
The Legal Protection of Broadcast Signals

At the time of publication of this *IRIS plus*, the WIPO Standing Committee on Copyright and Related Rights is holding its 12th Session, focusing in particular on the protection of broadcast transmissions.

The following questions are likely to be discussed: how are broadcast transmissions protected? Is that protection still in keeping with the latest technological advances? How can new rights, which are better adapted to current technology, be defined? Do these fit easily into the current system of copyright and related rights? What is the definition of broadcasting? What about *webcasting*?

In order to help you follow these discussions, this *IRIS plus* contains important information on current legal protection of broadcast signals at international and European levels, as well as a draft new international protection agreement, which will be discussed and may be adopted by the Standing Committee.

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The Legal Protection of Broadcast Signals

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1. Introduction

The history of neighbouring rights is a turbulent one. Broadcasting organisations, together with performers and phonogram producers, were for the first time granted legal protection on a world-wide level through the International Convention for the Protection of Performers, Producers of Phonograms, and Broadcasting Organisations of 26 October 1961 (the Rome Convention).¹ Although it may have been a first step in the right direction, the text of the Rome Convention soon proved unsatisfactory to all three categories of rightsholders, not least because of the subordinate place that neighbouring rights seemed to occupy in relation to copyright. The technology-dependent wording of its provisions further ensured that the Convention would lose much significance over the years, as technology evolved. Several international and regional instruments have been adopted since then in order to strengthen the protection of broadcasting organisations and to take account of new technological developments, such as satellite broadcasting, cable distribution, and direct-broadcast satellites.² Calls for the elimination of the main causes of irritation arising from the Rome Convention are increasingly being heard from the broadcasting organisations, especially since the technological gap between the broadcasting techniques covered by the Convention and the current possibilities has only grown over the last forty years.

The protection of broadcasting organisations has, however, always been surrounded by controversy. Unlike authors' rights, which reward the author for his creative effort and protect his personality rights, the grant of neighbouring rights for broadcast signals merely reflects the acknowledgement of the organisational, technical, and economic effort invested in a program and its broadcast.³ The main rationale of this type of neighbouring rights is to protect broadcasting organisations against piracy and unfair competition and, in general, against all acts whereby a third party derives unfair commercial profit from its investment.⁴ Another, more prosaic, explanation for the introduction of neighbouring rights for broadcasting organisations is that, with the adoption of the principles of the Rome Convention, the broadcasters became the main source of royalty payments to performing artists and phonogram producers and so, as a form of compensation, they should receive a neighbouring right of their own.⁵ Some uneasiness towards this category of neighbouring rights results from the fact that the regime sets no condition or investment threshold on the broadcasting organisations in order for them to benefit from the protection. Such an unconditional grant of rights is in contrast with every other type of intellectual property regime, where the grant of an exclusive right is predicated on the fulfilment of a condition of originality, novelty, inventiveness, or substantial investment. Other critics point to the fact that this category of neighbouring rights is granted irrespective of whether the content of the broadcast is subject to the copyright protection of other rightsholders or whether it constitutes material in the public domain.⁶

The question then arises whether the fight against signal piracy or the need to compensate broadcasters for the high licensing fees of performers and phonogram producers constitute sufficient grounds to confer on broadcasting organisations such a strong monopoly on their signals.

This article on the protection of broadcasting organisations is divided into two main parts: the first one describes the current state of the protection at the international and European levels; and the

second one, examines the protection as currently proposed in the consolidated text of the WIPO Standing Committee on Copyright and Related Rights.⁷ The analysis of the present state of the protection of broadcasting organisations will highlight the most important shortcomings of the international instruments on the subject, as well as draw attention to the relatively high level of protection that broadcasting organisations enjoy at the European level. We will thereafter consider some of the issues that are hotly debated within the WIPO Standing Committee and, more specifically, analyse how the proposed changes would compare with the current situation. Finally, we will conclude by making some general remarks on the progress of the Standing Committee towards the adoption of a treaty on the subject.

2. Current Status of Broadcasting Organisations

At the international level, the most important instrument remains the Rome Convention of 1961. The Convention on the Distribution of Programme Carrying Signals Transmitted by Satellite signed in Brussels in 1974 was specifically intended to adapt the protection of broadcasting organisations to the new technological development of satellite broadcasting. As we shall see below, apart from the Rome and Brussels Conventions, the regulation of broadcasting rights is further completed at the international level only by the very succinct provisions of the Agreement on the Trade-Related Aspects of Intellectual Property (TRIPS). At the European level, the Council of Europe has also adopted two instruments and several recommendations dealing with the neighbouring rights of broadcasting organisations. However, these instruments have had a very limited impact in practice. The core of the protection enjoyed by broadcasting organisations in Europe derives from a number of directives adopted by the European Council and the Parliament in the field of copyright and neighbouring rights law.

