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Whither a Signal-Based Broadcast Treaty?

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WIPO negotiators appear prepared to approve a draft Broadcast Treaty that is no longer “signal-based” or limited to “traditional” (non-Internet-based) broadcasting.



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There is a significant push at this week’s meetings of the World Intellectual Property Organization (WIPO) Standing Committee on Copyright and Related Rights to approve a Diplomatic Conference on a Broadcasting Organizations Treaty that is not strictly limited to combating unlawful interception of traditional broadcast signals. We are observing the meeting on behalf of academics, civil society and libraries, respectively. We write to inform those wary of the potential for a new sweeping WIPO Internet treaty to take note.

At issue are two General Assembly decisions, each over 15 years old, that required the SCCR to narrow the agreement. The **2006** GA authorized negotiations for a diplomatic conference on the Broadcast Treaty only on “traditional” broadcasting and cable casting and only adopting a “signal based” approach. After a failed attempt to create a negotiating draft on these terms, the **2007** GA authorized progress to a Diplomatic Conference on the treaty “only after agreement on objectives, specific scope and object of protection has been achieved.” At the 45th meeting of the SCCR, member states habitually repeated that they were committed to the 2006 and 2007 GA mandates, but the **chair’s draft** falls far from the original goals.

These confines were important, because there were major fears at the time that broad definitions of a “broadcaster” and the use of exclusive rights models would give every amateur and professional

webcaster new exclusive rights, and create new layers of exclusivity that would require licenses from mere conduits to use content already covered by copyright law.

In a hint that the push toward a diplomatic conference may continue despite lack of strict adherence to the 2006 and 2007 GA mandates, the Committee's expert stated to the Committee:

“Consensus is not a clearly defined concept. But indisputably it does not mean unanimity. In the WIPO tradition, in context, ... when there is consensus among member states, not every member state should be in full agreement.”

He further suggested that “after 17 years there are varying views as to whether the mandate is still relevant and valid.” But ultimately he provided that “because the general assembly has not [adopted] any mandate superseding that of 2006 and 2007, ... the view is that mandate is still relevant and applicable.” But strict adherence to the “traditional” broadcasting focus was described by the same expert as impractical because of a shift of technology to Internet-based tools.

As shown below, no country has formally (in the public session of SCCR 45) proposed amendments to the “chair’s draft” that would render the treaty truly signal based and limited to traditional broadcasting.^[1] The term “signal-based” was meant in 2006 to restrict the treaty’s objectives and scope to the use of general obligations to regulate the interception of a signal, as in the Brussels Convention, rather than mandating or promoting an exclusive rights approach, as in the Rome Convention. There is such a provision in current Article 10, mandating prohibitions of signal piracy in any regulatory framework. But Articles 6-9 promote exclusive rights. Indeed, the Chair’s facilitators have long recognized that the treaty is not signal-based in the Brussels Convention sense; Jukka Liedes, the Chair’s facilitator, described the treaty in SCCR 44 as being a blend of the Rome Convention and Brussels Convention approaches. The use of the term “traditional” broadcasting was meant to restrict the treaty from regulating “webcasting” or other Internet-born content. But the present draft clearly reaches such content.^[2]

One key provision of the Treaty proposal that has been analyzed by James Love is the “ratchet” form of national treatment it proposes.^[3] The current chair’s draft contains a national treatment clause (article 5.2) that allows a contracting party to limit the rights of a broadcasting organization from another contracting party when that contracting party provides fewer rights. Thus, even if the exclusive rights clauses are made permissive, there will be domestic pressure to harmonize to the highest level, especially if adopted by the members of the European Union and other high income parties.

At bottom, the outcomes of the WIPO discussions on the Broadcast Treaty thus far this week show a significant risk of movement toward a diplomatic conference on a negotiating text that no longer

would limit the framework to a signal based approach or only to traditional broadcasting. Maybe it should be called the Internet Streamers Exclusive Rights Treaty.

