

DOCTRINE AND OPINIONS

THE DRAFT WIPO BROADCASTING TREATY AND ITS IMPACT ON FREEDOM OF EXPRESSION¹

Patrícia Akester
PhD - Cambridge University

Abstract

This study is focused on the *Second Revised Consolidated Text for a Treaty on the Protection of Broadcasting Organizations*, SCCR/12/2 Rev.2 of 2 May 2005 (hereinafter SCCR/12/2 Rev.2)), and the *Working Paper on Alternative and Non-Mandatory Solutions on the Protection in relation to Webcasting*, SCCR/12/5 Prov. of 13 April 2005 (hereinafter SCCR/12/5), prepared by the WIPO Standing Committee on Copyright and Related Rights, taking into consideration the changes introduced by the *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*, SCCR/14/2 of 8 February 2006 (hereinafter SCCR/14/2 or Draft Treaty).

This approach accords with the introductory notes to the Working Paper for the Preparation of the Basic Proposal for a Treaty on the Protection of Broadcasting Organizations SCCR/14/3 of 8 February 2006 (SCCR/14/3), which states that “*the Working Paper is intended to be a tool for the Committee for testing the Draft Basic Proposal, and the basis to consider whether certain elements should be added or replaced. Both documents should be read in conjunction with the previous set of documents, especially with the Second Revised Consolidated Text (SCCR/12/2 Rev.2).*”

The study critically analyses the Draft Treaty’s provisions on object of protection, beneficiaries of protection, scope of granted rights, exceptions and limitations, term of protection, obligations regarding protection of technological measures, rights management information and formalities, pointing out potential areas of conflict with freedom of expression.

¹ This study was subject to a peer-review carried out by Professor J. Ginsburg, Professor T. Dreier and Dr. U. Suthersanen. The author wishes to thank the latter for their valuable comments on the original draft. All errors and omissions are those of the author.

For the sake of a more comprehensive view a brief examination of the main international instruments addressing the rights of broadcasting Organizations is also advanced (with the aid of eight tables comparing the instruments at stake), aiming to ascertain whether the Draft Treaty, in comparison with the existing international framework on copyright and neighbouring rights, would add further constrictions on the right to freedom of expression. The protection granted by national or regional telecommunications or conditional access laws remains outside the scope of the study.

The third part of the Study concentrates on the potential negative impact of the Draft Treaty on freedom of expression. Ascertaining whether the Draft WIPO Broadcasting Treaty may affect negatively the right to freedom of expression requires, in the context of the above analysis, an investigation of the way in which the existence and exercise of copyright restrictions, use of public domain works, use of works by their respective authors and owners, and generally access to information, knowledge and culture may be affected by the proposed provisions. In this context, potential problems of the proposed instrument are illustrated by means of concrete examples. There follows an assessment of the Draft Treaty in the context of European Court of Human Rights jurisprudence.

Lastly, recommendations are made and conclusions are drawn.

Table of Contents

Abstract.....	1
Table of Contents.....	3
Background.....	4
The Berne Convention, 1886.....	4
The Rome Convention, 1961.....	5
The Satellite Convention, 1974.....	7
The TRIPS Agreement, 1994.....	7
The WIPO Copyright Treaty, 1996.....	8
The WIPO Performances and Phonograms Treaty, 1996.....	10
Conclusion.....	11
Overview of the Draft WIPO Broadcasting Treaty.....	12
Introductory.....	12
Protected subject-matter.....	13
Beneficiaries.....	14
Scope of granted rights.....	15
Exceptions and limitations.....	22
Term of protection.....	23
Technological protection measures.....	24
Rights management information.....	24
Formalities.....	25
Webcasting.....	25
Conclusion.....	26
Does the Draft WIPO Broadcasting Treaty negatively affect the right to freedom of expression?.....	27
The right to freedom of expression.....	27
The liaison between freedom of expression and copyright.....	29
Freedom of expression versus copyright in the context of the Draft WIPO Broadcasting Treaty.....	32
Introductory.....	32
Protected subject-matter.....	32
Rights and exceptions.....	33
Term of protection.....	36
Obligations concerning technological measures.....	38
Formalities.....	44
Webcasting.....	44
Assessment of the Draft Treaty in the context of European Court of Human Rights jurisprudence.....	44
Conclusions and Recommendations.....	46

Background

The main international instruments addressing the rights of broadcasting Organizations are the Rome Convention² and the TRIPS Agreement.³ Where the broadcast contains works or other related subject matter, other treaties are concerned, namely the Berne Convention,⁴ the WCT,⁵ and the WPPT⁶. The protection of programme-carrying signals is currently provided by the Satellite Convention.⁷ There follows a brief analysis of these instruments.

The Berne Convention, 1886

The Berne Convention was created in 1886. It is the fundamental instrument of international copyright law, owing its basic principles to the author's rights concept, in the sense that authors and their creations should be granted substantial protection.⁸

Four crucial principles are set out in Berne: minimum rights,⁹ automatic protection¹⁰, national treatment,¹¹ and independence of protection.¹² Protection is independent of the mode and form of expression of the work.¹³ Notwithstanding the work must be

² Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, Rome, 1961.

³ Agreement on Trade-related Aspects of Intellectual Property Rights, Marrakesh, 1994.

⁴ Berne Convention for the Protection of Literary and Artistic Works, Paris text, 1971.

⁵ WIPO Copyright Treaty, Geneva, 1996.

⁶ WIPO Performances and Phonograms Treaty, Geneva, 1996.

⁷ Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite, Brussels, 1974.

⁸ See, *inter alia*, A. Bogoch, "The First Hundred Years of the Berne Convention for the Protection of Literary and Artistic Works" (1986) 22 *Copyright* 322-333; M. Stojanovic, "Quel avenir pour la Convention de Berne?" (1986) 130 *RIDA* 3-17; E. Ulmer, "One Hundred Years of the Berne Convention" (1986) 17:6 *I.I.C.* 707-715; S. Ricketson, "The shadow land of Berne: A survey of the hidden parts of the Berne Convention – Part I" (1988) 7 *E.I.P.R.* 197-202; S. Ricketson, "The shadow land of Berne: A survey of the hidden parts of the Berne Convention - Part II" (1988) 9 *E.I.P.R.* 267-274; S. Ricketson, "The shadow land of Berne: A survey of the hidden parts of the Berne Convention – Part III" (1989) 2 *E.I.P.R.* 58-65; P.E. Geller, "Can the GATT Incorporate Berne Whole?" (1990) 11 *E.I.P.R.* 423-428; A.D. Schuz, "An Overview of the Berne Convention – Generally and in relation to Computer Programmes and Semiconductor Chips" (1993) 9:4 *C.L. & P.* 115-121; G.W.G. Karnell, "The Berne Convention Between Author's Rights and Copyright Economics – An International Dilemma" (1995) 26:2 *I.I.C.* 193-213. For a detailed study of the Berne Convention see C. Masouyé, *WIPO guide to the Berne Convention* (English version by W. Wallace) (WIPO, 1978), and S. Ricketson and J.C. Ginsburg, *International Copyright and Neighbouring Rights: the Berne Convention and Beyond* (2nd ed., Oxford University Press, 2005).

⁹ Member countries must grant authors "*the rights specially granted*" by the Convention (Berne Convention, Article 5(1)). See Berne Convention, Articles 6bis (moral rights), 8 (translation right), 9 (reproduction right), 11 (public communication right), 11bis (broadcasting and cable retransmission right), 12 (adaptation right), 14 (distribution of cinematographic works).

¹⁰ Copyright protection is granted automatically upon the creation of the work and without the fulfilment of any formalities (Berne Convention, Article 5(2)).

¹¹ Member countries must give nationals of other member countries the same rights as enjoyed by its own nationals (Berne Convention, Article 5(3)).

¹² Protection is independent of the existence of protection on the country of origin of the work (Berne Convention, Article 5(2)), subject to a few exceptions.

¹³ Berne Convention, Article 2(1).

original, that is, an intellectual creation.¹⁴ Fixation can be required as a condition of protection.¹⁵

Moral rights encompass the right to claim authorship of the work and the right to object to any distortion or modification of the work.¹⁶

Authors of literary and artistic works are given the rights of authorizing the translation,¹⁷ reproduction,¹⁸ communication to the public,¹⁹ broadcasting and cable retransmission,²⁰ adaptation, arrangements and other alterations of their works²¹ and distribution of the cinematographic adaptation of their works.²² The owner of copyright in a cinematographic work is protected as the owner of copyright in an original work.²³ Authors of dramatic, dramatico-musical and musical works, enjoy the right to authorize the public performance of their works and any communication to the public of the performance of their works.²⁴ Berne further provides for the *droit de suite* (artist's resale right) for works of art and manuscripts.²⁵

The Convention allows for certain exceptions to author's rights.²⁶ It also allows for some limitations, in the form of statutory or compulsory licences.²⁷

The basic rule is that protection is granted for the life of the author plus fifty years after his death.²⁸

The Rome Convention, 1961

Films were protected under Berne as cinematographic works at an early stage, but before 1961 producers of sound recordings received no international protection against piracy. Performers had problems in the form of piracy of their recorded

¹⁴ For example, the Berne Convention states that “collections of literary or artistic works such as encyclopaedias 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.” (Berne Convention, Article 2(5)).

¹⁵ Berne Convention, Article 2(2).

¹⁶ Berne Convention, Article 6bis. The Rome Revision of 1928 inserted the moral right as well as the broadcasting right.

¹⁷ Berne Convention, Article 8.

¹⁸ Berne Convention, Article 9.

¹⁹ Berne Convention, Article 11.

²⁰ Berne Convention, Article 11bis.

²¹ Berne Convention, Article 12.

²² Berne Convention, Article 14(1)(i).

²³ Berne Convention, Article 14bis(1).

²⁴ Berne Convention, Article 11(1).

²⁵ Berne Convention, Article 14ter.

²⁶ The Convention only applies the test to the reproduction right. For other exceptions see Berne Convention, Articles 2bis(1) and (2) (certain speeches, certain uses of lectures and addresses); 10 (quotations, illustrations for teaching); 10bis (certain articles and broadcast works, works seen or heard in connection with current events); 11bis(3) (ephemeral recordings made by broadcasting organizations).

²⁷ Berne Convention, Articles 11bis(2) (broadcasting and related rights) and 13(1) (right of recording musical works and any words pertaining thereto).

²⁸ Berne Convention, Article 7(1).

performances. In the 1920s broadcasters began public broadcasting. Thus, there were three interests, separate from those of authors, which needed protection at an international level. The three parties involved would have to reach a compromise, which took the form of the Rome Convention.²⁹

The Rome Convention is based on the principle of national treatment, with minimum standards of protection.³⁰

Performers are not given an exclusive right, but merely the possibility of preventing certain acts: broadcasting and the communication to the public of their performances, fixation of their unfixed performances and reproduction of a fixed performance in certain cases.³¹ Producers of phonograms are given the right to prohibit reproduction of their phonograms.³² Broadcasting Organizations have the right to authorize certain uses of their broadcasts (re-broadcasting, fixation, reproduction and communication to the public), but not cable distribution of broadcasts.³³ A single equitable remuneration has to be paid by broadcasters or other users of a phonogram to the performers, producers, or both, but this right can be restricted or waived by Member Countries.³⁴

The Rome Convention establishes possible exceptions for private use, reporting current events, ephemeral recordings and use for teaching and scientific purposes.³⁵

Protection lasts for a minimum period of twenty years computed from the year in which the fixation of the phonogram is made, or the performance or the broadcast takes place.³⁶

The Rome Convention has not been revised since 1961 but some of its provisions are reflected in the TRIPS Agreement.³⁷

²⁹ See, *inter alia*, P. Masouyé, “The Rome Convention: Realities and Prospects” (1985) 21 *Copyright* 296-313; E. Thompson, “Twenty years of the Rome Convention: Some personal reflections” (October 1981) *Copyright* 270-273; A. Françon, “Should the Rome Convention on Neighbouring Rights be Revised?” (1991) 25:4 *Copyright Bulletin* 20-24; A. Kerever, “Should the Rome Convention be Revised and if so, is this the Right Moment?” (1991) 25:4 *Copyright Bulletin* 5-16; V.B. Labra, “The Rome Convention: A Three-Cornered Marriage (a love triangle?)” (1991) 25:4 *Copyright Bulletin* 17-19; R. Rembe, “Time for a Performer’s Convention” (1991) 25:4 *Copyright Bulletin* 25-31; I.D. Thomas, “Revision of the Rome Convention: Is it necessary and timely?” (1991) 25:4 *Copyright Bulletin* 32-35; W. Rumphorst, “Neighbouring Rights Protection of Broadcasting Organizations” (1992) 10 *E.I.P.R.* 339-342; M. Burnett, “Thirty-four Years On: Time for Filling the Gaps in Broadcasters’ Protection” (1995) 2 *Ent.L.R.* 39-41.

³⁰ Foreign performers are to be treated as national performers concerning performances that take place or are broadcast or first recorded on the territory of a Contracting State, foreign producers of phonograms are to be granted the same treatment which is granted to national producers of phonograms regarding phonograms that are first recorded or first published in a Contracting State, and foreign broadcasting organizations are entitled to the same treatment as given to broadcast organizations which have their headquarters in a Contracting State regarding broadcasts that are transmitted from transmitters that are located in that country (Rome Convention, Article 2).

³¹ Rome Convention, Article 7.

³² Rome Convention, Article 10.

³³ Rome Convention, Article 13.

³⁴ Rome Convention, Articles 12 and 16.

³⁵ Rome Convention, Article 15.

³⁶ Rome Convention, Article 14.

The Satellite Convention, 1974

The Satellite Convention emerged in the context of a perceived need to protect broadcasting Organizations as regards the distribution of program-carrying signals transmitted by satellite. There were doubts as to whether such satellite transmissions would qualify as *broadcasting* under Rome.

