of November 3, 2008
5. WIPO Document SCCR/ 19/12, Study on the socio economic dimension of the unauthorized use of signals: Part I: Current market and technology trends in the broadcasting sector of November 30, 2009
6. WIPO Document SCCR/ 20/2 Rev, Study on the socio economic dimension of the unauthorized use of signals: Part II: Unauthorized access to broadcast content- Cause and effects: A global overview of November 10, 2010
7. WIPO Document SCCR/ 21/2, Study on the socio economic dimension of the unauthorized use of signals: Part III: Study on the social and economic effects of the proposed treaty on the protection of broadcasting organizations of August 4, 2010
8. WIPO Document SCCR/ 21/4, Analytical document on the study on the socioeconomic dimension of the unauthorized use of signals, Part I, II and III prepared by the WIPO Secretariat of September 14, 2010

III. Proposals for new WIPO broadcaster treaty

1.WIPO Document SCCR/2/5, Proposals submitted by the European Community and Japan of April 6, 1999

2. WIPO Document SCCR/2/5, Proposal submitted by Switzerland for a Protocol on the Protection of the Rights of Broadcasting Organizations Under the WIPO Performances and Phonograms Treaty of April 6, 1999

3. WIPO Document SCCR/2/6, Proposal submitted by non-governmental organizations of April 7, 1999

4. WIPO Document SCCR/2/7, Proposal submitted by Mexico of April 12, 1999

5. WIPO Document SCCR/2/8, Proposal submitted by UNESCO of April 12, 1999

6. WIPO Document SCCR/2/12, Proposal submitted by Cameroon of May 18, 1999

7. WIPO Document SCCR/3/4, Proposal submitted by Argentina of July 29, 1999

8. WIPO Document SCCR/3/5, Proposal submitted by the United Republic of Tanzania of August 24, 1999

9. WIPO Document SCCR/5/3, Proposal submitted by Sudan of April 23, 2001

10. WIPO Document SCCR/5/4, Proposal submitted by Japan of April 25, 2001

11.WIPO Document SCCR/7/9, Comparative table of proposals (received by April 30, 2001) of May 3, 2001

12.WIPO Document SCCR/6/2, Proposal submitted by the European Community of October 3, 2001

13. WIPO Document SCCR/6/3, Proposal submitted by Ukraine of October 9, 2001

14. WIPO Document SCCR/7/7, Proposal submitted by the Eastern Republic of Uruguay of April 17, 2002

15. WIPO Document SCCR/7/9, Comparative table of proposals (received by May 6, 2002) of May 6, 2002

16. WIPO Document SCCR/8/4, Proposal submitted by Honduras of August 28, 2002

17. WIPO Document SCCR/8/5, Comparative table of proposals of September 16, 2002

18. WIPO Document SCCR/8/7, Proposal submitted by the United States of America of October 21, 2002

19. WIPO Document SCCR/9/3 Rev, Proposal submitted by Kenya of May 1, 2003

20. WIPO Document SCCR/9/4, Proposal submitted by the United States of America of October 21, 2002

21. WIPO Document SCCR/9/4 Rev, Proposal submitted by the United States of America of May 1, 2003

22. WIPO Document SCCR/9/5, Comparative table of proposals (received by April 15, 2003) of April 15, 2003

23. WIPO Document SCCR/9/8 Rev, Proposal submitted by Egypt of June 24, 2003

24. WIPO Document SCCR/9/9, Proposal submitted by Japan of May 28, 2003

25. WIPO Document SCCR/9/10, Proposal submitted by Canada of June 20, 2003

26. WIPO Document SCCR/9/12, Proposal by the European Community of June 24, 2003

27. WIPO Document SCCR/10/3,Comparative table of proposals of September15, 2003

28. WIPO Document SCCR/11/2, Proposal submitted by Singapore of December 26, 2003

29. WIPO Document SCCR/11/3, Consolidated text for a treaty on the protection of broadcasting organizations prepared by the Chairman of the Standing Committee on Copyright and Related Rights in cooperation with the Secretariat of February 9, 2004

30. WIPO Document SCCR/12/2 Rev.2, Second revised consolidated text for a treaty on the protection of broadcasting organizations prepared by the Chairman of the Standing Committee on Copyright and Related Rights in cooperation with the Secretariat of May 2, 2005

31. WIPO Document SCCR/12/5 Prov., Working paper on alternative and non- mandatory solutions on the protection in relation to webcasting prepared by the Chairman of the Standing Committee on Copyright and Related Rights of April 13, 2005