2.1 Protection at the International Level

2.1.1. Rome Convention

The Rome Convention protects three categories of beneficiaries with radically diverging interests, namely performers, phonogram producers, and broadcasting organisations.⁸ This explains why the road towards the adoption of the Convention was a bumpy one and why the final text is, to a large extent, a reflection of significant compromises on the part of the three categories of rightsholders. Its completion has been described as a remarkable tribute to the diplomatic talents of those who guided the countervailing forces into a workable solution. Its survival, despite the shortcomings, is almost miraculous.⁹ The Convention, which is currently binding upon 73 States, has served as a model for most of the existing national provisions on the protection of neighbouring rights. With respect to broadcasting organisations, the object of the protection is the programme output, or broadcast signal, as opposed to the content of the broadcast, upon which may rest copyright protection that may or may not belong to the broadcasting organisation.¹⁰ Article 13 of the Convention provides for a number of minimum rights to "broadcasting organisations" with

respect to their "broadcasts", two terms that are left undefined. As Rumphorst explains, it is the combined effort of the broadcasting organisation to plan, produce and/or acquire, schedule and transmit programmes that deserves protection against unauthorised appropriation by third parties.¹¹ "Broadcast" is therefore to be understood as the programme output as assembled and broadcast by or on behalf of the "broadcasting organisation", which in turn may be defined as the organisation which engages in this activity.

The duration of the protection granted under the Convention lasts at least until the end of a period of twenty years computed from the end of the year in which the broadcast took place. Since the content of the broadcast is irrelevant, the period of protection must be established with regard to each individual broadcast. Thus, if a broadcasting organisation transmitted a given programme in 2000 and repeats the broadcast ten years later, each individual transmission enjoys a separate period of protection of twenty years. The term "broadcasting" is defined at Article 3 (f) as a "transmission by wireless means for the public reception of sound or of images and of sounds".¹² Pursuant to Article 13, broadcasting organisations have the right to authorize or to prohibit the following acts:

- 1) The re-broadcasting of their broadcasts;
- 2) The fixation of their broadcasts;
- 3) The reproduction of unauthorized fixations; and
- 4) 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.¹³

Clearly, a transmission via cable, or a communication to the public by fixed-service satellite whose signals cannot be directly picked up by the public is excluded from the scope of the definition. The fact that the Rome Convention does not take into account the technological developments that have occurred since its adoption in 1961 undeniably constitutes, from the point of view of broadcasting organisations, the Convention's main shortcoming.¹⁴

2.1.2. *Brussels Satellite Convention*

The Convention on the Distribution of Programme Carrying Signals Transmitted by Satellite,¹⁵ which was adopted in 1974, deals with the protection of satellite transmission by which programmes are transmitted between different broadcasting organisations or between broadcasting organization and cable distributor. According to the provisions of this Convention, Contracting States are required to undertake adequate measures to prevent the distribution on or from their territories of any programme-carrying transmission by any distributor for whom the signal is not intended. In other words, the protection granted under this Convention relates exclusively to the transmissions of signals between broadcasting organisations. Article 3 of the Brussels Convention expressly excludes from the scope of protection "the signals emitted by or on behalf of the originating organisation [that] are intended for direct reception from the satellite by the general public". Arguably, this Convention was negotiated and signed before direct broadcast satellite services had become an economically viable means of exploitation. This exclusion did have as a direct consequence the removal of any practical significance from the Convention. As a result, only 26 States have ratified the Brussels Satellite Convention, in comparison to the 73 Contracting States of the Convention of 1971 for the Protection of Producers of Phonograms against Unauthorized Duplication of their Phonograms,¹⁶ which was also intended to supplement the norms laid down in the Rome Convention.

2.1.3. *TRIPS Agreement*

The provision of the TRIPS Agreement on neighbouring rights is, once again, the result of a compromise. Like the Rome Convention, it deals with all three traditional categories of beneficiaries of the pro-

tection.¹⁷ Unlike the solution adopted with regard to Articles 1 to 21 (except 6bis) of the Berne Convention, however, the TRIPS Agreement does not mandate the Contracting Parties to implement the material regulations of the Rome Convention as such. While the TRIPS Agreement reiterates most of the substantial regulations of the Rome Convention and even provides for some supplemental regulations with respect to the rights of performers and phonogram producers, it imposes no obligation on Contracting Parties to confer neighbouring rights on broadcasting organisations. Article 14, paragraph 3 of TRIPS provides that:

"Broadcasting organisations shall have the right to prohibit the following acts when undertaken without their authorization: the fixation, the 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 Members do not grant such rights to broadcasting organisations, 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 (1971)."

In other words, as long as a Contracting Party complies with the relevant provisions of the Berne Convention, it does not have to grant special rights to broadcasting organisations. This option was introduced mainly to take account of the fact that, in common law countries, copyright protects not only literary and artistic works, but also all material products which may be reproduced or copied without benefiting from industrial property protection.¹⁸ On the other hand, if a Contracting Party chooses to grant protection for broadcast signals, it must meet the minimum standards of Article 13 of the Rome Convention.

Another noticeable difference in treatment between performers and phonogram producers, on the one hand, and broadcasting organisations, on the other hand, concerns the term of protection of the respective neighbouring rights. Article 14, paragraph 5, of the TRIPS Agreement extends the term of protection offered to performers and phonogram producers from the 20 years provided under the Rome Convention, to a period of protection lasting 50 years computed from the end of the calendar year in which the fixation was made or the performance took place. By contrast, this same provision of the TRIPS Agreement merely confirms the term of protection set by the Rome Convention with respect to broadcasting organisations, protection that lasts for at least 20 years from the end of the calendar year in which the broadcast took place.