The Convention provides protection against unauthorized distribution of satellite signals, defining *distribution* as the operation by which a distributor transmits derived signals to the public, thus extending protection to cable distribution.³⁸

The fundamental obligation enshrined in the Satellite Convention is to *prevent the distribution of programme-carrying signals by any distributor for whom the signals passing through the satellite are not intended*.³⁹ The Convention does not establish a term of protection, leaving the matter to national legislation.

The Satellite Convention permits certain restrictions on protection, such as, in the case of developing countries, where the program carried by the emitted signals is distributed solely for the purposes of teaching or scientific research.⁴⁰

The Satellite Convention grants no specific rights to broadcasting Organizations or other parties and does not provide for protection of the programme content.⁴¹

The TRIPS Agreement, 1994

The TRIPS Agreement is part of the World Trade Organization Agreement, covering the intellectual property field.⁴² Three basic principles are set out in TRIPS: minimum standards of protection⁴³, national treatment⁴⁴ and most favoured nation treatment.⁴⁵

³⁷ Compare Article 14 of the TRIPS Agreement with Articles 7, 10, 13 and 15(1) of the Rome Convention.

³⁸ Satellite Convention, Articles 3 and 1(viii).

³⁹ Satellite Convention, Article 2.

⁴⁰ Satellite Convention, Article 4(iii).

⁴¹ See JAL Sterling, *World Copyright Law* (2nd ed, Sweet and Maxwell, 2003), para. 17.11.

⁴² See, *inter alia*, P.E. Geller, "Can the GATT Incorporate Berne Whole?" (1990) 11 *E.I.P.R.* 423-428; C.M. Correa, "TRIPS Agreement, Copyright and Related Rights" (1994) 25:4 *I.I.C.* 543-552; J. Worthy, "Intellectual Property Protection After GATT" (1994) 5 *E.I.P.R.* 195-198; S. Ricketson, "The Future of the Traditional Intellectual Property Conventions in the Brave New World of Trade-Related Intellectual Property Rights" (1995) 26:6 *I.I.C.* 872-899; M.A. Hamilton, "TRIPS Agreement: imperialistic, outdated and overprotective" (May 1996) 29 *Vanderbilt Journal of Transnational Law* 613-634; M.D.H. Woodard, "TRIPS and NAFTA's Chapter 17" (1996) 31 *Texas International Law Journal* 269-285.

⁴³ Member States have the obligation of granting to nationals of other parties the rights set out in the TRIPS Agreement (TRIPS Agreement, Article 1(3)).

⁴⁴ Member States cannot provide to nationals of other parties a protection less favourable than the one they provide to their own nationals (TRIPS Agreement, Article 3(1)).

⁴⁵ Any privileges given to nationals of a Member State must be given to nationals of all Member States (TRIPS Agreement, Article 4 *supra*).

The protection of author's rights is based on imperative compliance with Articles 1 to 21 of the Berne Convention, excluding the provisions on moral rights.⁴⁶ Computer programmes and databases are protected by copyright provided the relevant criteria are fulfilled.⁴⁷ The TRIPS Agreement introduces a rental right for the first time in an international agreement, though limited to computer programmes, phonograms and cinematographic works.⁴⁸

Member States are allowed to establish exceptions to copyright, at the national level, subject to the *three-step test*.⁴⁹ The Berne Convention only applies the test to the reproduction right, whereas the TRIPS Agreement applies the *three-step test* to all rights granted to authors.

Performers are given the possibility of preventing the unauthorized fixation, reproduction, wireless broadcasting and communication to the public of their performances.⁵⁰ Producers of phonograms are given the right to prohibit reproduction of their phonograms.⁵¹ Broadcasting Organizations have the right to control the fixation, reproduction, wireless re-broadcasting and communication to the public of broadcasts.⁵²

Member States are allowed to provide for conditions, limitations, exceptions and reservations to the extent permitted by the Rome Convention.⁵³

The WIPO Copyright Treaty, 1996

At the WIPO Diplomatic Conference, of December 1996, two treaties were achieved: the WCT and the WPPT. The aim was to deal with copyright and with the rights of performers and producers of phonograms, particularly in the technological field.⁵⁴

⁴⁶ TRIPS Agreement, Article 9(1).

⁴⁷ TRIPS Agreement, Article 10.

⁴⁸ TRIPS Agreement, Article 11.

⁴⁹ See Article 13 of the TRIPS Agreement and Article 9(2) of the Berne Convention. According to Article 9(2) of the Berne Convention: *exceptions and limitations regarding the reproduction right will only be allowed in certain cases and may not conflict with the normal exploitation of the author's work nor unreasonably hinder the legitimate interests of the author*. This test will be referred to as the *three-step test*.

⁵⁰ Article 14(1) of the TRIPS Agreement follows Article 7 of the Rome Convention.

⁵¹ Article 14(2) of the TRIPS Agreement follows Article 10 of the Rome Convention.

⁵² Article 14(3) of the TRIPS Agreement follows Article 13 of the Rome Convention.

⁵³ See Article 14(6) of the TRIPS Agreement and Article 15(1) of the Rome Convention. These exceptions include private use, use of short excerpts related to current events, reporting and use for the purpose of teaching or scientific research.

⁵⁴ For a critical analysis of both WIPO Treaties see, *inter alia*, C. Davies "WIPO Treaties – The New Framework for the Protection of Digital Works" (1997) 2:2 *Communications Law* 46 - 48; M. Fabiani, "The Geneva Diplomatic Conference on Copyright and the Rights of Performers and Phonogram Producers" (1997) 3 *Ent.L.R.* 98-102; J. Reinbothe, M. Prat and S. Lewinski "The New WIPO Treaties: A First Resume" (1997) 4 *E.I.P.R.* 171-176; H. Rosenblatt, "Protocol to the Berne Convention - The WIPO Diplomatic Conference, The Birth of Two New Treaties" (1997) 13:5 *C.L. & S.R.* 307-311; P. Wand, "New Rules for our Global Village" (1997) 5 *Ent.L.R.* 176-180; K. Weatherall, "An end to private communications in copyright? The expansion of rights to communicate works to the public: Part 1" (1999) 7 *E.I.P.R.* 342-349. For a critical analysis of WIPO Copyright Treaty see *inter alia* S. Fraser, "The Copyright Battle – Emerging International Rules and Roadblocks on the Global Information Infrastructure" (1997) 25 *Journal of Computer & Information Law* 773-783; A. Mason,

Contracting Parties have to comply with Articles 1 to 21 of the Berne Convention.⁵⁵ The WCT incorporates the principles of minimum rights, national treatment, automatic protection and independence of protection and a means of identification of the country of origin of the work, as in the Berne Convention.⁵⁶ Computer programmes are protected as literary works, along with databases.⁵⁷

Authors are given the right to authorize the distribution of copies of their works.⁵⁸ Under Berne such right is only recognised in respect of cinematographic works. The WCT also provides for a rental right, which does not include audio-visual works.⁵⁹ It goes beyond the TRIPS Agreement in granting such right to authors of works embodied in phonograms.⁶⁰ The WCT extends the right of communication to the public to all authors of literary and artistic works.⁶¹ The right of communication to the public includes Internet dissemination.

The WCT allows exceptions and limitations to rights granted to authors, subject to the *three-step test*.⁶²

Lastly, this treaty contains obligations regarding technological measures⁶³ and rights management information.⁶⁴

“Development in the Law of Copyright and Public Access to Information” (1997) 11 *E.I.P.R.* 636-643; T.C. Vinje “The New WIPO Copyright Treaty: A Happy Result in Geneva” (1997) 5 *E.I.P.R.* 230-236. For a critical analysis of the WPPT see *inter alia* V.A. Espinel, “Harmony on the Internet: WPPT and United Kingdom Copyright Law” (1998) 1 *Ent.L.R.* 21-29. See also M. Ficsor, *The Law of Copyright and the Internet* (Oxford University Press, 2002).

⁵⁵ Therefore, the WCT incorporates the obligations of the Berne Convention, (WCT, Article 1(4)).

⁵⁶ These rules are contained in Article 5 of the Berne Convention, which Contracting Parties have to apply in respect of the protection conferred by the WCT (WCT, Article 3).

⁵⁷ WCT, Articles 4-5.

⁵⁸ WCT, Article 6.

⁵⁹ WCT, Article 7.

⁶⁰ WCT, Article 7(1)(iii).

⁶¹ WCT, Article 8.

⁶² See Article 10 of the WCT and Article 9(2) of the Berne Convention.

⁶³ According to Article 11 of the WCT, “Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures (...)”

⁶⁴ According to Article 12 of the WCT, “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.”

The WIPO Performances and Phonograms Treaty, 1996

The WPPT protects performers and producers of phonograms. Unlike the Rome Convention and the TRIPS Agreement, the WPPT does not provide protection for broadcasters. In contrast with the WCT, the WPPT does not provide for compliance with the corresponding Convention, i.e., the Rome Convention.⁶⁵

The WPPT's basic principle is national treatment, which is limited to the rights granted by the Treaty, and to the equitable remuneration right.⁶⁶ The enjoyment of the rights granted by the Treaty is not dependent upon the compliance with any formalities.⁶⁷ For the first time, performers are given certain moral rights.⁶⁸

The WPPT goes beyond the Rome Convention in several respects:

- Performers are granted the rights of reproduction, distribution, rental and making available to the public of their performances fixed in phonograms;⁶⁹
- Producers of phonograms are given the rights of reproduction, distribution, rental and making available to the public of their phonograms;⁷⁰ and,
- The right to remuneration for broadcasting and communication to the public is extended to both performers and phonogram producers.⁷¹

Exceptions and limitations on the rights of performers and producers of phonograms are subject to the *three-step test*.⁷² The WPPT establishes a general rule and leaves this matter to national regulation.

The basic term of protection is extended to fifty years.⁷³ Like the WCT, the WPPT contains obligations regarding technological measures⁷⁴ and rights management information.⁷⁵

⁶⁵ WPPT, Article 1.

⁶⁶ Contracting Parties must accord to nationals of other Contracting Parties the same treatment it grants to its own nationals (WPPT, Article 4).

⁶⁷ WPPT, Article 20.

⁶⁸ Performers are given the right to claim to be identified as the performer of his performance and to object to any distortion, mutilation or other modification of his performance that would be damaging to his reputation (WPPT, Article 5).

⁶⁹ WPPT, Articles 6-10.

⁷⁰ WPPT, Articles 11-14.

⁷¹ WPPT, Article 15.

⁷² See Article 16 of the WPPT and Article 9(2) of the Berne Convention.

⁷³ WPPT, Article 17.

⁷⁴ WPPT, Articles 18-19.

⁷⁵ WPPT, Article 19.

Conclusion

It results from the existing international legal framework that:

- except for the Satellite Convention, the significance of which is diluted by its limited number of members, the protection granted to broadcasting organizations concerns *wireless* means of transmission alone;
- the concept of rebroadcasting covers *simultaneous* transmission but not the subsequent retransmissions;
- broadcasters are not given *exclusive rights*, but rights *to authorize and prohibit* certain acts.

Overview of the Draft WIPO Broadcasting Treaty

Introductory

The Draft Treaty appears to protect the interests of broadcasting organizations, which had not been included in the WIPO 1996 treaties, reflecting a professed need to “*introduce new international rules in order to provide adequate solutions to the questions raised by economic, social, cultural and technological developments*” and “*recognizing the profound impact of the development and convergence of information and communication technologies which have given rise to increasing possibilities and opportunities for unauthorized use of broadcasts both within and across borders.*”⁷⁶

The Draft Treaty increases the level of international protection of broadcasts, both as regards protected subject-matter and the scope of granted rights. It provides protection for wireless broadcasters, as well as for cablecasters (and possibly webcasters), granting them rights regarding retransmission,⁷⁷ fixation,⁷⁸ reproduction,⁷⁹ transmission following fixation,⁸⁰ making available⁸¹ and protection of signals prior to broadcasting.⁸²

Contracting Parties may, in their national legislations, establish the same limitations and exceptions as set out for copyright and related rights, subject to the *three-step test*.⁸³

As to the term of protection, this is proposed to be fifty years from the end of the year in which the broadcast or cablecast took place.⁸⁴

There are obligations, in line with the WPPT, regarding protection of technological measures and rights management information.⁸⁵

On some provisions, alternative wording is provided.

⁷⁶ SCCR/12/2 Rev.2, Preamble. Beyond the scope of this study is the question of whether this perception ought to be translated into a new treaty in view of the existing protection granted by the legal international framework on copyright and neighbouring rights and national or regional telecommunications or conditional access laws.

⁷⁷ SCCR/12/2 Rev.2, Article 6 (SCCR/14/2, Article 6).

⁷⁸ SCCR/12/2 Rev.2, Article 8 (SCCR/14/2, Article 7).

⁷⁹ SCCR/12/2 Rev.2, Article 9 (SCCR/14/2, Article 8).

⁸⁰ SCCR/12/2 Rev.2, Article 11 (SCCR/14/2, Article 9).

⁸¹ SCCR/12/2 Rev.2, Article 12 (SCCR/14/2, Article 10).

⁸² SCCR/12/2 Rev.2, Article 13 (SCCR/14/2, Article 11).

⁸³ SCCR/12/2 Rev.2, Article 14 (SCCR/14/2, Article 12).

⁸⁴ SCCR/12/2 Rev.2, Article 15 (SCCR/14/2, Article 13).