32. WIPO Document SCCR/13/3/Corr., Proposal submitted by Brazil of November 17, 2005
33. WIPO Document SCCR/13/4, Proposal submitted by Chile of November 22, 2005
34. WIPO Document SCCR/14/2, Draft basic proposal for the WIPO treaty on the protection of broadcasting organizations including a non-mandatory Appendix on the protection in relation to webcasting prepared by the Chair of the Standing Committee on Copyright and Related Rights in cooperation with the Secretariat of February 8, 2006
35. WIPO Document SCCR/14/3, working paper for the preparation of the basic proposal for the WIPO treaty on the protection of broadcasting organizations prepared by the Chair of the Standing Committee on Copyright and Related Rights in cooperation with the Secretariat of February 8, 2006
36. WIPO Document SCCR/14/4, Proposal submitted by Colombia of March 17,2006
37. WIPO Document SCCR/14/6, Proposal submitted by Peru of April 28, 2006
38. WIPO Document SCCR/15/2, Revised draft basic proposal for the WIPO treaty on the protection of broadcasting organizations, prepared by the Chair of the Standing Committee on Copyright and Related Rights in cooperation with the Secretariat of July 31, 2006
39. WIPO Document SCCR/15/INF/2, Proposal submitted by the United States of America of August 22, 2006
40. Non-paper on the WIPO Treaty on the Protection of Broadcasting Organizations prepared by the Chairman of the Standing Committee on Copyright And Related Rights of April 20, 2007
41. WIPO Document SCCR/17/INF/1, Informal paper on the WIPO Treaty on the Protection of Broadcasting Organizations prepared by the Chairman of the Standing Committee on Copyright And Related Rights of November 3, 2008
42. WIPO Document SCCR/22/5, Proposal submitted by the Delegation of South Africa of March 1,2011
43. WIPO Document SCCR/22/6, Proposal submitted by Canada of March 7, 2011
44. WIPO Document SCCR/22/6, Comments on the WIPO draft treaty on the protection of broadcasting organizations submitted by Japan of March 15, 2011
45. WIPO Document SCCR/22/11, Elements for a draft treaty on the protection of broadcasting organizations of prepared by the Chair of the informal consultation on the protection of broadcasting organizations (held in Geneva on April 14 and 15, 2011) of May 30, 2011
46. WIPO Document SCCR /23/6, Proposal submitted by the Delegation of South Africa and Mexico of November 28, 2011
47. WIPO Document SCCR/24/3, Proposal submitted by Japan on Renewal version of the Revised Draft Basic Proposal for the WIPO treaty on the protection of broadcasting organizations (SCCR/15/2rev) of June 7, 2012
48. WIPO Document SCCR /24/5, Proposal submitted by the Delegation of South Africa and Mexico of July 2, 2012
49. WIPO Document SCCR/24/10, Working document for a treaty on the protection of broadcasting organizations, adopted by the SCCR of September 21, 2012
50. WIPO Document SCCR/24/10 CORR., Working document for a treaty on the protection of broadcasting organizations, adopted by the SCCR of March 6, 2013
51. WIPO Document SCCR /27/2 Rev, Working document for a treaty on the protection of broadcasting organizations prepared by the Secretariat of March 25, 2014

52. WIPO Document SCCR /27/6, Proposal on a treaty on the protection of broadcasting organizations submitted by Armenia, Azerbaijan, Belarus, Kazakhstan, Kyrgyzstan, Russian Federation, Tajikistan, Turkmenistan, Ukraine and Uzbekistan of April 21, 2014