2.2 Protection at the European Level

2.2.1. *Council of Europe*

Over the years, the Council of Europe also made a few attempts to regulate the protection of broadcasting organisations. Like all other international instruments in the field of broadcasting rights, those of the Council of Europe have met the same limited success. Adopted in June 1960, the European Agreement on the Protection of Television Broadcasts (EAT)¹⁹ was in fact the first international instrument to provide for neighbouring rights protection for broadcasting organisations. Unlike the Rome Convention, the European Agreement deals exclusively with the protection of broadcasting organisations. In many respects, this Agreement is more modern than the Rome Convention. For example, it grants broadcasters the additional right to authorise or prohibit the diffusion of broadcasting by wire. However, for reasons of technical nature, it now has only a limited number of ratifications, some of which have been accompanied by important reservations, which relate exactly to those provisions that go further than the Rome Convention.²⁰

The European Convention Relating to Questions on Copyright Law and Neighbouring Rights in the Framework of Transfrontier Broad-

casting by Satellite (European Satellite Convention) was opened for signature in May 1994.²¹ This regional instrument specifically addresses the technical developments, in particular in the field of broadcasting by satellite, which have resulted in the blurring of the technical differences between direct broadcasting satellites and fixed service satellites. Whereas this Convention has a rather broad coverage, including copyright and neighbouring rights, it contains only one provision on the rights of broadcasting organisations. Article 5, paragraph 1 of the Convention provides that 'as far as trans-frontier broadcasting by satellite is concerned, (...) broadcasting organisations from States parties to this Convention shall be protected, as a minimum, in accordance with the provisions of the Rome Convention'. In essence, the European Satellite Convention adds nothing to the protection afforded to broadcasting organisations under the Rome Convention, whether it is in regard to the scope of the protection or its duration. The European Satellite Convention will enter into force upon ratification by 7 States. Since only two States, Cyprus and Norway, have ratified it so far, only time will tell whether the Convention will ever enter into force.

Both instruments are completed by quite a number of Recommendations of the Committee of Ministers to member States on the subject of copyright and neighbouring rights.²² The latest of these Recommendations was adopted in 2002 and deals expressly with the rights of broadcasting organisations in the digital environment.²³ If implemented, the principles laid down in this Recommendation would indeed bring quite significant changes to the current level of protection of the neighbouring rights of broadcasting organisations. In addition to the rights granted under the Rome Convention, the Recommendation would extend the protection to:

- 1) The right of retransmission of a broadcast by wire or wireless means, whether simultaneous or based on fixations,
- 2) The right of direct or indirect reproduction of the fixations of broadcasts in any manner or form;
- 3) The right of making fixations of broadcasts available to the public by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them; and
- 4) The right of distribution of the fixations and copies of fixations of broadcasts.

The Recommendation encourages Member States to take measures to ensure that broadcasting organisations enjoy adequate protection against any of the acts referred to above in relation to their pre-broadcast programme carrying signals.²⁴ Member States are also invited under the Recommendation to take adequate measures for the protection of technological measures that are used by broadcasting organisations in connection with the exercise of their neighbouring rights, as well as for the protection of rights management information. Finally, the protection would be extended to a period of 50 years from the end of the year in which the broadcast took place. Be that as it may, the Recommendation, as its name indicates, is by nature not a binding legal instrument and we have no indication as to whether or to what extent it has led to any express legislative amendment within the Member States of the Council of Europe.

2.2.2. European Union

In comparison to the protection afforded at the international level, the protection granted to broadcasting organisations within the European Union is relatively high. The *acquis communautaire* with respect to the protection of neighbouring rights of broadcasting organisations derives for a large part from a number of directives adopted over the past decade in the field of copyright and neighbouring rights. For our purpose, the most important directives are the Rental and Lending Rights Directive²⁵ and the InfoSoc Directive.²⁶ In the course of this effort at harmonisation, the European Commission

has always striven, as much as possible, to bring the protection of neighbouring rights up to par with that of copyright law. In effect, such an upgrade in protection has profited not only performers and phonogram producers, but also filmmakers and broadcasting organisations.²⁷ Today, the protection afforded within the European Union far exceeds the norms of the Rome Convention and is almost equivalent to that of Recommendation (2002)7 of the Council of Europe.

Pursuant to article 7 of the Rental and Lending Rights Directive, broadcasting organisations have the exclusive right to authorise or prohibit the direct or indirect reproduction of fixations of their broadcasts. Article 6(2) confers on broadcasting organisations the right to authorize or prohibit the fixation of their broadcasts, whether these broadcasts are transmitted by wire or over the air, including by satellite.²⁸ Paragraph 3 specifies, however, that "a cable distributor shall not have the right provided for in paragraph 2 where it merely retransmits by cable the broadcasts of broadcasting organisations". This last provision takes account of the opinion of some Member States that it is not appropriate to grant a proper neighbouring right for cable distributors that only make simultaneous retransmissions of received broadcasts. Articles 6(2) and article 6(3) would seem to give an indirect definition of the 'broadcasting organisation', whereby the fixation right is vested in traditional broadcasting organisations, satellite broadcasters, and cable distributors. According to Reinbothe and von Lewinski, this definition applies to the entire Directive, and the fact that Article 8(3)²⁹ refers exclusively to the rebroadcasting by wireless means does not mean that transmission by satellite or by cable is not included.³⁰ The rights conferred under article 8 of the Rental and Lending Rights Directive are modelled after the provisions of the Rome Convention and constitute a minimum level of protection. As article 6 of the Satellite and Cable Retransmission Directive expressly indicates, Member States may provide for more far-reaching protection.³¹ Finally, Article 9(1) of the Rental and Lending Rights Directive requires Member States to grant broadcasting organisations the exclusive right to distribute fixations of their broadcasts, including copies thereof, by sale or otherwise.