⁸⁵ SCCR/12/2 Rev.2, Article 16-17 (SCCR/14/2, Articles 14-15)

Protected subject-matter

Table 1: Comparison between the Rome Convention, TRIPS, the Satellite Convention and the Draft Treaty

Rome Convention	TRIPS	Satellite Convention	Draft Treaty
Wireless broadcasts [Article 3]	Broadcasts [Article 14]	Programme carrying signals transmitted by satellite [Article 1]	Signals [Article 3(0) SCCR/12/2 Rev.2 and [Article 3(1) SCCR/14/2]

Here the Draft Broadcasting Treaty is filled with ambiguity. The Draft Treaty states that protection extends only to *signals* used for transmissions by the Treaty beneficiaries.⁸⁶ It adds that it protects broadcasts, equating them to “*the programme-carrying signal constituting the transmission*”.⁸⁷

Since the term *broadcast* can refer to the *signal*,⁸⁸ or the content represented by the signal or both, it could be argued that the Draft Treaty was adopting a signal based approach. But some of the rights provided in the draft Treaty, such as the rights to reproduce⁸⁹ and transmit following fixation,⁹⁰ do not subsist in signals as such. Furthermore, the Draft Treaty’s definition of *communication to the public* refers to “*making the transmissions audible or visible*”, which implies a content approach,⁹¹ and the term *embodiment* covers *content* as well as *signal*.⁹²

Thus, there is no express definition of broadcast and various clues abound, within the text and comments to the Draft Treaty, pointing in different directions. Therefore, conceptual interpretation of protected subject-matter of the Draft Treaty could follow different paths. There could be a *stricto sensu* interpretation leading to mere protection in relation to the signal, or a *lato sensu* interpretation extending to content, or to both.

Lack of clarity will lead to legal uncertainty. If a *lato sensu* interpretation is followed infringement will take place *inter alia* by means of an unauthorized fixation or

⁸⁶ SCCR/12/2 Rev.2, Article 3(0) (SCCR/14/2, Article 3(1)).

⁸⁷ SCCR/12/2 Rev.2, Comment 2.06.

⁸⁸ SCCR/12/2 Rev.2, Comment 2.02.

⁸⁹ SCCR/12/2 Rev.2, Article 9 (SCCR/14/2, Article 8).

⁹⁰ SCCR/12/2 Rev.2, Article 11 (SCCR/14/2, Article 9).

⁹¹ SCCR/12/2 Rev.2, Article 2(e).

⁹² SCCR/12/2 Rev.2, Comment 2.11 and Article 2(f) (SCCR/14/2, Article 2(e)).

reproduction of the content, whereas under a *stricto sensu* interpretation only unauthorized fixation or reproduction of the signal will qualify as infringement.

Beneficiaries

Table 2: Comparison between the Rome Convention, TRIPS, the Satellite Convention and the Draft Treaty

Rome Convention	TRIPS	Satellite Convention	Draft Treaty
Broadcasting organizations [Preamble, Article 3]	Broadcasting organizations [Article 14]	Not designated	Broadcasting and cablecasting organizations [Article 3 SCCR/12/2 Rev.2] and [Article 3 SCCR/14/2]

The Draft Treaty proposes to expand the protection from wireless transmission only to cable transmission. The beneficiaries of protection will include both broadcasting and cablecasting organizations.⁹³

There were divergences as to whether webcasters should be covered by the proposed Treaty, leading to the drafting of a non-mandatory appendix on webcasting.

⁹³ SCCR/12/2 Rev.2, Article 3. See Article 3(f) of the Rome Convention and Article 2(f) of the WPPT.

Scope of granted rights

Table 3: Comparison between Rome, TRIPS and SCCR/12/2 Rev.2

Rome Convention	TRIPS	SCCR/12/2 Rev.2
<p>Broadcasting organizations have the right to authorize or prohibit:</p> <p>Rebroadcasting</p> <p>Fixation</p> <p>Certain cases of reproduction of fixations</p> <p>Certain cases of communication to the public of television broadcasts</p> <p>[Articles 2-4,13]</p>	<p>Broadcasting organizations have the right to prohibit, where unauthorized:</p> <p>Fixation</p> <p>Reproduction of fixations</p> <p>Rebroadcasting by wireless means</p> <p>Communication to the public of television broadcasts</p> <p>[But granting of rights is not compulsory]</p> <p>[Article 14(3)]</p>	<p>Broadcasting and cablecasting organizations have the exclusive right of authorizing:</p> <p>Retransmission by any means</p> <p>Certain cases of communication to the public</p> <p>Fixation</p> <p>Reproduction of fixations [or the right to prohibit]</p> <p>Making available to the public of the original and copies of fixations [or: the right to prohibit distribution to the public and importation of reproductions of unauthorized fixations]</p> <p>Transmission following fixation [or: the right to prohibit]</p> <p>Making available on-demand of fixed broadcasts [or: the right to prohibit]</p> <p>Protection in relation to signals prior to broadcasting</p> <p>[Articles 6-13]</p>

Table 4: Comparison between Rome, TRIPS and SCCR/14/2

Rome Convention	TRIPS	SCCR/14/2
<p>Broadcasting organizations have the right to authorize or prohibit:</p> <p>Rebroadcasting</p> <p>Fixation</p> <p>Certain cases of reproduction of fixations</p> <p>Certain cases of communication to the public of television broadcasts</p> <p>[Articles 2-4,13]</p>	<p>Broadcasting organizations have the right to prohibit, where unauthorized:</p> <p>Fixation</p> <p>Reproduction of fixations</p> <p>Rebroadcasting by wireless means</p> <p>Communication to the public of television broadcasts</p> <p>[But granting of rights is not compulsory]</p> <p>[Article 14(3)]</p>	<p>Broadcasting and cablecasting organizations have the exclusive right of authorizing:</p> <p>Retransmission by any means</p> <p>Fixation</p> <p>Reproduction of fixations <i>[or: the right to prohibit]</i></p> <p>Transmission following fixation <i>[or: the right to prohibit]</i></p> <p>Making available on-demand of fixed broadcasts <i>[or: the right to prohibit]</i></p> <p>Protection in relation to signals prior to broadcasting</p> <p>[Articles 6-11]</p>

Table 5: Comparison between the WPPT and SCCR/12/2 Rev. 2

WPPT	WPPT	SCCR/12/2 Rev.2
<p>Performers have the exclusive right of authorizing:</p> <p>Broadcasting and communication to the public of unfixed (non-broadcast) performances</p> <p>Fixation of unfixed performances</p> <p>Reproduction of performances fixed in phonograms</p> <p>Distribution (through sale or other transfer of ownership) of phonograms which include performances</p> <p>Rental to the public of phonograms which include performances</p> <p>Making available on-demand of their performances fixed in phonograms</p> <p>Equitable remuneration for wireless broadcasting or for any communication to the public of phonograms (But: possibility of reservations).</p> <p>[Articles 6-10, 15]</p>	<p>Phonogram producers have the exclusive right of authorizing:</p> <p>Reproduction of phonograms</p> <p>Distribution (through sale or other transfer of ownership) of phonograms</p> <p>Rental of phonograms</p> <p>Making available on-demand of their phonograms</p> <p>Equitable remuneration for wireless broadcasting or for any communication to the public of phonograms (But: possibility of reservations)</p> <p>[Articles 11-14, 15]</p>	<p>Broadcasting and cablecasting organizations have the exclusive right of authorizing:</p> <p>Retransmission by any means</p> <p>Certain cases of communication to the public</p> <p>Fixation</p> <p>Reproduction of fixations [or: the right to prohibit]</p> <p>Distribution of the original and copies of fixations [or: the right to prohibit distribution to the public and importation of reproductions of unauthorized fixations]</p> <p>Transmission following fixation [or: the right to prohibit]</p> <p>Making available on-demand of fixed broadcasts [or: the right to prohibit]</p> <p>Protection in relation to signals prior to broadcasting</p> <p>[Articles 6-13]</p>

Table 6: Comparison between the WPPT and SCCR/14/2

WPPT	WPPT	SCCR/14/2
<p>Performers have the exclusive right of authorizing:</p> <p>Broadcasting and communication to the public of unfixed (non-broadcast) performances</p> <p>Fixation of unfixed performances</p> <p>Reproduction of performances fixed in phonograms</p> <p>Distribution (through sale or other transfer of ownership) of phonograms which include performances</p> <p>Rental to the public of phonograms which include performances</p> <p>Making available on-demand of their performances fixed in phonograms</p> <p>Equitable remuneration for wireless broadcasting or for any communication to the public of phonograms (But: possibility of reservations)</p> <p>[Articles 6-10, 15]</p>	<p>Phonogram producers have the exclusive right of authorizing:</p> <p>Reproduction of phonograms</p> <p>Distribution (through sale or other transfer of ownership) of phonograms</p> <p>Rental of phonograms</p> <p>Making available on-demand of their phonograms</p> <p>Equitable remuneration for wireless broadcasting or for any communication to the public of phonograms (But: possibility of reservations)</p> <p>[Articles 11-14, 15]</p>	<p>Broadcasting and cablecasting organizations have the exclusive right of authorizing:</p> <p>Retransmission by any means</p> <p>Fixation</p> <p>Reproduction of fixations [or: the right to prohibit]</p> <p>Transmission following fixation [or: the right to prohibit]</p> <p>Making available on-demand of fixed broadcasts [or: the right to prohibit]</p> <p>Protection in relation to signals prior to broadcasting</p> <p>[Articles 6-11]</p>

Table 7: Comparison between the Rome Convention, TRIPS, and the Draft Treaty as regards broadcasting organizations rights

Wireless rebroadcasting right	Fixation right	Fixation reproduction right	Public communication right
Rome	Rome	Rome	Rome (TV)
TRIPS	TRIPS	TRIPS	TRIPS
SCCR/12/2 Rev.2	SCCR/12/2 Rev.2	SCCR/12/2 Rev.2	SCCR/12/2 Rev.2
SCCR/14/2	SCCR/14/2	SCCR/14/2	

Cable retransmiss. right	Transmission following fixation right	Fixation distribution right	Making available right	Protection in relation to signals prior to broadcasting
SCCR/12/2 Rev.2	SCCR/12/2 Rev.2	SCCR/12/2 Rev.2	SCCR/12/2 Rev.2	SCCR/12/2 Rev.2
SCCR/14/2	SCCR/14/2		SCCR/14/2	SCCR/14/2

Article 6 SCCR/14/2 (Article 6 SCCR/12/2 Rev.2) provides broadcasting and cablecasting organizations with an exclusive right to authorize the retransmission by any means of their broadcasts or cablecasts, including rebroadcasting, retransmission by wire and retransmission over computer networks.⁹⁴ The Draft Treaty covers retransmissions 'by any means' including on-line, but not where the time of transmission and place of reception may be individually chosen by members of the public,⁹⁵ hence excluding on-demand transmissions from the compass of this treaty. The scope of the right is restricted to simultaneous retransmissions.⁹⁶ Non-simultaneous transmissions require fixation of the original transmissions and are deemed new transmissions dealt with under the right of transmission following fixation.⁹⁷

In order to prevent “a situation where the level of protection of broadcasts would exceed the rights of the rightholders of the content being broadcast,”⁹⁸ Canada proposed a reservation to Article 6, according to which “any Contracting Party may, in a notification deposited with the Director General of WIPO, declare that it will apply the right to authorize or prohibit the simultaneous retransmission by wire or

⁹⁴ “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.”

⁹⁵ SCCR/12/2 Rev.2, Article 3(4) (SCCR/14/2, Article 3(4)).

⁹⁶ SCCR/12/2 Rev.2, Comment 6.02 and Article 2(d) (SCCR/14/2, Article 2(d)).

⁹⁷ SCCR/12/2 Rev.2, Article 11 (Article 9 SCCR/14/2).

⁹⁸ SCCR/12/2 Rev.2, Comment 6.05.

wireless means of unencrypted wireless broadcasts only in respect of certain retransmissions, or that it will limit it in some other way, or that it will not apply it at all.”

Article 7 SCCR/14/2 (8 SCCR/12/2 Rev.2) grants broadcasting and cablecasting organizations the exclusive right of authorizing the fixation of their broadcasts or cablecasts.⁹⁹ According to Comment 2.11 SCCR/12/2 Rev.2, “*there are no conditions regarding the requisite permanence or stability of the embodiment*”, even though traditionally, fixation is defined as “*capturing a work in some form of enduring physical expression, be it writing, printing, photography, sound or visual recording, carving, engraving, building, graphic representation or any other appropriate method allowing subsequent identification and reproduction of the author’s creation.*”¹⁰⁰

Article 9 SCCR/12/2 Rev.2 established a right of reproduction for broadcasting and cablecasting organizations over the reproductions of fixations of their broadcasts or cablecasts. Alternative N granted the right of fixation as an exclusive right for direct or indirect fixations. Alternative O gave broadcasting and cablecasting organizations the *right to prohibit* the reproduction of fixations of programmes and the *right of authorizing* reproduction of fixations even if they were made under an exception or limitation to the broadcaster’s or cablecaster’s exclusive right. An article containing a two-tier solution was converted into Alternative HH, combining the approaches in Alternatives N and O. Article 8 SCCR/14/2 excludes Alternatives N and O, keeping the two-tier solution (albeit with changes).¹⁰¹

Article 11 SCCR/12/2 Rev.2 addressed the transmission of broadcasts and cablecasts subsequent to fixation. Alternative JJ granted broadcasting and cablecasting organizations the exclusive right to authorize the transmission of their broadcasts or cablecasts following their fixation. This right covered all transmissions, including broadcasting and cablecasting, following fixation of a broadcast or cablecast. An article containing a two-tier level of protection was converted into Alternative KK. The first paragraph included Alternative JJ and the second authorized a Contracting Party to opt, instead, for a right to prohibit the transmission of their broadcasts following unauthorized fixations of their broadcasts. Article 9 SCCR/14/2 excludes Alternative JJ, keeping the two-tier level of protection.¹⁰²

⁹⁹ “*Broadcasting organizations shall enjoy the exclusive right of authorizing the fixation of their broadcasts.*”

¹⁰⁰ WIPO Glossary of Terms of the Law of Copyright and Neighbouring Rights, Geneva 1980, 116.

