

**Public Knowledge Analysis of the Consolidated Text for a
Treaty on the Protection of Broadcast Organizations Presented for
Discussion at the Standing Committee on Copyright and
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A. Introduction.

The Consolidated Text for a Treaty on the Protection of Broadcasting Organizations (“Draft Treaty”²) proposes to grant a broad set of exclusive rights to broadcasting organizations in their broadcasts. Despite this breadth, the Draft Treaty fails to directly address the narrow issue of greatest concern to broadcasting organizations: signal theft.³ At the same time, the Draft Treaty would create an obligation for signatories to create new exclusive rights and to protect technological measures that apply to all broadcasts, regardless of whether the contents are protectable by copyright. These new rights in broadcasts will conflict with those of copyright holders and will adversely affect the exercise of rights held by copyright owners and by the public. The approach that the Draft Treaty takes to protecting broadcasting organizations’ investments could therefore inhibit access to the knowledge that broadcasting organizations are integral in disseminating.

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² Consolidated Text for a Treaty on the Protection of Broadcasting Organizations, February 29, 2004, SCCR/11/3 available at http://www.wipo.int/documents/en/meetings/2004/sccr/pdf/sccr_11_3.pdf.

³ See Protection of Rights of Broadcasting Organizations: Submissions Received from Non-Governmental Organizations by March 31, 1999 (SCCR/2/6) 8-9, at http://www.wipo.int/documents/en/meetings/1999/sccr_99/pdf/sccr2_6.pdf (April 7, 1999) (“Comprehensively updated international protection of the broadcasters’ neighboring right is the only way to ensure the possibility of swift and effective action against piracy of broadcasts,”) [hereinafter *Broadcasting Organizations’ Submissions*].

B. Background on International Broadcast Protection.

The Draft Treaty represents a significant expansion of the current international protection of “broadcasts,”⁴ both in the object of protection and the scope of rights granted. The Draft Treaty expands the object of protection relative to existing treaties by including cablecasts within its definition. The Draft Treaty thus takes the useful step of harmonizing protection for the signals transmitted by terrestrial, satellite, and cable facilities.

However, the Draft Treaty does much more than provide equal protection for all modes of transmitting sounds and images. The consensus rationale among proponents of this expansion in protection is that broadcasting technology has changed dramatically since the Rome Convention was formed in 1961.⁵ The Rome Convention granted *wireless* broadcasters rights to *authorize or prohibit* fixation, communication to the public, reproduction, and rebroadcasting. Signatories of Rome are obligated to provide a 20-year term of protection for these rights. The increasing use of satellites in broadcasting in the years following the Rome Convention led to the Brussels Convention. Article 2(1) states the major obligation of that instrument: preventing signal theft. Signatories must “take adequate measures to prevent the distribution on or from its territory of any programme-carrying *signal* by any distributor for whom the signal emitted to or passing through the satellite is not intended.”⁶ Providing similar protection for cable and non-public broadcast signals is a logical step for the current treaty to take.

⁴ The primary instruments for broadcast protection are the Rome Convention (1961), the Brussels Convention (1974), and the TRIPS Agreement (1994).

⁵ See *Broadcasting Organizations' Submissions* 8, at http://www.wipo.int/documents/en/meetings/1999/sccr_99/pdf/sccr2_6.pdf (identifying technological advances and deregulation as leading causes of the risk of piracy).

⁶ Brussels Convention, Article 2(1), available at <http://www.wipo.int/clea/docs/en/wo/wo025en.htm>.

C. The Draft Treaty Goes Beyond Harmonizing Protection of Signal Transmissions and Fails to Appropriately Protect Against Signal Theft.

The Draft Treaty goes well beyond protecting on equal terms all modes of transmitting sounds and images. It discards the Brussels Convention's clear and forceful obligation to prevent signal theft and follows, in some respects, the Rome Convention's approach of granting broadcasting organizations rights in post-broadcast uses of their signals. In other respects, the Draft Treaty departs from the Rome Convention's overall approach. Overall, the Draft Treaty upsets the role of the Rome and Brussels Conventions in the balance of interests embodied in copyright law and the communication of knowledge by:

1. *failing to appropriately address the harm of signal theft;*
2. *creating an unqualified definition of "fixation";*
3. *granting rights to exclude that overlap with economic rights under copyright;*
4. *failing to provide adequate exceptions and limitations;*
5. *mandating protection for controversial technological protection measures;*
6. *requiring a minimum term of broadcast protection that is far beyond that required to create economic incentive for broadcasters; and*
7. *creating the risk that informational and cultural works will be underused and less accessible.*

1. The Draft Treaty Lacks Clear Signal Theft Protection.

Signal theft directly harms broadcasting organizations that charge a fee for access to the programs that they broadcast. This loss of revenue, like the loss that results from other kinds of theft, is passed on to consumers in the form of higher pay-per-view and subscription fees. Uniform protection against signal theft is therefore a legitimate and beneficial aim of the present treaty.

The Draft Treaty does not provide appropriate signal theft protection in a clear fashion. As a general matter, the principal rights-granting articles in the Draft Treaty refer either to *fixations* of broadcasts⁷ or to the broadcasting organizations' right of communication to the public.⁸ Only Articles 6 and 13 are arguably pointed toward broadcasts themselves. But Article 6 prohibits unauthorized retransmission of broadcasts.⁹ This article therefore prohibits acts that may concern unprotected, non-exclusive signals while failing to create any uniform protection for signals that are intended only for authorized recipients.¹⁰

Article 13, then, is the only provision of the Draft Treaty that squarely addresses signals themselves; but its protection is limited to “signals *prior to broadcasting.*”¹¹ Moreover, Article 13 only protects signals against unauthorized communication to the public and acts involving fixations of signals.¹² It does not establish uniform protection against the receipt of signals by unintended recipients.

Such protection, if it is in the Draft Treaty at all, must be located in the definition of “fixation” and in the prohibition against circumventing technological protection measures that broadcasting organizations employ. The hazards of this strategy are explored in more detail below.

2. The Draft's Overbroad Definition of Fixation Does Not Address Signal Theft and Casts Doubt on Currently Lawful Activities that Do not Harm Broadcasters.

In copyright law, requiring that a work be fixed in a tangible medium before qualifying for protection reduces the frequency of disputes over originality and ownership. The Draft

⁷ See Draft Treaty arts. 8-12.

⁸ See Draft Treaty art. 7.

⁹ See Draft Treaty art. 6.

¹⁰ Cf. Brussels Convention art. 2(1).

¹¹ Draft Treaty art. 13 (emphasis added).

¹² See *id.* (“Broadcasting organizations shall enjoy adequate and effective legal protection against any acts referred to in Article 6 to 12 of this Treaty in relation to their signals prior to broadcasting.”).

Treaty borrows this term but not the condition—required in the United States¹³ and an option under the Berne Convention¹⁴—that a fixation have at least some persistence. Thus, by granting broadcasting organizations the “exclusive right of authorizing the fixation of their broadcasts”¹⁵ without “qualify[ing] or quantify[ing] the duration of the life of the embodiment necessary to result in fixation,”¹⁶ the Draft Treaty creates a right of extraordinary breadth. The comment in the Draft Treaty continues: “There are no conditions regarding the requisite permanence or stability of the embodiment.”¹⁷

One problem with the suggested fixation right is the uncertainty of whether it addresses the concern of signal theft. For example, a signal pirate who unscrambles and records a scrambled satellite signal would probably make an unauthorized fixation. Indeed, the Draft Treaty’s definition of “fixation” might apply to a signal pirate who simply *displays* an illegally unscrambled broadcast without making a permanent copy of the underlying content. But this application raises a further question: What else does the fixation right prohibit?

The fixation right might prohibit many activities that members of the public expect to be able to engage in and currently engage in legally. “Time shifting,” or recording a program for a later, private viewing seems to fall within the ambit of the Draft Treaty’s fixation right. Although countries that have established rights of broadcasting organizations might accommodate this use by imposing levies on blank media, time shifting in other countries, such

¹³ See, e.g., 17 U.S.C. § 101 (providing that a work is “fixed” when it is “sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated *for a period of more than transitory duration*”) (emphasis added).

¹⁴ See Berne Convention art. 2(2) (“It shall, however, be a matter for legislation in the countries of the Union to prescribe that works in general or any specified categories of works shall not be protected unless they have been *fixed in some material form*.”) (emphasis added).

¹⁵ Draft Treaty, Article 8, p. 41.