According to Article 3(4) of the Directive harmonising the term of protection of copyright and certain related rights,³² the rights of broadcasting organisations 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. Contrary to the Rome Convention however, the duration is calculated from the first broadcast only, so that the repeat of a broadcast does not give rise to a separate term of protection.³³

Like Recommendation (2002)7 of the Council of Europe, the InfoSoc Directive is intended to adapt the protection granted to authors and neighbouring rightsholders, such as broadcasting organisations, to the digital environment. Among other things, the Directive clarifies that broadcasting organisations have 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.³⁴ The Directive grants an exclusive right to communicate a work to the public only to authors and not to neighbouring rightsholders, such as broadcasting organisations, since this right is already provided for under the Rental and Lending Right Directive. Broadcasting organisations enjoy, under the InfoSoc Directive, the exclusive right to authorise 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 of fixations of their broadcasts, whether those broadcasts are transmitted by wire or over the air, including by cable or satellite.³⁵ Generally speaking, this provision is designed to cover on-demand services over the Internet. It is unclear whether webcasting and other similar types of on-line transmission techniques are protected under the InfoSoc Directive as, although they do not constitute on-demand delivery services, they do

constitute a transmission "by wire". In addition to the creation of new rights, Member States are required to implement the provisions of the InfoSoc Directive with respect to the legal protection of technological measures and of rights management information. Unlike Recommendation (2002)7 of the Council of Europe, however, no protection is afforded at Community level with respect to pre-broadcast programme carrying signals.

3. Issues Raised by the Possible Treaty

Since the adoption of the WIPO Copyright Treaty (WCT) and the WIPO Performers and Phonograms Treaty (WPPT) of 1996,³⁶ stakeholders and lawmakers have been committed to bringing the international protection of broadcast signals up to par with that of performers and phonogram producers and to adapt it to the digital network environment. The topic of modernisation of the principles of the Rome Convention with respect to the protection of broadcasting organisations has been on the agenda of the WIPO Standing Committee on Copyright and Related Rights since November 1998. At that time, most delegations agreed on the principle that the existing international framework should be updated and improved and were confident that a new instrument would see the light in 2000-2001.³⁷ Today, more than six years after the launch of the discussion process, the protection of broadcasting organisations remains the main topic on the agenda of the Standing Committee and a new instrument has yet to be adopted. Although the Chairman of the Standing Committee recently reported some progress towards a consensus, several important issues still generate intense debate: the object of protection and definitions, beneficiaries of protection and national treatment, rights of broadcasting organisations, obligations on technological measures, application in time and relationship with other treaties. Before the latest meeting of the Standing Committee, held in June 2004, the delegations had once again been invited to submit proposals in treaty language, which have been compiled into a consolidated text.³⁸ Time will tell if and when a new treaty on the protection of broadcasting organisations will be adopted and how far the protection will reach.

For now, let us concentrate on two major stumbling blocks encountered during the discussions of the Standing Committee: first, what is the scope of protection foreseen under the possible treaty. In other words, who are the beneficiaries of the protection: should it be granted only to traditional broadcasting entities or should it also extend to datacasters, cablecasters, simulcasters and webcasters? Second, which new rights should be conferred on broadcasting organisations to allow them to combat piracy? What would be the status of pre-broadcast programme carrying signals?

3.1 Scope of Protection

When the Rome Convention was signed, FM radio barely existed, digital audio broadcasting was hardly imaginable, and satellite and computer networks belonged to the realm of science fiction. Technological developments change the broadcasting market by adding new channels of mass communication. In the current technological environment, a broadcast signal may still originate from a terrestrial transmitter, but it is more likely to be delivered *via* satellite or *via* cable. A drastic increase in bandwidth and computer networking further accounts for the emergence of streaming video and audio services, as well as for datacasting, cablecasting, simulcasting or webcasting technologies. The new digital transmission technologies allow the creation and distribution of new kinds of services. This is for instance the case of multi-channel TV, which implies a greater choice of programmes and video-on-demand. Estimates predict that within the next few years, computer networks will allow average home users to listen to music and to watch live shows, movies and series of the same technological quality as today's TV and Radio broadcasting services.

The question arises today of whether these new techniques fall under the definition of a "broadcasting entity" in the sense of a possible international instrument on neighbouring rights of broadcasting organisations. Does the expression "broadcasting entity" include datacasters, cablecasters, simulcasters and webcasters? Or should these new categories of "broadcasters" be the subject of a separate definition? Although the definition of what constitute "broadcasting" and a "broadcasting organisation" has always been a thorny issue, it has proven particularly difficult throughout the discussions of the Standing Committee. Delegations are indeed strongly divided on the question of webcasting. The elaboration of workable definitions is paramount for the proper determination of the scope of protection of any upcoming treaty on the broadcasters' rights, as well as to avoid any inconsistency with existing international instruments.