¹⁰¹ “(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 12 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.”*

¹⁰² “(1) *Broadcasting organizations shall enjoy the exclusive right of authorizing the transmission by any means for the reception by the public of their broadcasts following fixation of such broadcasts.*

Article 12 SCCR/12/2 Rev.2 provided broadcasting and cablecasting organizations with a right to make available to the public, by wire or wireless means, their fixed broadcasts or cablecasts in such a way that members of the public could access them from a place and at a time individually chosen by them. Two alternatives were offered in the Consolidated Text. Alternative R established an exclusive right of authorizing the making available to the public of broadcasts or cablecasts from fixations. Alternative S granted such organizations the right to prohibit the making available to the public of their broadcasts or cablecasts from unauthorized fixations. An article containing a two-tier level of protection was converted into Alternative LL, combining the approaches of Alternatives R and S. Article 10 SCCR/14/2 excludes Alternatives R and S, keeping the two-tier solution.¹⁰³

Article 11 SCCR/14/2 (Article 13 SCCR/12/2 Rev.2) requires Contracting Parties to grant adequate and effective legal protection against the theft of *pre-broadcast signals*.¹⁰⁴ These are signals that are not intended for direct reception by the public and used, for example, to transfer material “*from the site of an event to the place where a transmitter is situated*”.¹⁰⁵ This right may be granted to both the receiving organization and/or the transmitting organization.

SCCR/14/2 sees the deletion of two rights: the right of communication to the public and the distribution right.

Article 7 SCCR/12/2 Rev.2 laid down two alternatives for an exclusive right of communication to the public for broadcasting and cablecasting organizations. In both, the right of communication applied to broadcasts or cablecasts made in places accessible to the public against payment of a fee. Alternative L recognized this exclusive right in an unconditional way. Alternative M opened a possibility of conditioning the protection based on domestic law or by reservation of applicability. A broad interpretation of such right could have led to the inclusion of on-line transmissions within the breadth of the right. According to Comments 7.05 and 7.06 SCCR/12/2 Rev.2, “*during the discussions in the June 2004 meeting of the Standing Committee Alternative M was widely supported over Alternative L*” and “*in the*

(2) 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 transmission, without the consent of the broadcasting organizations, of their broadcasts from unauthorized fixations of their broadcasts shall be prohibited.”

¹⁰³ “(1) 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.

(2) 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 making available to the public, without the consent of the broadcasting organizations, of their broadcasts from unauthorized 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, shall be prohibited.”

¹⁰⁴ “Broadcasting organizations shall enjoy adequate and effective legal protection against any acts referred to in Article 6 to 10 of this Treaty in relation to their signals prior to broadcasting.”

¹⁰⁵ SCCR/12/2 Rev.2, Comment 13.02.

November 2004 meeting of the Standing Committee the deletion of Article 7 was considered.” It became clear that such provision enjoyed very limited support and it does not appear in the latest draft (SCCR/14/2).

Article 10 SCCR/12/2 Rev.2 set out a distribution right, including three alternatives. Alternative P granted broadcasting and cablecasting organizations the exclusive right of authorizing distribution of the originals and copies of fixations of their broadcasts or cablecasts, through sale or other transfer of ownership. The second paragraph of that alternative left it up to the Contracting Parties to determine the conditions for exhaustion of the right of distribution. Alternative Q reflected proposals by the United States and Egypt to grant to broadcasting and cablecasting organizations the right to prohibit the distribution of their broadcasts or cablecasts and a right to prohibit the importation of reproductions of unauthorized fixations of their broadcasts. No exhaustion of rights was foreseen in this alternative. Alternative II would combine the approaches of Alternatives P and Q, in the shape of a two-tier level of protection. The first two paragraphs incorporated Alternative P and the third paragraph gave a Contracting Party the possibility of selecting Alternative Q instead. This provision does not appear in the latest draft (SCCR/14/2).

Exceptions and limitations

Article 14 SCCR/12/2 Rev.2 addressed exceptions and limitations to the rights of broadcasting and cablecasting organizations. Paragraph (1) did not impose but permitted Contracting Parties to provide for the same type of exceptions and limitations with regard to the protection of broadcasts that their national law provides in connection with the protection of copyright. These domestic law exceptions and limitations were confined in Paragraph (2) by the *three-step test*. The United States and Egypt proposed a third paragraph (Alternative T) to this provision that would allow Contracting Parties to maintain national law exceptions and limitations to the retransmission right concerning non-commercial broadcasts if they were in force by the date of the Treaty’s Diplomatic Conference. Article 12 SCCR/14/2 excludes Alternative T, thus eliminating the ‘*grandfathering clause*’ which explicitly allowed Contracting Parties to maintain certain limitations and exceptions concerning retransmissions.¹⁰⁶

According to SCCR/12/2 Rev.2, Comment 14.06, the Agreed Statement concerning Article 16 of the WPPT, is relevant in the context of the interpretation of Article 14 of the new Instrument and is included in paragraph 20 of the Introductory Notes to SCCR/12/2 Rev.2.¹⁰⁷

¹⁰⁶ “(1) Contracting Parties may, in their national legislation, provide for the same kinds of limitations or exceptions with regard to the protection of broadcasting organizations as they provide for, in their national legislation, in connection with the protection of copyright in literary and artistic works, and the protection of related rights.

(2) Contracting Parties shall confine any limitations of or exceptions to rights provided for in this Treaty to certain special cases which do not conflict with a normal exploitation of the broadcast and do not unreasonably prejudice the legitimate interests of the broadcasting organization.”

¹⁰⁷ The Agreed Statement reads as follows: “The reproduction right, as set out in Articles 7 and 11, and the exceptions permitted there under through Article 16, fully apply in the digital environment, in particular to the use of performances and phonograms in digital form. It is understood that the storage

This should be read in consonance with the introductory notes to the Working Paper for the Preparation of the Basic Proposal for a Treaty on the Protection of Broadcasting Organizations SCCR 14/3 of 8 February 2006 (SCCR 14/3), which states that “*the Working Paper is intended to be a tool for the Committee for testing the Draft Basic Proposal, and the basis to consider whether certain elements should be added or replaced. Both documents should be read in conjunction with the previous set of documents, especially with the Second Revised Consolidated Text (SCCR/12/2 Rev.2).*”

Term of protection

Table 8: Comparison between the Rome Convention, TRIPS, the WPPT and the Draft Treaty

Rome Convention	TRIPS	WPPT	SCCR/12/2 Rev.2	SCCR/14/2 Article 13
<p>Minimum of 20 years from year of broadcast</p> <p>[Article 14(c)]</p>	<p>Minimum of 20 years from year of broadcast</p> <p>[Article 14(5)]</p>	<p>Performers: Minimum of 50 years from the end of the year in which the performance was fixed in a phonogram</p> <p>[Article 17(1)]</p> <p>Phonogram producers: Minimum of 50 years from the end of the year in which the phonogram was published or, failing such publication, 50 years from the end of the year in which the fixation was made</p> <p>[Article 17(2)]</p>	<p>Minimum of 50 years from the end of the year in which the broadcast took place</p> <p><i>[alternatively:</i> 20 years]</p> <p>[Article 15]</p>	<p>Minimum of 50 years from the end of the year in which the broadcast took place</p> <p>[Article 13]</p>

of a protected performance or phonogram in digital form in an electronic medium constitutes a reproduction within the meaning of these Articles.”

Article 15 SCCR/12/2 Rev.2 (Article 13 SCCR/14/2) established, in Alternative DD, supported by the European Union and the United States, amongst other countries, the term of protection to be granted to broadcasting and cablecasting organizations as fifty years from the end of the year in which the broadcast or cablecast took place. Alternative EE, which, supported by Singapore and India, proposed a term of twenty years, in line with the Rome Convention, does not appear in Article 13 SCCR/14/2.¹⁰⁸

Technological protection measures

Article 16 SCCR/12/2 Rev.2 required legal sanctions against circumvention of technological measures used by broadcasters “*in connection with the exercise of their rights under this Treaty and that restrict acts, in respect of their broadcasts, that are not authorized or are prohibited by the broadcasting organizations concerned or permitted by law.*” Alternative V went further, prohibiting (i) the decryption of an encrypted broadcast, (ii) the receiving and distributing or communicating to the public of an encrypted broadcast that had been decrypted without the express authorization of the broadcasting organization that emitted it, and (iii) participation in the manufacture, importation, sale or any other act that makes available a device or system capable of decrypting an encrypted broadcast or that could help another to decrypt a broadcast. Article 14 SCCR/14/2 excludes Alternative V, maintaining the obligation to adopt domestic legislation preventing circumvention of technological restrictions placed on broadcast signals, with no express exceptions.¹⁰⁹

Rights management information

Article 15 SCCR/14/2 (Article 17 SCCR/12/2 Rev.2) defines ‘rights management information’ as “*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*”.¹¹⁰

¹⁰⁸ “The term of protection to be granted to broadcasting organizations under this Treaty shall last, at least, until the end of a period of 50 years computed from the end of the year in which the broadcast took place.”

¹⁰⁹ “Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by broadcasting organizations in connection with the exercise of their rights under this Treaty and that restrict acts, in respect of their broadcasts, that are not authorized by the broadcasting organizations concerned or are not permitted by law.”

¹¹⁰ “(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:

to remove or alter any electronic rights management information without authority;

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

This provision prohibits the removal or alteration of any rights management information “*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 being distributed to the public*”, in addition to the distribution of fixations of broadcasts where that information has been removed or altered.

Where a person carries out these acts knowingly they may be subject to criminal liability, but where they have “*reasonable grounds to know*” that they “*will induce, enable, facilitate or conceal an infringement of any right*” they will incur in civil liability.

Formalities

Article 16 SCCR/14/2 (Article 18 SCCR/12/2 Rev.2) provides that no formalities shall be required for broadcasting organizations to have the enjoyment and benefit of the rights created by the treaty.¹¹¹

Webcasting

A working paper on alternative non-mandatory solutions on the protection of webcasting organizations, including simulcasting organizations, was prepared to accompany the second revised version. The separate Working Paper on webcasting reflected the view that this aspect should be covered in a separate instrument.

Alternative Solution 1 ('Opt in by notification') and Alternative Solution 2 ('Possibility of reservation, and withdrawal of reservation') were based on additional provisions that could be added to the draft Treaty later in the process. Alternative Solution 3 was in the form of an Additional and Optional Protocol that could be attached to the Treaty.

Webcasting was defined as the making accessible to the public of transmissions of sounds and/or images 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.*”

This would give to webcasting organizations the same rights afforded to broadcasting and cablecasting organizations, as well as extending the rights of broadcasting organizations to the simultaneous and unchanged webcasting of their own broadcasts (*simulcasting*).

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.”

¹¹¹ “The enjoyment and exercise of the rights provided for in this Treaty shall not be subject to any formality.”

SCCR/14/2 presents a single non-mandatory solution on the protection of webcasts, including simulcasts, merging the previous three alternative solutions. The non-mandatory Appendix is based on the 'opt-in' approach. According to Article 1, the Appendix is not binding without notification.

The Appendix is intended to extend to webcasting organizations the protection provided for in the Draft Treaty in an analogous manner.

Article 2 defines *webcasting*¹¹² and *webcasting organizations*.¹¹³ Protection is subject to an investment in the programming, namely assembly and scheduling, of the content.

Article 3 extends the scope of application of the protection of the Draft Treaty to all webcasts, including simulcasts, also enabling a Contracting Party to limit the protection to the simultaneous and unchanged webcasting by the broadcasting organizations of their own broadcasts (*simulcasting*) by making a notification to this effect to the Director General of WIPO.

Conclusion

As seen above, it results from the existing international legal framework that:

- except for the Satellite Convention, the significance of which is diluted by its limited number of members, the protection granted to broadcasting organizations concerns *wireless* means of transmission alone;
- the concept of rebroadcasting covers *simultaneous* transmission but not the subsequent retransmissions;
- broadcasters are not given *exclusive rights*, but rights to *authorize and prohibit* certain acts.

The Draft Treaty, though, proposes exclusive rights regarding retransmission (including by wire), fixation, reproduction, transmission following fixation, and making available to the public, also providing for protection for signals prior to broadcasting. Beneficiaries are not limited to broadcasting organizations, including

¹¹² '(a) *webcasting*' means the transmission by wire or wireless means over a computer network for the reception by the public, of sounds or of images or of images and sounds or of the representations thereof, by means of a program-carrying signal which is accessible for members of the public 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." Comment 2.01 states that, "the operative term is 'transmission' but qualified as an act taking place "by means of a program-carrying signal accessible for members of the public". This qualification 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 'for members of 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 in 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 accessible of program-carrying signals to such activity over computer networks, which by nature may take place by wire or wireless means."

¹¹³ (b) '*webcasting organization*' means 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."

cablecasters (and possibly webcasters). Exceptions and limitations to these rights are not mandatory and are restricted by the *three-step test*. Lastly, the Draft Treaty sets out obligations concerning the legal protection of technological measures and rights management information.

Does the Draft WIPO Broadcasting Treaty negatively affect the right to freedom of expression?

The right to freedom of expression

Freedom of expression is an element of every individual's spiritual freedom, forming one of the vital foundations of a democratic society.¹¹⁴ It is one of the indispensable conditions for the development of society and of every individual.

Article 11 of the French Declaration of the Rights of Man and of the Citizen reiterates the concept of freedom of expression as expressed by Montesquieu:¹¹⁵ *"The free communication of ideas and opinions is one of the most precious rights of man; hence, all citizens may speak, write, and print freely, except that each must assume responsibility for the abuse of his liberty as determined by the law."*¹¹⁶

In an active sense, freedom of expression denotes freedom to impart information and in a passive sense, a right to receive information. It includes the right to unconstrained dissemination of information and the right to gather and receive information. The second aspect is indispensable to form an opinion. The first aspect enables the imparting of the latter once it has been formed. Both facets of freedom of expression have been extrapolated into the international arena leading to the contemplation of the concerns of both communicators and recipients of information.