¹⁶ Draft Treaty ¶2.11, page 24.

¹⁷ *Id.*; *contra* NII White Paper at 28 (“Works are not sufficiently fixed if they are purely evanescent or transient in nature, such as those projected briefly on a screen, shown electronically on a television or cathode ray tube, or captured momentarily in the memory of a computer.”) (internal quotation omitted).

as the United States, is permissible as a “fair use” of the program transmitted by the broadcast. It is unclear whether the exclusive right to fix a broadcast would trump either of these accommodations for personal use.

Another way of rendering both sound and video broadcasts is through the use of personal computers. It is unclear whether this broad definition of fixation would apply to the Internet. While the United States proposed that the Treaty protect webcasters, a majority of the delegations opposed protecting webcasts.¹⁸ Regardless of intention, it is still possible that the Treaty might inappropriately cover certain activities involving the Internet.

In addition the draft treaty could impact software and hardware tools. For example, software-defined radio receivers allow users to hear radio broadcasts, and inexpensive tuner cards allow users to watch broadcast television on their computer screens. Both of these processes involve manipulating content in a computer’s physical memory and in its sound and video cards. In other words, numerous “fixations” of a broadcast might occur before the underlying program is rendered; yet these uses neither present a risk of signal piracy (because they use non-exclusive broadcast signals), nor do they produce permanent copies of the works contained in the broadcasts. Relying upon an unqualified definition of “fixation” to address signal theft is therefore likely to cast doubt on the legality of practices that pose no economic threat to broadcasting organizations.

3. The Exclusive Rights in the Draft Treaty Ignore Signal Theft Protection While Creating Conflicts Between Copyright Holders and Broadcasters That Will Harm the Public Interest.

The Draft Treaty’s proposed exclusive rights for broadcasting organizations are similarly ill-suited to prevent signal theft. Broadcasting organizations have cited two reasons to justify expanding their rights. First, deregulation in many countries has increased competition in

¹⁸ Draft Treaty ¶2.13, page 24.

markets for the licensing of content.¹⁹ Second, technological advances have enabled individuals to retransmit and redistribute broadcast programs.²⁰ Both of these threats, according to broadcasting organizations, point to a single, practical goal: establishing the right of broadcasting organizations to bring legal actions against parties that steal signals, without the need to join the copyright holder (if there is one) of the underlying program and without the need to prove that the underlying program is copyrighted in the first place.²¹ Put simply, broadcasting organizations have clearly stated that their economic interests—and the public interest in gaining access to broadcasts—would be well-protected by a right to sue parties that commit signal theft.

Although the Draft Treaty might facilitate broadcasting organizations' acting as a plaintiff alongside or in place of a copyright holder, it does so, not by creating an explicit protection against signal theft, but by granting broadcasting organizations exclusive rights that could undermine the public interests that broadcasting organizations otherwise serve.²² These rights include the Rome Convention-based right to reproduce fixations,²³ as well as the rights to distribute, transmit, and make available to the public fixations of broadcasts.²⁴

Additionally, since these rights shadow some of the exclusive rights held in broadcasts' contents, the Draft Treaty could make it necessary for potential users of a broadcast to negotiate with two parties holding rights to exclude a particular use. These overlapping rights might work in several ways to raise the cost of using broadcasts and accessing knowledge.

First, the addition of parties that hold a right to authorize a particular use might raise the cost of securing permission to engage in this use; a user would need to secure permission from

¹⁹ See *Broadcasting Organizations' Submission* at 8, (identifying technological advances and deregulation as leading causes of the risk of piracy).

²⁰ *Id.* See also FCC Broadcast Flag Regulation (identifying potential for “mass indiscriminate distribution” of broadcast content as a reason to mandate a “broadcast flag” for retransmission control).

²¹ *Broadcasting Organizations' Submissions* at 8-9.

²² See Draft Treaty at 13 (“Recognizing the need to maintain a balance between the rights of broadcasting organizations and the larger public interest, . . .”).

²³ Draft Treaty art. 9.

²⁴ Draft Treaty arts. 10-12.

two parties through potentially separate negotiations. Second, the independent broadcast rights and copyrights both have their own value; a potential licensee can therefore expect to pay more for permission to use a signal and its contents than he would if copyright were the only exclusion.