In the course of the work of the Committee, Governments and the European Community were invited to submit proposals on this issue. Several proposals for a new instrument on the protection of broadcasting organisations have been received by the Secretariat of the World Intellectual Property Organization (WIPO) and made available to all participating Delegations. The Secretariat has prepared at different times several documents containing comparisons of the proposals, the latest updated version being dated 15 September 2003 (SCCR/10/3) and prepared for the tenth session of the Standing Committee. The discussions of the Standing Committee from its second session until the tenth session were based on the above-mentioned proposals and facilitated by the comparative documents prepared by the Secretariat. The consolidated text covers all the necessary articles for a new treaty, both substantive provisions and administrative and final clauses. The consolidated text provides a facilitating tool for the Standing Committee, which represents a simplifying step forward from the comparative document referred to above. The function of the consolidated text is to indicate clearly areas where there is a high degree of agreement in substance in the proposals and areas where there are important divergences in the proposals. In areas of agreement single proposals of articles are presented, sometimes in a combined, reorganized or reformulated format. In areas of divergence varying solutions have been presented.

The current version of the consolidated text prepared by the Standing Committee³⁹ contains a number of definitions. Among them is the definition of "broadcasting", which now reads as follows:

"'Broadcasting' means the transmission by wireless means for public reception of sounds or of images or of images and sounds or of the representations thereof; such transmission by satellite is also "broadcasting". Wireless transmission of encrypted signals is "broadcasting" where the means for decrypting are provided to the public by the broadcasting organization or with its consent. "Broadcasting" shall not be understood as including transmissions over computer networks."

This definition is inspired from Article 2 of the WPPT, whereby "broadcasting" is confined to transmissions by wireless means. Note that such a definition would diverge from the definition of "broadcasting" as it is presently applied at the European Union level that also includes broadcasts by wire. Contrary to this same provision of the WPPT, which is silent on the issue, Article 2(a) of the consolidated text expressly excludes computer network transmissions from the definition of broadcasting, in such a way that it is reasonable to infer that webcasting or any other use of the Internet to transmit content is excluded from the definition. With respect to the reference to "sounds and images", the new convoluted wording differentiates "sounds and images" from written text and data, conferring protection only on the first. This distinction could be particularly problematic in the light of digital signals, where the technology allows for the combination of ancillary data as texts, graphics, moving pictures and subtitles alongside the "traditional" image and sound. These addi-

tional forms of transmission can be used, for example by webcasters, to provide added value for consumers with the supply of programme related background information, interviews, links, biographies of the actors, different language versions or subtitles etc. At this time, it would seem that such signals are not entitled to any neighbouring rights protection under the consolidated text.

In contrast with all other international instruments on the subject, the consolidated text provides for a definition of "broadcasting organisations". In the discussions in the Standing Committee, it was felt that some limits should be set concerning the persons benefiting from the protection of the new Instrument. Not everybody transmitting program-carrying signals shall be regarded as a "broadcasting organization." The definition proposed in item (b) consists of three main elements: (1) the person shall be a "legal entity", (2) taking "the initiative" and having "the responsibility," for "the transmission", and (3) for "the assembly and scheduling of the content of the transmission."⁴⁰ It is suggested that the definition of "broadcasting organization" would be applied *mutatis mutandis* to the legal entities engaged in cablecasting and, subject to the final scope of the new Instrument, in webcasting.⁴¹

Article 2(c) of the current version of the consolidated text provides for a separate definition of "cablecasting", which reads as follows:

"Cablecasting" means the transmission by wire for public reception of sounds or of images or of images and sounds or of the representations thereof. Transmission by wire of encrypted signals is "cablecasting" where the means for decrypting are provided to the public by the cablecasting organization or with its consent. "Cablecasting" shall not be understood as including transmissions over computer networks;"

The definition follows *mutatis mutandis* the definition of "broadcasting" in item (a), and also in the WPPT. The notion of "cablecasting" is confined to transmissions by wire in line with the proposals of Argentina (using the term "cable distribution"), Egypt, Singapore, and the United States of America. No wireless transmissions, including by satellite, are included in "cablecasting." In the definition, the interpretative clause referring to encrypted signals is maintained. For the same reason as in the case of the definition of "broadcasting", "transmissions over computer networks" are excluded from the notion of "cablecasting". The definition of "cablecasting" is needed if the notion of traditional broadcasting is adopted in the new Instrument as proposed, but would be superfluous if the new Instrument were based on a broader notion.

Proposed Article 2(d) contains a definition of "retransmission".⁴² The term "retransmission" encompasses all forms of retransmission by any means, *i.e.* by wire or wireless means, including combined means. It covers rebroadcasting, retransmission by wire or cable, and retransmission over computer networks. All proposals contained suggestions on retransmission in narrower or broader form, either in the definitions or in the clauses on rights. In the open-ended form of the definition, "retransmission" covers the substance of all proposals. Language has been added to make it clear that protection should extend to subsequent retransmissions. The definition is confined to simultaneous retransmissions only.