The right to freedom of expression is a fundamental right that has been recognised at both international and regional levels. According to the Universal Declaration of Human Rights, everyone has the right to freedom of opinion and expression, which includes the right to *"seek, receive and impart information and ideas."*¹¹⁷ In line with the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights reiterates this principle, adding that the right may be subject to certain restrictions provided they are required *"(a) for respect of the rights or reputations of others; (b) for the protection of national security or of public order (ordre public), or of public health or morals."*¹¹⁸

¹¹⁴ See, *inter alia*, Z.M. Nedjati, *Human Rights Under the European Convention* (North-Holland, 1978); H. Kanger, *Human Rights in the UN Declaration* (Almqvist & Wiksell, 1984); T.D. Jones, *Human Rights: Group Defamation, Freedom of Expression and the Law of Nations* (Martinus Nijhoff, 1997); H. Bosma, *Freedom of Expression in England under the ECHR: in Search of a Common Ground – A Foundation for the Application of the Human Rights Act 1998 in English Law* (Intersentia-Hart, 2000).

¹¹⁵ Montesquieu, *The Spirit of Laws* (1748).

¹¹⁶ Reprinted in Downrick, *Human Rights: Problems, Perspectives and Texts* (1982), at 153-154.

¹¹⁷ Universal Declaration of Human Rights, Article 19: *"Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."*

¹¹⁸ International Covenant on Civil and Political Rights, Article 19: *"1. Everyone shall have the right to hold opinions without interference. 2. Everyone shall have the right to freedom of expression; this right*

At the European level, Article 10 of the European Convention on Human Rights states that the right to freedom of expression includes the right to “*receive and impart information and ideas*”.

Fundamental rights were originally adopted in the Magna Carta and in the constitutions of civil law countries to offer protection to citizens against their Governments. This was also the initial purpose of the European Convention on Human Rights. This vertical approach is maintained, except where Governments are held responsible for legislation (or lack of it) allowing the rights of citizens to be infringed by third parties. In such cases, a citizen of a Contracting State cannot complain before the European Court of another citizen infringing their rights, but may complain about their Government not providing legislation (or adequate legislation) to protect their freedom of expression. The Court has explicitly held that Contracting States have a definite obligation to provide for freedom of expression in horizontal situations.¹¹⁹ Therefore, the rights of the Convention, including freedom of expression, can have horizontal effect, in the sense that states may be held responsible for the legislation (or absence of it) that would enable a citizen to exercise their rights under the European Convention on Human Rights.

In line with the Universal Declaration of Human Rights, the exercise of these freedoms may be subject to restrictions prescribed by law and deemed necessary in a democratic society.¹²⁰ The right to freedom of expression contains an exclusive list of grounds upon which states may rely to restrict the exercise of the protected freedom, including the 'rights of others' covering the rights protected under copyright.

The article further circumscribes restrictions by requiring that they be necessary in a '*democratic society*'. The European Court has construed the phrase as requiring a '*pressing social need*' for limiting any of these rights.¹²¹ Contracting States are

shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice. 3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (ordre public), or of public health or morals.”

¹¹⁹ *Fuentes Bobo c. Espagne*, n° 39293/98 (fr) – (29.2.00) available at <http://www.echr.coe.int/echr>.

¹²⁰ European Convention on Human Rights, Article 10: “1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises. 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.” See C. Uytendaele, J. Dumortier, “Free Speech on the Information Superhighway: European Perspectives”, (1998) 16 *John Marshall J. of Comp. & Inf. Law* 905.

¹²¹ See *inter alia*, *Müller and others v. Switzerland*, case number 25/1986/123/174, para. 32, available at <http://www.echr.coe.int/echr>; *Hertel v. Switzerland*, case number 59/1997/843/1049, para. 46,

entitled to a substantial degree of deference or ‘margin of appreciation’ for their actions. In practice, the leeway allowed to national governments varies from case to case. The European Court has made it clear that information of a commercial nature is protected to a lesser degree than political speech.¹²² However, where the essential freedoms protected under Article 10, such as political speech or questions of public interest, are at stake the ‘margin of appreciation’ will decrease.¹²³

The liaison between freedom of expression and copyright

From a legal architecture perspective, copyright and freedom of expression should not be seen as advocating opposed principles. Protection for copyright follows from Article 27(2) of the Universal Declaration of Human Rights¹²⁴ and from Article 15 of the International Covenant on Economic, Social and Cultural Rights.¹²⁵ In some countries copyright is actually protected as a fundamental right.¹²⁶

available at <http://www.echr.coe.int/echr>; *Arslan v. Turkey*, application no. 23462/94, para. 44, available at <http://www.echr.coe.int/echr>; *Karatas v. Turkey*, application no. 23168/94, para. 48, available at <http://www.echr.coe.int/echr>; *Polat v. Turkey*, application no. 23500/94, para. 43, available at <http://www.echr.coe.int/echr>; *Plon (Société) v. France*, application no. 58148/00, para. 42, available at <http://www.echr.coe.int/echr>; *News Verlags GmbH & Co. Kg v. Austria*, application no. 31457/96, para. 52, available at <http://www.echr.coe.int/echr>;

¹²² See *inter alia*, *Barthold v. Germany*, case number 10/1983/66/101, available at <http://www.echr.coe.int/echr>; *markt intern Verlag GmbH and Klaus Beermann v. Germany*, case number 3/1988/147/201, available at <http://www.echr.coe.int/echr>; *Casado Coca v. Spain*, case number 8/1993/403/481, available at <http://www.echr.coe.int/echr>; *Hertel v. Switzerland*, *ibid*.

¹²³ See *inter alia*, *Arslan v. Turkey*, para. 46, *Nilsen and Johnsen v. Norway*, application no. 23118/93, para. 46, available at <http://www.echr.coe.int/echr>; *Wingrove v. the United Kingdom*, case number 19/1995/525/611, para. 58, available at <http://www.echr.coe.int/echr>; *Karatas v. Turkey*, para. 50; *Polat v. Turkey*, para. 45; *Krone Verlag GmbH & Co. Kg v. Austria*, application no. 34315/96, para. 35, available at <http://www.echr.coe.int/echr>.

¹²⁴ Article 27 (2) of the Universal Declaration of Human Rights reads: “Everyone has the right to protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.”

¹²⁵ The International Covenant on Economic, Social and Cultural Rights recognises in its preamble “that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights”, stating in Article 15 that “1. The States Parties to the present Covenant recognize the right of everyone: (a) To take part in cultural life; (b) To enjoy the benefits of scientific progress and its applications; (c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author. 2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture. 3. The States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity. 4. The States Parties to the present Covenant recognise the benefits to be derived from the encouragement and development of international contacts and co-operation in the scientific and cultural fields.” [emphasis added]

¹²⁶ In Portugal, for example, copyright is a fundamental right explicitly protected by Article 42 of the Portuguese Constitution: “1. Intellectual, artistic and scientific creation shall not be restricted. 2. This freedom shall comprise the right to invent, produce and publicise scientific, literary and artistic work and shall include the protection of copyright by law.”

Furthermore, Article 10 of the ECHR does not apply solely to certain types of information or ideas or forms of expression,¹²⁷ in particular those of a political nature; it also encompasses artistic expression,¹²⁸ information of a commercial nature,¹²⁹ and even light music and commercials transmitted by cable.¹³⁰

The European Court has recognised that freedom of expression includes freedom of artistic expression, affording “*the opportunity to take part in the public exchange of cultural, political and social information and ideas of all kinds.*”¹³¹ Confirmation is said to be provided by Article 10(1)’s reference to ‘*broadcasting, television or cinema enterprises*’, media whose activities extend to the field of art, and by Article 19(2) of the International Covenant on Civil and Political Rights, which expressly covers freedom of expression information and ideas ‘*in the form of art*’.¹³² “*Those who create, perform, distribute or exhibit works of art contribute to the exchange of ideas and opinions which is essential for a democratic society. Hence the obligation on the State not to encroach unduly on their freedom of expression.*”¹³³

In the US, for example, the Supreme Court has taken the view that copyright works side by side with freedom of expression, complementing it rather than opposing it.¹³⁴ By providing a reward mechanism which enables the creation of works independently of a system of benefaction, copyright does encourage uncensored and impartial formation and expression of opinions. Furthermore, copyright protection can be seen as an instrument at the service of cultural identity.¹³⁵

It is also true, though, that authors are granted *quasi* monopolies in works, enabling them to encumber the reception of information in such works by others – the passive component of the right to freedom of expression. Copyright can impinge too upon the right to freedom of expression as regards its active facet – imparting information – where the potential conveyor of information requires the inclusion of the essential *expression* of the work.

There is, thus, a potential conflict between the right to freedom of expression and copyright, but the balance between these rights is normally achieved by means of *freedom of speech safety valves*, such as the idea/expression dichotomy,¹³⁶ the fact that only original works of authorship are protected, the existence of exceptions and

¹²⁷ See *Markt Intern Verlag GmbH and Klaus Beermann v. Germany*, para. 26, available at <http://www.echr.coe.int/echr>.

¹²⁸ See *Müller and others v. Switzerland*, para. 27.

¹²⁹ See *Markt Intern Verlag GmbH and Klaus Beermann v. Germany*, *ibid.*

¹³⁰ See *Groppera Radio AG and Others v. Switzerland*, case number 14/1988/158/214 paras. 54-55, available at <http://www.echr.coe.int/echr>.

¹³¹ See *Müller and others v. Switzerland*, para. 27; *Karatas v. Turkey*, para. 49.

¹³² *Müller and others v. Switzerland*, para. 27.

¹³³ *Müller and others v. Switzerland*, para. 33; *Karatas v. Turkey*, para. 49.

¹³⁴ See *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 558 (1985) and *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003).

¹³⁵ P.B. Hugenholtz, “Caching and Copyright: the Right of Temporary Copying”, (2000) 22 *EIPR* 482-493, 483.

¹³⁶ See, in the US, *Ets-Hokin v. Skyy Spirits*, 225 F.3d 1068, 1082 (9th Cir. 2000).

limitations¹³⁷ and the limited term of protection. Possible tensions are reduced significantly by these boundaries, endowing freedom of expression with a certain amount of breathing space.¹³⁸

Copyright is sometimes described as a monopoly given to authors in the name of public interest. It is also in the name of public interest that some restrictions are imposed to copyright. To stimulate creativity, economic and moral rights are given to authors. However, to assure public access to works, copyright has to be subject to a number of restrictions which help keep the balance between the public interest in rewarding creators and stimulating future creative efforts, and the public interest in access to information and culture.¹³⁹

Restrictions to copyright are owed, principally, to the protection of fundamental rights, such as freedom of expression, and to the defence of corollaries of the latter, such as dissemination of information - restrictions to copyright in favour of dissemination of information promote access to information, knowledge and culture, thus promoting freedom of expression values.

Because of the tension between interests of authors on the one hand, and interests of the public on the other, this balance is difficult to maintain.¹⁴⁰ On the one hand,

¹³⁷ In the UK, for example, *Ashdown v Telegraph Group Ltd*, [2002] Ch 149, CA is the seminal case. In this case, “the court recognized that the ‘fair dealing’ and other exceptions under the UK copyright law are statutory recognitions of the right to freedom of expression. The court of appeal in *Ashdown* further held that the court does not need to take into account the defendant’s freedom of expression as a separate cause of action as this is subsumed within the fair dealing and other defences within the law.” UK Response to Questionnaire on Freedom of Expression, http://www.aladda.org/docs/06Barcelona/Quest_UK_en.pdf.

¹³⁸ In the Netherlands a few relatively recent decisions accepted, in special cases, an art. 10 ECHR defence in copyright cases, seeming to recognize that even where no statutory copyright limitation is applicable this does not preclude a conflict between copyright and freedom of expression, as protected by art. 10 ECHR. According to Eveline Rethmeier and P.B. Hugenholtz, Dutch Response to Questionnaire on Freedom of Expression, http://www.aladda.org/docs/06Barcelona/Quest_Netherlands_en.pdf, in *Dior v. Evora*, Dutch Supreme Court (Hoge Raad) 20 October 1995, NJ 1996, 682, “a landmark case decided in 1995, the conflict between copyright and freedom expression was expressly acknowledged by the Dutch Supreme Court. (...) Having concluded that no statutory copyright exemption applied to the facts of the case, the Court accepted there was room to move outside the existing system of exemptions, on the basis of a balancing of interests similar to the rationale underlying the existing exemptions. Having thus found sufficient room to accommodate the users’ interests by construing such an extra-statutory exemption, the Court however saw no need for direct application of Art. 10 ECHR”, and in the most recent case on the subject, *Scientology v. XS4ALL*, Court of Appeal the Hague 4 September 2003 [2003] AMI 217, “the Court of Appeal of The Hague held that in the absence of a statutory limitation that might cover Spaink’s extensive postings, Scientology’s copyright was trumped by the freedom of expression enshrined in art. 10 ECHR. The Court underscored the non-profit and informative character of Karin Spaink’s website and the contribution of her postings to the public democratic debate. The general interest of having a public debate on Scientology in this case outweighed the interest of the Scientology Church of enforcing its exclusive rights.”

¹³⁹ For a comparative analysis of the concept of public interest in the history of copyright, see G. Davies, *Copyright and the public interest* (2nd ed, Sweet and Maxwell, 2002).

¹⁴⁰ See *inter alia* P. Deely, “Copyright, limitation on exclusive rights: fair use” (1976) 13 *Houston Law Rev.* 1041; S. Ljungman, “The functions of copyright in the present day society” (1976) 88 *RIDA* 51; J.E. Oakes, “Copyright and the first amendment: where lies the public interest?” (1984) 59 *Tulane Law Rev.* 135; L.R. Patterson, “Free speech, copyright and fair use” (1987) 40 *Vanderbilt Law Rev.* 1; J.

exceptions and limitations must not be such as to hinder the author's will to create and, on the other hand, exceptions and limitations should not be erased from the law, in order to maintain a certain degree of free flow of information. The challenge is to maintain an appropriate balance. If the scope of rights is extended, the scope of exceptions and limitations should also be expanded, in order to regain the necessary balance.