Third, broadcasting organizations acquire exclusive rights in signals that carry programming that is not subject to copyright protection. Requiring users to obtain permission to fix, copy, or redistribute this information denies them timely access to and use of information pertaining to the “news of the day” and other content which has no copyright protection. Similarly, creative works for which copyright protection has expired could be made subject to a broadcasting organization’s exclusive rights. Copyright law’s policy against protecting facts and ideas and finite term would suffer if broadcasting organizations acquire exclusive rights in non-copyrighted content. Any benefit gained by the broadcasters, who are mere distributors rather than the creators, with these exclusive rights is heavily outweighed by the public benefit of access to and use of facts, ideas, and content no longer copyright protected.

Finally, granting broadcasting organizations rights that overlap with copyright could go beyond merely raising the cost of secondary uses of broadcasts and their contents. Either rightsholder—the broadcaster or the copyright holder—may have non-economic reasons for denying permission to engage in a certain use of a broadcast or the content carried by it. In many areas of regulation, the presence of multiple exclusive rightsholders has led to the underuse of resources.²⁵ The Draft Treaty raises the possibility that exclusive rights in broadcasts will have the same effect upon the use of copyrighted works.

These types of rights are not necessary to protect the broadcaster against signal theft and might instead block copyright holders’ abilities to license uses of their works. At minimum, the

²⁵ See generally James M. Buchanan & Yong J. Joon, *Symmetric Tragedies: Commons and Anticommons*, 43 J.L. & ECON. 1 (2000).

potential for broadcasting organizations to block copyright holders' authorization to use their works when fixed from broadcasts could reorder the market for licenses to broadcast copyrighted works, with uncertain effects upon the cost and availability of broadcasting to the public.

4. The Draft Treaty Interferes with Long-standing, Effective, and Varied Copyright Limitations, Exceptions, and Infringement Defenses.

In contrast with the Draft Treaty's expansive and overlapping rights in broadcasts, the Draft Treaty offers little overlap with the myriad and varied limitations and exceptions that are found in States' copyright laws. While the Draft Treaty purports not to prejudice copyrights and obligations under copyright treaties, the discussion above demonstrates that, in substance, the Draft Treaty would allow broadcasting organizations (rather than authors or creators) to claim exclusive rights in uncopyrightable and no longer copyrighted subject matter. In addition, the Draft Treaty does not appear to have adequate coordination with copyright exceptions. Any limitations or exceptions created by parties to the Treaty are to be confined 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."²⁶ There are no explicit limitations or exceptions. A "grandfathering clause" proposed by Egypt and the United States "would allow Contracting Parties to maintain certain limitations and exceptions concerning retransmissions,"²⁷ but it is unclear whether there will be sufficient support for this clause to become part of the treaty. Without this clause, there is no explicit preservation of existing national exceptions. Even with this clause, the Draft Treaty's exceptions would not reach reproduction, distribution, and other activities that copyright law—and its limitations—are meant to encourage. Further, States have long been able to implement the exceptions and limitations to

²⁶ Draft Treaty, Article 14, p. 53.

²⁷ Draft Treaty, ¶ 14.04, p. 52

copyright law that are relevant to their individual traditions and cultures. The Draft Treaty does not support this important national choice.

The Draft Treaty could grant limitations and exceptions that are consistent with copyright law without compromising the end goal of preventing signal theft. Indeed, an anti-signal theft provision similar to Article 2(1) of the Brussels Convention is almost entirely separate from the business of defining rights in *fixations* of broadcasts.

5. The Draft Treaty Mandates Protection for Controversial and Harmful Technological Protection Measures.

A possible limited role for technological measures (TMs) may be in preventing signal theft. Granting broadcasters the right to seek redress for the circumvention of limited TMs could help to reduce the costs of signal theft borne by broadcasters and their customers. The Draft Treaty, however, does not provide TM protection tailored to signals. Instead, the Draft Treaty's TM anti-circumvention provision extends to TMs used "in connection with the exercise" of any of the broadcasters' rights under the Draft Treaty.²⁸ By its own terms, then, this article fails to guard against signal theft; the Draft Treaty does not grant a right to broadcast. Moreover, it is evident that Draft Treaty will create legal protection for TMs that disregard the limitations in copyright law that reflect a judgment that less exclusivity sometimes better promotes access to knowledge. In other words, broadcast-based TMs might prohibit uses of programs that copyright-based TMs would allow. This is the same reasoning why TMs are controversial in general—they prevent the public not only from engaging in illegal uses but also from engaging in legally permissive uses.