International and regional instruments

1. Berne Convention for the Protection of Literary and Artistic Works, as revised at Paris, 24 July 1971, 1161 UNTS 3 (entered into force 15 December 1972) [Berne Convention].
2. International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, 26 October 1961, 496 UNTS 43 (entered into force 18 May 1964) [WIPO Rome Convention].
3. European Agreement on the Protection of Television Broadcast, 22 June 1960, CETS No 034 (entered into force 1 July 1961) [European Agreement on the Protection of Television Broadcast].
4. The Andean Subregional Integration Agreement (Cartagena Agreement) (1969)
5. Convention Establishing the World Intellectual Property Organization, 14 July 1967, 828 UNTS 3 (entered into force 26 April 1970) [WIPO Convention]
6. Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms, 29 October 1971, 886 UNTS 67 (entered into force 18 April 1973) [Phonograms Convention]
7. Convention relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite, 21 May 1974, 1144 UNTS 3 (entered into force 25 August 1979) [WIPO Brussels Convention]
8. The North American Free-Trade Agreement (NAFTA Agreement) between the Government of Canada, the Government of the United Mexican States and the Government of the United States of America", concluded on December 8, 1993, and entered into force on January 1, 1994.
9. ANDEAN Decision No. 351 - Common Provisions on Copyright and Neighboring Rights, Gaceta Oficial del Acuerdo de Cartagena, 17 December 1993, X - No 145 (entered into force 21 December 1993) [ANDEAN Decision No. 351].
10. European Convention relating to questions on Copyright Law and Neighbouring Rights in the Framework of Transfrontier Broadcasting by Satellite, 11 May 1994, ETS No 153 (entered into force 1 December 1999) [European Satellite Convention]
11. Marrakesh Agreement Establishing the World Trade Organization, 15 April 1994, 1867 UNTS 154 (entered into force 1 January 1995) [WTO agreement].
12. Agreement on Trade-Related Aspects of Intellectual Property Rights, 15 April 1994, 1869 UNTS 299 (entered into force 1 January 1995) [TRIPS Agreement]
13. WIPO Copyright Treaty, 20 December 1996, 2186 UNTS 121 (entered into force 3 March 2002) (approved in Geneva, 20 December 1996) [WCT]
14. WIPO Performances and Phonograms Treaty, 20 December 1996, 2186 UNTS 203 (entered into force 20 May 2002) [WPPT]

The European Community Directives

1. The Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property, Official Journal of the European Union, L 346, 27 December 1992
2. The Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and Cable retransmission, OJ L 248, 6 October 1993
3. Council Directive 93/98/EEC of 29 October 1993 harmonizing the term of protection of copyright and certain related rights, OJ L 290, 24 November 1993 (This Directive amended by Directive 2001/29/EC of the European Parliament and of the Council, Official Journal L 167, 22.6.2001, p. 10 and codified by the Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006, Official Journal L 372, 27/12/2006 P. 0012 – 0018)
4. Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society, Official Journal L 167, 22 June 2001

Table of cases

1. Organismos Sillogikis Diacheirisis Dimiourgon Theatrikon kai Optikoakoustikon Ergon v Divani Akropolis Anonimi Xenodocheiaki kai Touristiki Etaireai (Case C-136/09), Court of Justice of the European Union, March 18, 2010
2. Sociedad General de Autores y Editores de Espana (SGAE) v Rafael Hoteles SA C-306/05, Court of Justice of the European Union, December 7, 2006
3. Società Consortile Fonografici (SCF) v Marco Del Corso (Case C-135/10), Court of Justice of the European Union, March15, 2012
4. Phonographic Performance (Ireland) Limited v Ireland and Attorney General (Case C-162/10) Court of Justice of the European Union, March15, 2012
5. Bezpečnostní softwarová asociace - Svaz softwarové ochrany v Ministerstvo kultury (Case C-393/09) Court of Justice of the European Union, December22, 2010
6. Twentieth Century Fox Film Corporation v Newzbin limited [2010] EWCH 608 (CH)
7. ITV Broadcasting Limited v TVcatchup limited [2011] EWHC 2977 (Pat) (Approved Judgment on question for CJEU and deferred issues)
8. Polydor Limited & Others v. Brown & Others [2005] EWHC 3191 (CH) (UK)
9. Joined Cases Football Association Premier League Ltd and Others v QC Leisure and Others (C-403/08) and Karen Murphy v Media Protection Services Ltd (C-429/08), Court of Justice of the European Union, 4 October 2011
10. Joined Cases Airfield NV and Canal Digitaal BV v Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (Sabam) (C-431/09) and Airfield NV v Agicoa Belgium BVBA (C-432/09), Court of Justice of the European Union, October13, 2011
11. Phonographic Performance (Ireland) Limited v Ireland and Attorney General (Case C-162/10) Court of Justice of the European Union, March15, 2012
12. Bezpečnostní softwarová asociace - Svaz softwarové ochrany v Ministerstvo kultury (Case C-393/09) Court of Justice of the European Union, December22, 2010.

13. Twentieth Century Fox Film Corporation v Newzbin limited [2010] EWCH 608 (CH)
14. ITV Broadcasting Limited v TVcatchup limited [2011] EWHC 2977 (Pat) (Approved Judgment on question for CJEU and deferred issues)
15. Phonographic Performance Company of Australia Limited v Commercial Radio Australia Limited [2013] FCAFC 11
16. Twentieth Century Fox Film Corporation v. icraveTV (Feb. 8, 2000) (2000 WL 255989 (W.D.Pa.)), United States District Court, W. D. Pennsylvania