Freedom of expression versus copyright in the context of the Draft WIPO Broadcasting Treaty

Introductory

The problem is that the Draft WIPO Broadcasting Treaty may jeopardise the referred *safety valves*. The treaty would give broadcasters and cablecasters (and possibly webcasters) broad rights which in parallel with technological measures, could prevent or restrict the flow of information with respect to materials which may not be protected by copyright, such as news of the day, or which are in the public domain, because their term of protection has expired, or in relation to materials created by third parties who do not wish to prevent dissemination of the latter.

For example, a broadcast of a speech by a public official may be covered by the scope of the proposed Treaty, even though it may not be protected by copyright, and a broadcast of materials under a Creative Commons license may prevent users from fixing such materials.

Time-honored copyright values do not prohibit fixation, reproduction or dissemination of this kind of content. The rights set out by the Draft Treaty may be subject to exceptions, but these are not compulsory and must comply with the *three-step test*.

Therefore, in the context of the Draft Treaty, a conflict may be delineated between the right to freedom of expression, which advocates the freedom to receive and impart information, and copyright.

The most problematic areas of the Treaty, in this respect, will now be examined and where appropriate recommendations will be made.

Protected subject-matter

The uncertainty as to the scope of application of the Draft Treaty, as described above, may enable broadcasting and cablecasting organizations to control both signal and content. This would conflict with the right to freedom of expression, as it could, for example, prevent use of a work in the public domain once it has been broadcast.

To overcome this uncertainty it is recommended that a definition of *broadcast* is presented that expressly circumscribes the ambit of protection granted by the Draft

Griffiths, "Holding back the tide - a review of recent developments in copyright law in the United Kingdom", (1999) 13:3 *I.R.L.C.T.* 283.

Treaty, assuring that it covers the broadcast signals but not the broadcast work, thus allowing use of the latter from another provenance.

Rights and exceptions

Article 7 SCCR/14/2 (Article 8 SCCR/12/2 Rev.2) grants broadcasting and cablecasting organizations the exclusive right of authorizing the fixation of their broadcasts or cablecasts without addressing the ‘*requisite permanence or stability of the embodiment*’ necessary to result in fixation. But an unqualified definition of *fixation* may cast doubt on the legality of the use of hardware, such as a digital tuner card,¹⁴¹ to watch a broadcast programme on a computer screen, even though the process does not involve the making of permanent copies of the broadcast and arguably does not create any economic danger to broadcasting and cablecasting organizations. If this is to be avoided there are two options. One is to qualify the definition of *fixation* and the other option is to subject the right to an exemption perhaps similar to the one encapsulated in Article 5(1) of Directive 2001/29/EC. Certain acts of fixation could be exempted from the scope of the fixation right where they have no separate economic significance.

Additionally, the Treaty may rule out the possibility to record off-air without the permission of a broadcasting organization unless an exception is in place as regards the broadcast itself. The fixation right may prohibit ‘time shifting’, or the making in domestic premises for private use of a recording of a broadcast for the purpose of enabling it to be viewed at a more convenient time. Note, for example, that in the UK this is permitted by section 70 of the Copyright, Designs and Patent Act 1988.

Furthermore, the reproduction right, foreseen in Article 8 SCCR/14/2 (Article 9 SCCR/12/2 Rev.2), may prohibit the shift of a broadcast from a TiVo¹⁴² to a laptop to watch in a different room. Note, for example, that, in Portugal, Article 81 of the Author’s Right and Connected Rights Code 1985 authorizes the reproduction of works, exclusively for private purposes, provided they do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author. The works thus reproduced may not be communicated to the public or used for commercial purposes. The principle enshrined in the Portuguese Code is that the right to privacy, which is set out in the Constitution, impedes control of private use of works and related subject matter.

Moreover, Article 9 SCCR/14/2 (Article 11 SCCR/12/2 Rev.2) addresses the transmission of broadcasts and cablecasts subsequent to fixation, setting out a right to authorize transmission that covers all transmissions, including broadcasting, cablecasting and transmission over computer networks, following fixation. It could be argued that the on-line dissemination of any copy of a broadcast would infringe such right. The uncertainty as to the scope of application of the Draft Treaty coupled with the expansive concept of *transmission*“, may prevent use of broadcast materials which are in the public domain or which are covered by an exception to copyright.

¹⁴¹ A *digital tuner card* is a computer extension card containing a radio frequency tuner and optionally a processor and memory for the purposes of video and audio decompression.

¹⁴² A *TiVo* is a set-top box which allows digital recording and pausing of live analogue TV.

Article 10 SCCR/14/2 (Article 12 SCCR/12/2 Rev.2), which provides broadcasting and cablecasting organizations with a right to authorize the making available to the public of their broadcasts and cablecasts from fixations, would allow –it could be contended- broadcasting and cablecasting organizations to prevent other rightholders from making their works and related subject-matter available for viewing. Nevertheless, this would run counter to the *fifth paragraph* of the Preamble which sets the aim not to compromise but to recognize the rights of the owners of the content carried by broadcasts and also to Article 1(2) SCCR/14/2, which holds a *non-prejudice clause* pertaining to the protection of copyright and related rights following the example of Article 1 of the Rome Convention and Article 1(2) of the WPPT.¹⁴³

It could be argued also that Article 8 SCCR/12/2 Rev.2 (Article 7 SCCR/14/2) and Article 12 SCCR/12/2 Rev.2 (Article 10 SCCR/14/2) could prevent someone from merely storing a copy of a broadcast on a computer that is connected to the Internet.

Article 12 SCCR/14/2 (Article 14 SCCR/12/2 Rev.2) focuses on exceptions and limitations to the rights of broadcasting and cablecasting organizations, permitting – not requiring- Contracting Parties to provide for the same type of exceptions and limitations with regard to the protection of broadcasts that their national law provides in connection with the protection of copyright. These domestic law exceptions and limitations are confined in Paragraph (2) by the *three-step test*, in line with Articles 9(2) of the Berne Convention, 13 of TRIPS, 10 of the WCT and 16 of the WPPT. Conflicts may emerge since approaches will differ between developed and developing countries as to the meaning of the *three-step test*. The former will take a more restricted view of the scope of exceptions and limitations, whereas the latter will take a broader view, namely due to public interest goals such as the promotion of education.

As it stands this Treaty may undermine certain exceptions enshrined in the copyright laws of many countries.

It is recommended that the Draft Treaty sets out a list of exceptions and limitations that are not in discrepancy with copyright law nor with signal protection.¹⁴⁴

¹⁴³ “Protection granted under this Treaty shall leave intact and shall in no way affect the protection of copyright or related rights in program material incorporated in broadcasts. Consequently, no provision of this Treaty may be interpreted as prejudicing such protection.” (SCCR/14/2, Article 1(2)).

¹⁴⁴ According to the new proposals received at the 13th session of the SCCR, the provision on exceptions and limitations would read:

1. Contracting Parties may, in their national legislation, provide for the same kinds of limitations and exceptions with regard to the protection of broadcasting organizations as they provide for, in their national legislation, in connection with the protection of copyright in literary and artistic works, and the protection of related rights.

2. Contracting Parties may, in their domestic laws and regulations, provide, *inter alia*, the exceptions listed below to the protection guaranteed by this Convention. It is presumed that these uses constitute special cases that do not conflict with the normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder:

(a) Private use
(b) The use of excerpts in connection with the reporting of current events;

Restrictions for certain purposes could be established in line with the ones currently recognized under Article 15 of the Rome Convention: private use, reporting of current events, ephemeral recordings and use for teaching and scientific research.

The Draft Treaty should delineate the contours of exceptions and limitations, leaving to domestic legislators the task of setting out more clear-cut provisions.

These exceptions and limitations would serve the public policy objective to disseminate information - an exponent of freedom of expression. Exceptions and limitations that exist in order to protect free flow of cultural, academic and educational information should be preserved as much as possible in a broadcast environment.

Secondly, Contracting Parties should also be given the chance to provide for further exceptions and limitations in accordance to the *three-step test*.¹⁴⁵ But because the

(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;*

(e) *The use of works specifically to promote access by persons with impaired sight or hearing, learning disabilities, or other special needs;*

(f) *The use by libraries, archivists or educational institutions, to make publicly accessible copies of works that are protected by any exclusive rights of the broadcasting organization, for purposes of preservation, education and/or research;*

(g) *Any use of any kind in any manner or form of any part of a broadcast where the program, or any part of it, which is the subject of the transmission is not protected by copyright or any related right thereto.*

Irrespective of paragraph 2, above, Contracting Parties may provide additional exceptions to the exclusive rights conferred by this Treaty, provided that such exceptions do not unreasonably conflict with a normal exploitation of the broadcast and do not unreasonably prejudice the legitimate interests of the right holder, taking account of the legitimate interests of third parties.

or

1. *Each Contracting Party may incorporate in its legislation exceptions to the protection granted by this Treaty in the following cases:*

(a) *private use;*

(b) *short excerpts used 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 only for the purposes of teaching or scientific research;*

(e) *use with the sole objective of making the broadcast accessible to disabled persons;*

(f) *use by publicly accessible libraries or museums, or by archive services, which do not seek to obtain economic or commercial benefit.*

2. *The Contracting Parties may, in their national legislations, provide for the same kinds of limitations or exceptions with regard to broadcasting organizations as they provide for in their national legislation, in connection with the protection of copyright in literary and artistic works, or other limitations or exceptions in so far as they concern special cases which do not affect commercialization of the broadcast and do not unreasonably prejudice the legitimate interests of the rightsholder. [emphasis added]*

¹⁴⁵ SCCR/12/2 Rev.2, Article 3(0) (SCCR/14/2, Article 3(0)). See M. Senftleben, *Copyright Limitations and the Three-Step Test – An Analysis of the Three-Step Test in International and EC Copyright Law* (Kluwer Law International, 2004), S. Ricketson, “WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment”, http://www.wipo.int/documents/en/meetings/2003/sccr/doc/sccr_9_7.doc and WTO Panel Decision on 17 USC § 110(5), DS160/R, http://www.wto.org/english/tratop_e/dispu_e/1234da.pdf.

three-step test could override the national systems of restrictions, an agreed statement should be introduced expressly safeguarding national exceptions and limitations that are deemed compatible with the Treaty, including restrictions regarding the work broadcast - thus assuring, to an extent, the ability for Contracting Parties to shape their national laws according to their needs, individual traditions and cultures.

Thirdly, another agreed statement should make clear that the protection granted to broadcasting and cablecasting organizations does not cover the situation where national laws relating to the protection of the work broadcast would permit the work to be used.

Therefore, the list should be open-ended, encapsulating the core cases of exceptions and limitations on the basis of the imperatives of freedom of expression, seen as the dominant rationalization of restrictions *per se*.

This methodology would help maintain the balance between exclusive rights and restrictions, supporting strong rights and preserving breathing space for freedom of expression and enlightenment values.

Term of protection

Article 13 SCCR/14/2 (Article 15 SCCR/12/2 Rev.2) follows *mutates mutandis* the corresponding provisions of the WPPT. The question should be asked, though, whether the *raison d'être* for protection is not different. Article 17(1) of the WPPT rewards the creative output of performers, but broadcasting organizations do not create works or related subject-matter, merely transmitting programmes which may contain such materials. Hence, the rationale for protection presiding to the term of protection provision seems to be, in the case of broadcasting and cablecasting organizations, to protect investment.

The reasoning for protection seems to be similar to the one that underlies the Database Directive.¹⁴⁶ Only original databases that, by reason of their selection or their arrangement, constitute the author's intellectual creation, will be granted copyright protection.¹⁴⁷ Databases that do not fulfil the originality requirement are still protected by the *sui generis* right,¹⁴⁸ which consists of the right to prevent extraction and reutilization of the contents of the database.¹⁴⁹

The Database Directive resulted from the recognition of the fundamental importance of databases for the development of the Community's information market, of the considerable investment needed for the development of databases and the fact that

¹⁴⁶ Directive 96/9/EEC on the legal protection of databases. For a critical analysis of the Database Directive see *inter alia* S. Beutler, "The Protection of Multimedia Products through the European Community's Directive on the Legal Protection of Databases" (1996) 8 *Ent.L.R.* 317-328; J.H. Reichman and P. Samuelson, "Intellectual Property Rights in Data?" (1997) 50:51 *Vanderbilt Law Rev.* 51-166.

¹⁴⁷ Directive 96/9/EEC, Article 3.

¹⁴⁸ Directive 96/9/EEC, Article 7(4).

¹⁴⁹ Directive 96/9/EEC, Article 7(1).

they can be copied at the fraction of the price required for their development.¹⁵⁰ Its aim was to implement a harmonised legal system to provide incentive for investment in databases.

Both the Draft Treaty and the Database Directive aim to protect the investment required to obtain, organize and disseminate information,¹⁵¹ but the *sui generis* right of database makers exists for fifteen years and can only be renewed for further fifteen-year periods where a substantial new investment in the database, “including any substantial change resulting from the accumulation of successive additions, deletions or alterations” has been carried out.¹⁵²

In the case of the Draft WIPO Broadcasting Treaty, the proposed extension could undermine the balance “between the rights of broadcasting organizations and the larger public interest, particularly education, research and access to information.”¹⁵³

It is stated that “the Treaty deals with the protection of signals which by their nature occur only one time”,¹⁵⁴ however, Article 13 SCCR/14/2 (Article 15 SCCR/12/2 Rev.2) does not prevent successive broadcasts of the same materials in order to extend its term of protection.