As mentioned above, webcasting currently represents the most contentious issue among the delegations. Webcasting is the delivery of content as real-time and recorded audio and video signals by broadcasting them over the Internet.⁴³ The technology involves the digital compression of audio, video, and text, which is then transmitted without delay. In practice, the streaming software creates a "buffer" in a computer's RAM memory allowing its user to download video or audio in packets, a few seconds at a time, creating the effect of a con-

tinuous flow of transmission. The streaming technology enables suppliers to opt for a few models of transmission over the Internet, among them simulcasting and fixed or on-demand webcasting.⁴⁴ In fixed webcasting, the schedule and appearance of the webcast is determined in advance without allowing the user to change or control the streamed content. This model, *mutatis mutandis*, resembles any other form of traditional television or radio broadcasting. On-demand webcasting involves the transmission of compressed audio or video signals most commonly used over the Internet today. This model allows users to fast-forward, rewind, pause, stop, record and replay the event being viewed on their personal user-end device.⁴⁵ The key feature of on-demand webcasting is the ability of the user to control the scheduling and transmission of the webcast.⁴⁶ On-demand webcasting is similar to the cablecasters' "on-demand services".⁴⁷ Simulcasting on the Internet involves the transmission of signals that hold an identical representation of images and sound that are broadcast at the same time through traditional television or radio broadcasting media.

Until now, broadcasting has always been understood as a transmission intended for "public reception", whereas webcasting and "video-on-demand" services are sent through computer networks from the server of the content provider directly to the end-user's device. In "video-on-demand" services, the transmitter streams the requested content directly to the customer's decoder. One can argue that a particular webcast or "on-demand" service cannot fall within the scope of "broadcasting", since the transmission is not preformed "for the public", but rather exclusively for a user who explicitly requested the transmission. In traditional broadcasting, which uses a "point to multi-point" technology, a single process is involved that transfers content from a single origin to multiple consumers. On the other hand, webcasting or "video-on-demand" services are accessible to a group of anonymous individuals. One could argue that a webcast transmission is available for "public reception" and therefore, could be defined as a transmission to the public. It is also a service intended for the public as long as any "member of the public" has at least the opportunity to access the service. Opinions are divided regarding the proper interpretation of "broadcasting".

In this context, delegations have been discussing the need for and possibility of introducing a separate definition of "webcasting" in the text. It is essential to realise that a broad interpretation of the notion of "broadcasting organisation" has a direct influence on the scope of application of the treaty. Two alternatives have been included in the consolidated text. Alternative C, which was put forward by the delegation from the United States of America, proposes the inclusion in the text of the following definition of "webcasting":

"Webcasting" means the making accessible to the public of transmissions of sounds or of images or of images and sounds or of the representations thereof, by wire or wireless means over a computer network at substantially the same time. Such transmissions, when encrypted, shall be considered as "webcasting" where the means for decrypting are provided to the public by the webcasting organization or with its consent."

In Alternative C, the structure of the definition of "webcasting" follows the definitions of "broadcasting" and "cablecasting". The operative term of the definition is not "transmission" but "making accessible to the public of transmissions." This expression implies the modicum of interactivity in today's technological environment that is necessary to access the streaming of a program-carrying signal. It is the receiver who activates or instigates the transmission over a telecommunications path. The elements "to the public" and "at substantially the same time" serve to limit the definition to accessibility of real-time streaming that may be received by several receivers at the same time. The receiver may log on to the program flow at a given point of time and receive what follows but cannot influence the program flow otherwise. The definition confines the making accessi-

ble of transmissions to such activity over computer networks, which by nature may take place by wire or wireless means.

Alternative D consists in not including any definition of “webcasting” at all in the text. This Alternative recognizes the fact that a great majority of delegations at the debates in the Standing Committee opposed the extension of the protection to webcasts. Many delegations have indicated that further study is needed and have suggested that the issue of webcasting deserves to be dealt with in future discussions and not in the present framework.

These two Alternatives on the definition of “webcasting” are completed by those of Article 3 of the consolidated text on the scope of application of the Treaty. According to Article 3(1), the protection granted under this Treaty would apply to the rights of broadcasting organisations in respect of their broadcasts. Article 3(2) states that the provisions of this Treaty would apply *mutatis mutandis* to the rights of cablecasting organisations in respect of their cablecasts. However, with respect to webcasting entities, three alternatives have been put forward. Alternative E offers the possibility of extending, by *mutatis mutandis* application, the rights of broadcasting organisations to the simultaneous and unchanged webcasting by them of their own broadcasts (“simulcasting”). It corresponds to the proposal of the European Community and its Member States, which was based on the legal techniques of assimilating such simulcasting to broadcasting (“as if it were broadcasting”). Alternative F offers, in line with the proposal of the United States of America, the possibility of extending, by *mutatis mutandis* application, to webcasting organisations the same protection that will be accorded to broadcasting and cablecasting organisations. Finally, Alternative G recognizes the limited support at this stage of international debate for protection beyond the areas of broadcasting and cablecasting. This alternative would lead to the adoption of Alternative D in Article 2(g), as the definition of “webcasting” would not be needed.