Article	Issue	Solution	Standing of current draft including suggested amendment by countries at SCCR 45
2-Definitions	The treaty's terms are defined so broadly as to include activities other than traditional broadcasting, e.g., on demand streaming, point to point transmissions. See Love 2023.	Restrict the treaty's terms to apply only to traditional broadcasting—linear radio and television broadcasting and cablecasting.	No amendment offered in public session.
2-Definitions	The treaty definitions do not limit protection to works for which the broadcaster has acquired rights, and also extends to works that are infringing or in the public domain	(c) “programme” means a body of live or recorded material consisting of images, sounds or both, or of representations thereof for which the broadcasting organization has acquired the right to transmit, and where the material is not in the public domain or infringing on the rights on the copyright holder;	No amendment offered in public session.
5- National Treatment	Paragraph 5.2 of the draft allows a contracting Party to limit the rights of a broadcasting organization from another contracting party, when that contracting party provides fewer rights. This pressures countries to provide more than the minimum required in current Article 10, to adopt the exclusive and post-fixation rights in articles 6-9.	Delete paragraph 5.2.	No amendment offered in public session.
6-Retransmission	Beyond signal based protection. Requires “exclusive right of authorizing the retransmission to the public” instead of a signal based protection. See Hugenholtz 2023	Delete Article 6.	No amendment offered in public session.
7-Fixation	Beyond signal based protection. Requires provision of exclusive right of fixation of the programme-carrying signal.	Delete Article 7.	USA requested deletion of article.

8–Stored Programmes	<p>Beyond signal based protection. Requires right to prevent the retransmission of a programme that has been stored after its original linear transmission. Particularly when combined with the Article 7 fixation right, this provides the broadcaster with copyright-like exclusive rights in the programme.</p>	Delete Article 8.	USA requested deletion of article.
9-	<p>The provision in effect creates an exclusive right of broadcasters. Rather than a flexible duty to regulate of government, it mandates “Broadcasting organizations shall enjoy the right to prohibit.” This is an area already regulated by the Brussels Convention.</p>	Delete Article 9.	No amendment offered in public session.
11–Limitations	<p>The treaty allows the adoption of exceptions, but does not mandate them. Thus, broadcasters could receive more protection than copyright owners. The three-step test is not appropriate for a signal-based treaty, is not found in the Rome Convention or Brussels Convention or Article 14 of TRIPS, and is based upon the most restrictive version of the 3-step test. If a 3 -step test is included, it could be designed to expand the flexibility, not shrink it. Exceptions for exhaustion of rights in TRIPS (Article 6) and remedies to anticompetitive acts (TRIPS Article 40, also found in the Brussels convention) have been removed from earlier drafts.</p>	<p>In Article 11(1) and (2), replace “may” with “shall.” Delete Article 11(3) (three-step test) or apply only to additional exceptions: (3) Contracting Parties shall confine any additional limitations of or exceptions to ...” Add: “, taking account of the legitimate interests of third parties”</p>	No amendment offered in public session.
12–Tech. Measures	<p>A prohibition on circumvention of TPMs could extend protection to materials in the public domain or prevent the exercise of exceptions.</p>	<p>Restore Article 12(3) mandating exceptions to the circumvention prohibition.</p>	<p>Brazil proposed restoration of TPM exception.</p>

^[1] As is normal in WIPO negotiations, considerable time in the meeting of the SCCR was conducted in “informal” session where public reporting on what was proposed or discussed is not permitted.

^[2] The analysis of the issues and proposed solutions are drawn from Hugenholtz, Bernt, “Simplifying the WIPO Broadcasting Treaty: Proposed Amendments to the Third Revised Draft” (2023). Joint PIJIP/TLS Research Paper Series. 85., and Love, James, “The Trouble With the WIPO Broadcasting Treaty” (2023). Joint PIJIP/TLS Research Paper Series. 85. Love, James P., “Comments on the September 6, 2023 Draft of a WIPO Broadcasting Treaty, the Definitions, Scope of Application, National Treatment and Formalities” (2023). Joint PIJIP/TLS Research

^[3] Love, James P., “Comments on the September 6, 2023 Draft”, *supra*.

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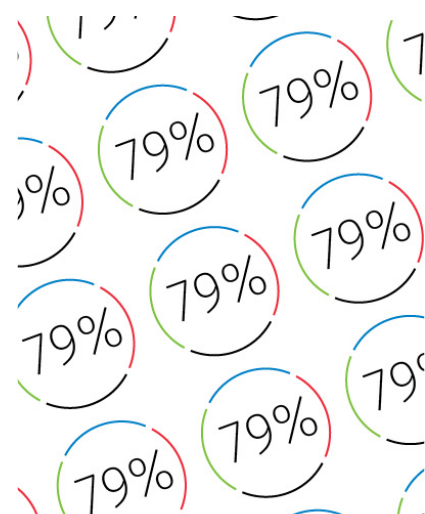
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