Where broadcasting or cablecasting organizations are also rightholders, upon expiry of their copyrights in relation to certain materials they may be able to prolong protection by broadcasting such materials, even though obtaining this protection does not require originality or a substantial investment.

This would challenge two *freedom of speech valves* that are present in the complex and intertwined relationship between copyright and freedom of expression: the fact that only original works of authorship are protected and the existence of a predetermined term of protection.

Additionally, broadcasts may integrate works protected by copyright or public domain content, such as laws, respectively and possibly endangering the rights of the copyright holders at stake, or disregarding the public interest in having access to information, knowledge and culture.

It is recommended that the Draft Treaty (1) takes an investment-orientated approach, by extrapolating the equivalent Rome provision, therefore arguably enabling

¹⁵⁰ Directive 96/9/EEC, Recitals 7-10.

¹⁵¹ In the context of databases the ECJ recently clarified that the legal protection of databases must be understood to refer to the resources used to seek out existing independent materials and collect them in the database and does not extend to the resources used for the creation of materials which make up the contents of a database. A substantial investment is a substantial investment in obtaining and verifying data not in creating it. See *British Horseracing Board Limited, The Jockey Club and Weatherbys Group Limited v. William Hill Organization Limited* (2001) E.C.D.R. 20, *Fixtures Marketing Ltd v Organismos Prognostikon Agonon Podosfairou* (OPAP) (C444/02) [2005 1 CMLR 15], *Fixtures Marketing Ltd v Oy Veikkaus AB* (C46/02) [2005] ECDR 2, and *Fixtures Marketing Ltd v Svenska Spel AB* (C338/02) [2005 ECDR 4].

¹⁵² Database Directive, Article 10.

¹⁵³ SCCR/12/2 Rev.2, Preamble.

¹⁵⁴ SCCR/12/2 Rev.2, Comment 15.04.

broadcasting or cablecasting organizations to recover its investment effort, or (2), as a minimum solution expressly prevents perpetual renewals of terms of protection.

Obligations concerning technological measures

Digital technology increases the ability to copy works and related subject-matter, the quality of the copies, the potential to manipulate and modify the work and the speed with which copies can be delivered to the public. Various technological measures have thus been developed to limit unauthorized copying. Technical solutions, such as digital watermarking¹⁵⁵ and encryption¹⁵⁶, have been used to develop copyright protection systems to prevent copyright infringement, by controlling access to content or copying of content.

The basic problem with available technological measures for protection of copyright and other subject-matter is that most of them have been disregarded or circumvented. In the music field, for example, the Serial Copyright Management System¹⁵⁷ requires devices where CDs are played to search for such flags, but also can be easily ignored.¹⁵⁸ In the audio-visual field, the Content Scramble System¹⁵⁹ has been overcome by De Content Scrambling System (DeCSS). This software was developed to allow the playing of DVD films on operating systems other than Windows and Macintosh, such as Linux. The problem is that programs such as DeCSS enable users to overcome technological measures inserted in DVDs.

Therefore, technology must keep ahead of circumventers, requiring in the process legal protection.

Bearing this in mind, Article 14 SCCR/14/2 (Article 16 SCCR/12/2 Rev.2) contains provisions on obligations concerning technological measures, which reproduce

¹⁵⁵ Digital watermarks are bits embedded in digital content, usually invisible in the absence of the proper software to detect and decode it. Watermarks can be read by a detection device which will know whether the content being played is authentic and where the source of the content originated. The watermark can contain information such as the author's name and e-mail address, ID number and a URL, information about who owns a work, how to contact the owner and whether a fee must be paid to use the work. A watermark can only be effective if the playback and record devices look for the watermark in that particular piece of content.

¹⁵⁶ Encryption is used to obscure the meaning of a message. There are various types of encryption, but only substitution encryption is used in computerised encryption. In substitution encryption, the message is encrypted by replacing one character for another. Only the intended recipient of the message is given the key for uncovering its true meaning and for reading the message.

¹⁵⁷ The Serial Copy Management System (SCMS) allows unlimited copies to be made from the original, but prevents second generation copying (i.e., copies of copies). The SCMS thus prevents the making of unauthorized multiple generations of digital copies from an original, but not of a single copy for personal use. The SCMS system uses copy control flags, which are embedded in the content and verify whether copying is permissible. If a user tries to do a copy from a copy, the copy device will reject it. SCMS is primarily used on digital music

¹⁵⁸ When the user attempts to make an unauthorized copy of a work protected by SCMS, a message appears stating that he may not reproduce that work. The user is given the choice to comply with the law or to make an unauthorized copy of the work.

¹⁵⁹ The Content Scramble System (CSS) stemmed from a proposal put forward by Matsushita Electric Industrial Co., Ltd. and Toshiba Corporation, aimed at controlling access and preventing copying of DVD films. The CSS uses encryption to prevent unauthorized reproduction and distribution of films.

mutatis mutandis the corresponding provisions of the WPPT. According to that provision “*Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by broadcasting organizations in connection with the exercise of their rights under this Treaty and that restrict acts, in respect of their broadcasts, that are not authorized by the broadcasting organizations concerned or are not permitted by law.*” [emphasis added].

In theory, this means that where the laws of a Contracting State permit a use, for example, in relation to public domain material, there should be no legal protection as regards the circumvention of technological measures used by broadcasting organizations in that connection.

In practice, implementation of the corresponding provisions of the 1996 WIPO Treaties has evidenced that such method does not prevent Contracting States from extending legal protection in relation to acts that are *permitted by law*.¹⁶⁰

Within the EC, the Information Society Directive updated the protection of copyright and related rights in line with the issues raised by the digital environment and obligations arisen from the WIPO Treaties.

According to Article 6 of the Information Society Directive, Member States must provide adequate protection against circumvention of technological measures for protection of copyright and against any activities, including the manufacture or distribution of devices which are marketed for the purposes of circumvention, or have only a limited commercially significant purpose or use other than to circumvent, or are primarily designed to enable the circumvention of protective technological measures - there is a grey area surrounding *limited commercial significant purpose*.¹⁶¹

¹⁶⁰ See, for example, Article 6(4) of Directive on the harmonisation of certain aspects of copyright and related rights in the information society (Dir. 2001/29/EC) which reads: “4. *Notwithstanding the legal protection provided for in paragraph 1, in the absence of voluntary measures taken by rightholders, including agreements between rightholders and other parties concerned, Member States shall take appropriate measures to ensure that rightholders make available to the beneficiary of an exception or limitation provided for in national law in accordance with Article 5(2)(a), (2)(c), (2)(d), (2)(e), (3)(a), (3)(b) or (3)(e) 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.*

A Member State may also take such measures in respect of a beneficiary of an exception or limitation provided for in accordance with Article 5(2)(b), unless reproduction for private use has already been made possible by rightholders to the extent necessary to benefit from the exception or limitation concerned and in accordance with the provisions of Article 5(2)(b) and (5), without preventing rightholders from adopting adequate measures regarding the number of reproductions in accordance with these provisions. The technological measures applied voluntarily by rightholders, including those applied in implementation of voluntary agreements, and technological measures applied in implementation of the measures taken by Member States, shall enjoy the legal protection provided for in paragraph 1. The provisions of the first and second subparagraphs shall not apply to works or other subject-matter made available to the public on agreed contractual terms in such a way that members of the public may access them from a place and at a time individually chosen by them.” [emphasis added]

¹⁶¹ Article 6 does not apply to computer programs. These are less liberally protected by Article 7 of Council Directive on the legal protection of computer programs (Dir. 91/250/EEC).

The provision on technological measures goes beyond the WIPO Treaties. The scope of protection covers any activities designated to overcome technical protection measures, including preparatory activities that facilitate or enable the circumvention of such devices. It requires knowledge by the person liable for the circumvention, which implies that only activities and services whose purpose is to circumvent technological protection devices are covered by this provision. It covers not only infringement of author's rights and related rights, but also that of the *sui generis* right of database makers.

Article 6(4) of the Information Society Directive addresses the interaction between the legal protection of technological measures for protection of copyright and the need for users to be able to take advantage of certain exceptions. The first sub-paragraph of Article 6(4) states that, notwithstanding Article 6(1), Member States should promote voluntary measures taken by rightholders, including the conclusion and implementation of agreements between rightholders and other parties concerned, in order to enable the working of certain exceptions or limitations provided for in national law. These specific exceptions listed in Article 6(4) of the Information Society Directive are those for reprographic copying, copying by libraries, educational establishments or museums, ephemeral recordings made by broadcasting organizations, copying of broadcasts by non-commercial social institutions, copying for illustration for teaching or scientific research, copying for people with a disability and copying for purposes of public security or for the proper performance or reporting of administrative, parliamentary or judicial proceedings. In the absence of such voluntary measures or agreements, within a reasonable period of time, Member States are obliged to take appropriate measures to ensure that rightholders provide beneficiaries of such exceptions or limitations with appropriate means of benefiting from them. The Directive does not define *appropriate measures*, providing practically no guidance on what that intervention should entail. Recital 51 refers to “*modifying an implemented technological measure or using other means*”.

Article 6(4) only applies to Article 6(1) and not Article 6(2), which means that although Member States must allow for the circumvention of the specified lawfully excepted uses, this principle does not apply to circumventing devices or services. Accordingly, even if a rightholder does not enable the exercise of the excepted use, devices which enable the circumvention of technological measures for protection of copyright or services which explain to users how to do so remain proscribed.

Since Article 6(4) of the Information Society Directive applies to Article 6(1) and not Article 6(2)), manufacturing or dealing in anti-circumvention devices or rendering services connected to the latter is unlawful even where the devices would enable users to benefit from exceptions authorized by Article 6 itself. In the UK, for instance, a person guilty of such offence is liable on conviction on indictment to a fine or imprisonment for a term not exceeding two years or both.¹⁶²

As to the beneficiaries of the exceptions listed in Article 6(4) of the Information Society Directive, they could find that rightholders fail to provide them with

¹⁶² Copyright, Designs and Patents Act, 1988, s. 296ZB.

appropriate means for benefiting from those exceptions and that they cannot obtain devices enabling them to circumvent technological measures for protection of copyright in order to benefit from the said exceptions.

Therefore, in the EC, certain acts which are permitted by law may be adversely affected by the use of technological measures for protection of copyright.¹⁶³

In the US, the implementation of the WIPO treaty obligations took the shape of the Digital Millennium Copyright Act of 1998 (DMCA). The DMCA sets out a prohibition against the circumvention of technological protection measures used by rightholders to protect their works, and against the removal or alteration of copyright management information.¹⁶⁴

In order to ensure that the public keeps the ability to engage in non-infringing uses of works, such as fair use, the US Congress set out safe harbour provisions regarding those measures, including a bi-annual review conducted by the Register's Office. The Act exempts non-infringing uses of any *particular class of works* when users are adversely affected by the prohibition in their ability to make non-infringing uses of a certain class of works, the latter being identified in a rulemaking proceeding conducted by the Register of Copyrights.

The US Copyright Office determined that during the period from October 28, 2003, through October 27, 2006, the prohibition against circumvention of technological measures that effectively control access to works protected by copyright does not apply to persons who engage in non-infringing uses of four classes of such works.¹⁶⁵

¹⁶³ S. Dusollier, "Technology as an imperative for regulating copyright: from the public exploitation to the private use of the work" (2005) 27(6) *EIPR* 201-204; N. Braun, "The interface between the protection of TPMs and the exercise of exceptions to copyright and related rights: comparing the situation in the United States and the European Community" (2003) 25(11) *EIPR* 496-503.

¹⁶⁴ The Act adds a new Chapter 12 to the copyright statute, Title 17 of the US Code, covering the prohibition of circumvention of technologies that control access to works (§1201), protecting the integrity of copyright management information (§1202) and providing civil remedies and criminal penalties for violations of §1201 and §1202 (§1203 and §1204). Certain exceptions are set out, such as a safe harbour for reverse engineering (§1201(f)). However, courts have not followed a single line of thought when articulating protection of technological measures and copyright exceptions. "For example, in *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 443 (2d Cir. 2001) the Second Circuit decided that the effect of §1201(c) is to ensure that the DMCA is not read to prohibit fair use altogether just because access to the underlying work was obtained in a manner made illegal by the DMCA. (...) Similarly, 321 Studios v. MGM Studios, Inc., 307 F. Supp. 2d 1085 (N.D. Cal. 2004) held that legal downstream use of the copyrighted material by customers is not a defense to the manufacturer's violation of the provisions prohibiting manufacturing and trafficking in technologies used to circumvent the technological protections. (...) In *Chamberlain Group, Inc. v. Skylink Techs., Inc.*, 381 F.3d 1178 (Fed. Cir. 2004), the court concluded that §1201 prohibits only access that bears a reasonable relationship to the protections that the Copyright Act otherwise affords copyright owners. The DMCA did not, the court decided, grant copyright owners carte blanche authority to preclude all use of their copyrighted work. To prevail on a DMCA action, a copyright owner must show that the use made after the circumvention was an infringement. Accord, *Storage Technology Corp. v. Custom Hardware Engineering & Consulting, Inc.*, 421 F.3d 1307 (Fed. Cir. 2005)." (J. Besek, L. Laben, US Response to Questionnaire on Freedom of Expression, http://www.aladda.org/docs/06Barcelona/Quest_USA_en.pdf).

¹⁶⁵ Docket No. RM 2002-4E, <http://www.copyright.gov/1201/docs/fedreg-notice-final.pdf>.

“(1) Compilations consisting of lists of Internet locations blocked by commercially marketed filtering software applications that are intended to prevent access to domains, websites or portions of websites, but not including lists of Internet locations blocked by software applications that operate exclusively to protect against damage to a computer or computer network or lists of Internet locations blocked by software applications that operate exclusively to prevent receipt of e-mail.

“(2) Computer programs protected by dongles that prevent access due to malfunction or damage and which are obsolete.