3.2 Substance of Protection

The rights enumerated in the consolidated text of the Standing Committee are very similar to those listed in Recommendation (2002)7 of the Council of Europe. Despite some minor doctrinal differences, there appears to be general agreement that any new treaty should clearly protect broadcasts transmitted for public reception via wire or wireless means, including by cable or satellite. Some of the rights proposed in the consolidated text⁴⁸ include rights with respect to:

- a) The retransmission, by any means of their broadcasts (article 6);
- b) The communication to the public of broadcasts, if such communication is made in places accessible to the public against payment of an entrance fee (article 7);
- c) The fixation of their broadcasts (article 8);
- d) The direct or indirect reproduction of fixations of broadcasts (article 9);
- e) The making available to the public of the original and copies of fixations of their broadcasts, through sale or other transfer of ownership (article 10);
- f) The transmission of their broadcasts following fixation of such broadcasts (article 11); and
- g) 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 a time individually chosen by them (article 12).

With respect to the right of reproduction of fixations of broadcasts under Article 9 of the consolidated text, two alternatives were put forward. The first alternative confers on broadcasting organisations the exclusive right of authorising the direct and indirect reproduction, in

any manner or form, of fixations of their broadcasts. The second alternative gives broadcasting organisations two distinct rights: (1) the right to prohibit the reproduction of fixations of their broadcasts; and (2), the right to authorise the reproduction of their broadcasts from fixations made pursuant to the fair use doctrine or other national legislation exceptions, when such reproduction would not be permitted by law or otherwise made without their authorization. This second paragraph corresponds to Article 13(c)(i) and (ii) of the Rome Convention.

With regard to article 10 of the text, the United States of America suggested, instead of a right of distribution as worded above, a second alternative: to grant a more restricted right to prohibit the distribution to the public and the importation of reproductions of unauthorised fixations of their broadcasts. Note that this solution, confined to the “outlawing” of bootlegged copies of broadcasts, would derogate from the one adopted by the WPPT and by the European Union.

Apart from the problems raised by webcasting, another long-debated issue within the Standing Committee concerns the protection that should be afforded to pre-broadcast programme carrying signals. Generally speaking, “programme-carrying signal transmission” can be divided into two types: pre-broadcast and post-broadcast transmission. In post-broadcast transmissions, the signals that are transmitted to the public can be perfectly reproduced, whereby perfect digital copies of broadcast programs can easily be copied and offered as Internet downloadable copies that can be redistributed. Transmissions of broadcasts over the Internet are vulnerable to piracy because of the ease with which contents can be accessed and copied. Pre-broadcast signals are signals that are not intended for direct reception by the public. Such signals are used by broadcasting organisations to transfer 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 transfer of program material between broadcasting organisations, as may be used for broadcast after a delay or after some editing of the material.⁴⁹ They do not constitute “broadcasting”, since they are not intended for the public, but form rather a point-to-point transmission by telecommunications links. Since pre-broadcast signals are often transmitted in digital form, perfect digital copies can be obtained from the programme-carrying signals and copies, and downloads or re-broadcasting can be made. The pre-broadcast signals can be disseminated simultaneously with the official transmissions or even before the scheduled time for those transmissions.

The issue of pre-broadcast signals had already been addressed during the negotiation process leading to the adoption of the Brussels Satellite Convention, as a result of which Contracting States were required to undertake adequate measures against unauthorized distribution. However, the question of whether the measures to control this phenomenon should be regulated by public or private law stayed open. After long discussions, Article 13 of the consolidated text now provides that “broadcasting organisations 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”. The open wording of this provision leaves Contracting Parties the necessary room to decide how best to implement this obligation.

Conclusion

In November 2004 the WIPO Standing Committee on Copyright and Related Rights will hold its twelfth session dedicated to the elaboration of an instrument on the protection of the rights of broadcasting organisations. Although the agenda for the meeting is not yet available, it is safe to assume that the delegations will attempt to consolidate the common ground achieved so far, with a view to convening a Diplomatic Conference at a later date for the adoption of



a treaty on the subject. According to the current version of the consolidated text drawn up by the Standing Committee, the protection afforded by any new treaty would show distinct similarities with the protection actually granted at the European Union level, as well as with Recommendation (2002)7 of the Council of Europe. In addition to creating new rights that are arguably better adapted to the state of technology, the consolidated text would, like the WPPT and the European instruments, contain provisions with respect to the legal protection of technological measures and of rights management infor-

mation. A new treaty based on this consolidated text would follow the trend established in Europe and increase the duration of protection to 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, instead of the 20 years provided for under the Rome Convention. For the rest, it remains to be seen whether the discussions of the upcoming meeting of the Standing Committee will lead to the adoption of a treaty and whether the protection of such a treaty will extend to webcasters.