“(3) Computer programs and video games distributed in formats that have become obsolete and which require the original media or hardware as a condition of access. A format shall be considered obsolete if the machine or system necessary to render perceptible a work stored in that format is no longer manufactured or is no longer reasonably available in the commercial marketplace.

“(4) Literary works distributed in ebook format when all existing ebook editions of the work (including digital text editions made available by authorized entities) contain access controls that prevent the enabling of the ebook's read-aloud function and that prevent the enabling of screen readers to render the text into a specialized format.”

Hence, the passing of the DMCA only signalled the commencement of an ongoing assessment by Congress of the relationship between technology and law.

Within the Draft Broadcasting Treaty there is no sign of recognition that the law may have unintended and undesirable effects in the context of obligations concerning technological measures for protection of broadcasts.

There are no express exceptions for circumvention by authorized users for legitimate purposes, or to preserve access to materials which are not protected by copyright or are in the public domain. Hence members of the public may be prevented from carrying out legal acts. For example, the ability to archive public domain works due their historical importance, certain cryptography research, building of interoperable technologies, and ‘*time-shifting*’ of broadcasts may be impeded.¹⁶⁶

Article 14 SCCR/14/2 (Article 16 SCCR/12/2 Rev.2) may also prohibit uses that technological measures for protection of copyright would allow. The emerging question is what happens where a technological measure for protection of copyright permits a particular use but a technological measure for protection of a broadcast does not.

Where legal boundaries addressing works and broadcasts become distorted, underlying policies which dictate, for instance, that certain materials which are broadcast are not protected by copyright because they have entered the public domain or because they do not comply with originality requirements, may be put at risk.

The Draft Broadcasting Treaty would enable broadcasting and cablecasting organizations to control materials that are in the public domain by transmitting them.

¹⁶⁶ See EFF, “Unintended Consequences: 7 Years Under the Digital Millennium Copyright Act”, http://www.eff.org/IP/DMCA/unintended_consequences.php.

In contrast, copyright protection is not granted to authors unless there is a certain degree of originality involved in the process of creation.

If copyright imperatives are not to be supplanted by the Draft WIPO Broadcasting Treaty, it is recommended that the creation of legal obligations concerning technological measures for protection of broadcasts be accompanied by an agreed statement according to which (1) such obligations will not cover the situation where national laws relating to the protection of the work broadcast or the broadcast itself would permit the work to be used (2) circumvention of a technological measure for protection of a broadcast will be allowed where it is required to enable a non-infringing use -of a work or a broadcast- and the means to carry out such use have not been made available by the respective rightholders.¹⁶⁷

The recommended approach would avoid the need for users to resort to burdensome and potentially ineffective processes in order to be able to benefit from restrictions where rightholders have not made available to the beneficiaries the means of benefiting from such restrictions.¹⁶⁸

Lastly, legal obligations concerning technological measures for protection of broadcasts should only cover the act of circumvention. If legal protection is extended to facilitation of such acts, it should be restricted to devices the sole or main purpose of which is to circumvent such measures.

¹⁶⁷ In line with the rationale of the Benefit Authors without Limiting Advancement or Net Consumer Expectations (BALANCE) Act, H.R. 4536 currently pending in Congress. According to J. Besek, L. Laben, though, “*that bill is not considered likely to pass in the near future.*” (US Response to Questionnaire on Freedom of Expression, http://www.aladda.org/docs/06Barcelona/Quest_USA_en.pdf).

¹⁶⁸ For example, in Portugal, a new provision -Article 221- was introduced in the Portuguese Author’s Rights Code to cover cases where, because of the application of an effective technological measure, a user is unable to carry out certain permitted acts. Article 221 states that effective technological measures may not constitute an obstacle to fair use. It adds that rightholders should take voluntary measures, such as agreements between rightholders or their representatives and users. In the absence of voluntary measures taken by rightholders, where the application of any effective technological measure prevents a person from carrying out a permitted act and that person has legal access to the protected work or subject matter concerned, he may require that adequate measures be taken to solve the case. These measures will be taken by *Comissão de Mediação e Arbitragem*, whose decisions have judicial value. In the UK, a new section -section 296ZE- was introduced in the Copyright, Designs and Patents Act, 1988, in order to cover cases where, because of the application of an effective technological measure, a user is unable to carry out certain permitted acts. Where the application of any effective technological measure to a copyright work - other than a computer program - prevents a person from carrying out a permitted act in relation to that work, that person may issue a notice of complaint to the Secretary of State. Pursuant to an investigation, the Secretary of State will establish whether any relevant voluntary measure or agreement subsists, that is any measure taken voluntarily by a copyright owner, his exclusive licensee or a person issuing copies of a work to the public, or communicating a work to the public (other than a computer program), or any agreement between any of those parties and another party, the effect of which is to enable a person to carry out a permitted act. Where it is established there is no subsisting voluntary measure or agreement, he may order the owner of the rights in the work to which the measure has been applied to ensure that the complainant can benefit from the permitted act. Failure to comply with his direction will amount to a breach of statutory duty.

Formalities

Article 16 SCCR/14/2 (Article 18 SCCR/12/2 Rev.2) provides that no formalities shall be required for broadcasting organizations to have the enjoyment and benefit of the rights created by the treaty, but It could be argued that the existence of formalities, such as registration, would both facilitate the process of obtaining licenses to use broadcasts and the identification of the boundaries of the public domain.

Webcasting

The creation of exclusive rights for webcasters, in parallel with obligations concerning technological measures for protection of webcasting, may restrict further the public's access to information as per the above analysis.

Assessment of the Draft Treaty in the context of European Court of Human Rights jurisprudence

In the context of the Draft Broadcasting Treaty, a conflict may emerge between the right to freedom of expression, which advocates the freedom to receive and impart information, and copyright, which grants authors and owners a *quasi-monopoly* in works and related subject matter. Such conflict could disturb the balance of interests embedded in copyright law to the detriment of freedom of expression principles.

Hypothetically, the question may be asked whether the European Court would find that an interference by a public authority with the exercise of a right guaranteed by the ECHR has taken place, and if so whether that interference would be deemed justified. An interference contravenes Article 10 of the ECHR unless it is prescribed by law, pursues one or more of the '*legitimate aims*' foreseen in Article 10(2) of the ECHR and is necessary, in a democratic society, for achieving such an aim or aims.

Where the public is not able to have access to works that they ought to have access to, such as works in the public domain, there seems to be an interference with the right to freedom of expression.

The interference will be deemed '*prescribed by law*', provided national laws do not leave a very wide margin of interpretation to the domestic courts in this matter and the applicant is able to foresee '*to a reasonable degree*' the likely legal consequences of his actions. The interference in issue pursues one of the '*legitimate aim*' set out in the second paragraph of Article 10 of the Convention: the protection of the rights of others, in this case, copyright. But to be justified the interference must be deemed '*necessary in a democratic society*'.

The European Court regards freedom of expression as one of the essential foundations of a democratic society. This freedom is subject to exceptions, but the European Court construes them strictly, requiring the need for restrictions to be established convincingly. Also, the adjective '*necessary*', within the meaning of Article 10(2), implies the existence of a '*pressing social need*'. The Contracting States have a

certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with European supervision. Ultimately the European Court must decide whether the interference complained of was *'proportionate to the legitimate aim pursued'* and whether the reasons adduced by the national authorities to justify it are *'relevant and sufficient'*.

European case law suggests that public interest in the speech plays a crucial role and that the European Court will be likely to favour freedom of expression where users' access to political, artistic, literary or journalistic speech is restricted.¹⁶⁹

In these circumstances, the European Court could find the free speech restrictions stemming from the implementation of the Draft Treaty unnecessary in a democratic society, not because the Treaty grants exclusive rights to broadcasting and cablecasting organizations, but because the balance between proprietary interests and users' access interests has not been kept.

¹⁶⁹ See *inter alia*, *Arslan v. Turkey*, para. 46, *Nilsen and Johnsen v. Norway*, para 46; *Wingrove v. the United Kingdom*, para. 58.; *Karatas v. Turkey*, para. 50; *Polat v. Turkey*, para. 45; *Krone Verlag GmbH & Co. Kg v. Austria*, para. 35.

Conclusions and Recommendations

The draft Treaty (1) would expand, in the international arena, the level of protection granted to broadcasting organizations and the beneficiaries of such protection (adding cablecasters and possibly webcasters), (2) the proposed legal framework may prevent access to materials in the public domain, (3) obligations as regards technological measures may endanger copyright policies underpinning restrictions, and (4) the term of protection would not be in accordance with the underlying rationale of recovering investment.

Digital technology brought with it amazing techniques for copying and dissemination of information, consequently affecting copyright's delicate inner balance. In this environment, technological measures for protection of copyright have been fostered, and in the international arena the trend seems to be towards the adoption of compulsory legal protection of these measures and establishment of broad rights, whilst devising non-mandatory exceptions.

In line with this move, the Draft Broadcasting Treaty would give broadcasters and cablecasters (and possibly webcasters) broad rights which in parallel with technological measures and ambiguity as to protected subject-matter could prevent or restrict the flow of information with respect to materials which may not be protected by copyright, such as news of the day, or which are in the public domain, because their term of protection has expired or in relation to materials created by third parties who do not wish to prevent dissemination of the latter.

Thus, the Draft Treaty may undermine the balance between the economic interests of broadcasting and cablecasting organizations and freedom of expression values.

On the premise that the significance of protection should be emphasized without failing to remember the democratic benefits ensuing from the subsistence of a suitable set of restrictions to such protection, the following recommendations are made:

Recommendation 1 – Scope of protection

The uncertainty as to the scope of application of the Draft Treaty, as described above, may enable broadcasting and cablecasting organizations to control both signal and content. This would conflict with the right to freedom of expression, as it could, for example, prevent use of a work in the public domain once it has been broadcast.

To overcome this uncertainty it is recommended that a definition of *broadcast* is presented that expressly circumscribes the ambit of protection granted by the Draft Treaty, assuring that it covers the broadcast signals but not the broadcast work, thus allowing use of the latter from another provenance.

Recommendation 2 – Exceptions and limitations

As it stands this Treaty may undermine certain exceptions enshrined in the copyright laws of many countries.

It is recommended that the Draft Treaty sets out a list of exceptions and limitations that are not in discrepancy with copyright law nor with signal protection. Restrictions for certain purposes could be established in line with the ones currently recognized under Article 15 of the Rome Convention: private use, reporting of current events, ephemeral recordings and use for teaching and scientific research.

The Draft Treaty should delineate the contours of exceptions and limitations, leaving to domestic legislators the task of setting out more clear-cut provisions.

These exceptions and limitations would serve the public policy objective to disseminate information - an exponent of freedom of expression. Exceptions and limitations that exist in order to protect free flow of cultural, academic and educational information should be preserved as much as possible in a broadcast environment.

Secondly, Contracting Parties should also be given the chance to provide for further exceptions and limitations in accordance to the *three-step test*. But because the *three-step test* could override the national systems of restrictions, an agreed statement should be introduced expressly safeguarding national exceptions and limitations that are deemed compatible with the Treaty, including restrictions regarding the work broadcast - thus assuring, to an extent, the ability for Contracting Parties to shape their national laws according to their needs, individual traditions and cultures.

Thirdly, another agreed statement should make clear that the protection granted to broadcasting and cablecasting organizations does not cover the situation where national laws relating to the protection of the work broadcast would permit the work to be used.

Therefore, the list should be open-ended, encapsulating the core cases of exceptions and limitations on the basis of the imperatives of freedom of expression, seen as the dominant rationalization of restrictions *per se*.

This methodology would help maintain the balance between exclusive rights and restrictions, supporting strong rights and preserving breathing space for freedom of expression and enlightenment values.

Recommendation 3 – Term of protection

It is recommended that the Draft Treaty (1) takes an investment-orientated approach, by extrapolating the equivalent Rome provision, therefore arguably enabling broadcasting or cablecasting organizations to recover its investment effort, or (2), as a minimum solution expressly prevents perpetual renewals of terms of protection.

Recommendation 4 – Obligations concerning the protection of technological measures

Where legal boundaries addressing works and broadcasts become distorted, underlying policies which dictate, for instance, that certain materials which are broadcast are not protected by copyright because they have entered the public domain or because they do not comply with originality requirements, may be put at risk.

The Draft Broadcasting Treaty would enable broadcasting and cablecasting organizations to control materials that are in the public domain by transmitting them. In contrast, copyright protection is not granted to authors unless there is a certain degree of originality involved in the process of creation.

If copyright imperatives are not to be supplanted by the Draft WIPO Broadcasting Treaty, it is recommended that the creation of legal obligations concerning technological measures for protection of broadcasts be accompanied by an agreed statement according to which (1) such obligations will not cover the situation where national laws relating to the protection of the work broadcast or the broadcast itself would permit the work to be used (2) circumvention of a technological measure for protection of a broadcast will be allowed where it is required to enable a non-infringing use -of a work or a broadcast- and the means to carry out such use have not been made available by the respective rightholders.

The recommended approach would avoid the need for users to resort to burdensome and potentially ineffective processes in order to be able to benefit from restrictions where rightholders have not made available to the beneficiaries the means of benefiting from such restrictions.

Lastly, legal obligations concerning technological measures for protection of broadcasts should only cover the act of circumvention. If legal protection is extended to facilitation of such acts, it should be restricted to devices the sole or main purpose of which is to circumvent such measures.

According to the preamble of the Draft Treaty:

“Recognizing the need to maintain a balance between the rights of broadcasting organizations and the larger public interest, particularly education, research and access to information,

“Recognizing the objective to establish an international system of protection of broadcasting organizations without compromising the rights of holders of copyright and related rights in works and other protected subject matter carried by broadcasts, as well as the need for broadcasting organizations to acknowledge these rights.”

But this elementary theoretical consideration has to be reflected in the provisions of the Draft Treaty and then applied *in praxis*.