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 Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite (Brussels Convention), signed in Brussels, 21 May 1974, text available at: <http://www.wipo.int/clea/docs/en/wo/wo025en.htm>
 European Convention Relating to Questions on Copyright Law and Neighbouring Rights in the Framework of Transfrontier Broadcasting by Satellite (European Satellite Convention), Council of Europe, Strasbourg, 11 May 1994, text available at: <http://conventions.coe.int/Treaty/en/Treaties/Html/153.htm>
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- 6) Ian D. Thomas, Revision of the Rome Convention: is it necessary and timely?, Copyright Bulletin, vol. XXV, No. 4, 1991, pp. 32-35, p. 32.
- 7) Consolidated Text For A Treaty On The Protection Of Broadcasting Organisations, Geneva, 29 February 2004, SCCR/11/3. Text available at: http://www.wipo.int/documents/en/meetings/2004/sccr/doc/sccr_11_3.doc
- 8) Kerever (1991), p. 5.
- 9) Thomas (1991), p. 35.
- 10) Helberger (1999), p. 4.
- 11) Werner Rumphorst, Protection of broadcasting organisations under the Rome Convention, Copyright Bulletin, Vol. 27, 1993, p. 11.
- 12) Rome Convention, Art 3(f).
- 13) André Kerever, Should the Rome Convention be revised and, if so, is this the right moment?, Copyright Bulletin, Vol. XXV, No. 4, 1991, p. 13.
- 14) André Françon, Should the Rome Convention on neighbouring rights be revised?, Copyright Bulletin, Vol. XXV, No. 4, 1991, p. 21.
- 15) Convention on the Distribution of Programme Carrying Signals Transmitted by Satellite, signed in Brussels, 21 May 1974, Treaty available at: <http://www.wipo.int/clea/docs/en/wo/wo025en.htm>
- 16) Phonograms Convention, WIPO, Geneva, 1971. Text available at: <http://www.wipo.int/clea/docs/en/wo/wo023en.htm>
- 17) D. Gervais, The TRIPS Agreement: Drafting History and Analysis, 2nd ed., London, Sweet & Maxwell, 2003, p. 160.
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- 19) Text available at: <http://conventions.coe.int/Treaty/en/Treaties/Html/034.htm>
- 20) Helberger (1999), p. 4.
- 21) Text available at: <http://conventions.coe.int/Treaty/en/Treaties/Html/153.htm>
- 22) Recommendation No. R (86)2 of the Committee of Ministers to member States - On Principles Relating To Copyright Law Questions In the Field of Television By Satellite and Cable, 14 February 1985; Recommendation No. R (86)9 of the Committee of Ministers to member States - On Copyright and Cultural Policy, 22 May 1986; Recommendation No. R (88)1 of the Committee of Ministers to member States - On Sound and Audiovisual Private Copying, 18 January 1988; Recommendation No. R (88)2 of the Committee of Ministers to member States - On Measures to Combat Piracy in the Field of Copyright and Neighbouring Rights, 18 January 1988; Recommendation No. R (91)5 of the Committee of Ministers to member States on the Right to Short Reporting on Major Events Where Exclusive Rights for their Television Broadcast have been Acquired in a Transfrontier Context, 11 April 1991; Recommendation No. R (91)14 of the Committee of Ministers to member States on the Legal Protection of Encrypted Television Services, 27 September 1991; Declaration on Neighbouring Rights, Committee of Ministers, 17 February 1994; Recommendation No. R(94)3 of the Committee of Ministers on the Promotion of Education and Awareness in the Area of Copyright and Neighbouring Rights Concerning Creativity, 5 April 1994; Recommendation No. R (95)1 of the Committee of Ministers to member States on Measures against Sound and Audiovisual Piracy, 11 January 1995. The text of these Recommendations can be found by date at: <https://wcm.coe.int/rsi/CM/index.jsp>
- 23) Recommendation Rec(2002)7 of the Committee of Ministers to member States on measures to enhance the protection of the neighbouring rights to broadcasting organisations, Stras-

bourg, 11 September 2002. Text available at: <https://wcm.coe.int/ViewDoc.jsp?id=303043&Lang=en>

- 24) For an explanation of the different types of programme carrying signals, see *infra* at 3.2.
- 25) 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, OJ L 346 27 November 1992 p. 61. Text available at: http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=31992L0100&model=guichett
- 26) 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: http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=32001L0029&model=guichett
- 27) J. Reinbothe, S. von Lewinski, The EC Directive on Rental and Lending Rights and on Piracy, London, Sweet & Maxwell, 1993, p. 85.
- 28) Rental and Lending Rights Directive, Art. 6(2).
- 29) Id., Art. 8 (3) which reads as follows: "Member States shall provide for broadcasting organisations the exclusive right to authorise 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."
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- 31) 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. Text available at: http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=31993L0083&model=guichett
- 32) 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. Text available at: http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=31993L0098&model=guichett
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 and text of the WPPT available at: <http://www.wipo.int/clea/docs/en/wo/wo034en.htm>
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- 40) Id., Art. 2(b).
- 41) Id., comment 2.04 of the Explanatory notes.
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- 44) A. Morrison and L. E. Gillies, Securing Webcast Content in the European Union, Copyright Technical Protection and Problems of Jurisdiction on the Internet, [2002] E.I.P.R. 74-80, at p.74.
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- 47) For example: Time Warner on demand channel available at: <http://www.twcnbraska.com/cable/vod.shtml>
- 48) SCCR, Consolidated Text for a Treaty on the Protection Of Broadcasting Organisations, WIPO, Geneva, 29 February 2004, SCCR/11/3.
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