This stacking of one TM protection obligation upon another obscures the separation between a broadcast and content. Consequently, the distinctions between the legal regimes that

²⁸ Draft Treaty art. 16(1).

protect broadcasts and copyrighted works are likely to become blurred. Currently, programs that are broadcast might not be under copyright, either because the work has entered the public domain, or the work does not meet the requirement of originality.²⁹ The absence of copyright in such works reflects a national policy judgment that they should not be subject to copyright's prohibitions against unauthorized reproduction and fixation. TMs that are developed with reference to this copyright policy could easily include these limitations.

The flexibility to make these kinds of judgments under copyright law might disappear under the Draft Treaty's provisions. Since the proposed rights in broadcasts attach irrespective of the protectability of the underlying work, signatories would be obligated to protect TMs that restrict copying and distributing fixations of a broadcast. Expanding the exclusive rights held by broadcasters and creating an obligation to protect the TMs that broadcasters employ in connection with those rights presents a puzzle that the Draft Treaty does not solve: If a content-protecting TM permits a particular use, but the broadcast-protecting TM does not, is the use allowed? The Draft Treaty is not merely silent on this point; it does not provide a process for reaching an answer. This uncertainty could impede industry development of broadcast-protecting TMs. Moreover, and perhaps more importantly, the Draft Treaty would leave signatories uncertain about whether their treaty-based obligations to broadcasters would supersede their copyright policies.

About the only uniformity with respect to TMs is the controversy that surrounds them in public debate in a wide variety of countries. Mandating protection for TMs that effectively attach to works that may be protected with different TMs and operate according to different rules will further stir this controversy while complicating the law and technology of gaining access to

²⁹ Under the Berne Convention, for example, the "news of the day" does not necessarily qualify for copyright protection. See 1 PAUL GELLER & MELVILLE NIMMER, INTERNATIONAL COPYRIGHT LAW AND PRACTICE §4[1][c] (2003) ("Article 2(8) of the Paris Act of Berne declares that the 'news of the day' need not be protected, ostensibly absent a special showing of originality.").

knowledge. A provision that limits the TM protection obligation to signals, consistent with copyright limitations, would largely avoid these problems. However, even this limited use of TMs raises serious implementation concerns and questions about how the use of such TMs could impact new technologies and technology innovation.

6. Extending the Term of Broadcast Protection Creates a Questionable Incentive.

As this discussion has emphasized, the primary harm that broadcasting organizations seek to address through this treaty is that of signal theft. Effective remedies against parties that receive signals that are not intended to reach them are consistent with this purpose; long-term economic rights are not. Nonetheless, the Draft Treaty takes the latter approach by proposing a 50-year minimum term for exclusive rights in broadcasts. This term is more than double the current international baseline of 20 years, which the Rome Convention established.

This extension defies justification on any plausible economic grounds, let alone the specific goal of preventing signal theft. Two aspects of the Draft Treaty's treatment of the term of protection could undermine the balance that the Preamble announces as the Treaty's goal. First, although broadcasts "by their nature occur only one time,"³⁰ the Draft Treaty does not preclude a broadcaster from engaging in a later broadcast of a work. A broadcasting organization could therefore effectively extend its term of exclusivity in the use of fixations of the same content. A broadcaster would have to obtain permission from a copyright holder to transmit a second broadcast of a given work. However, in many countries broadcasters are also copyright holders. In those situations, even though a copyright term may expire, the copyright holder itself would be able to extend the right by merely broadcasting the content. This

³⁰ Draft Treaty ¶ 15.04.

renewability could frustrate the policies that underlie finite copyright terms.³¹ Exclusive rights in separate broadcasts would attach merely upon a subsequent broadcast; obtaining this protection requires the input of additional investment in neither the work that underlies the broadcast nor in the technology required for the broadcast.

A second reason to question the effectiveness of the term proposed as an economic incentive is that it applies retroactively to works which “have not yet fallen into the public domain” when the Treaty enters into force.³² Not only does retroactive protection fail to provide an incentive; it will also upset the expectations of creators and the public that were formed on the basis of the minimum broadcast-related terms established under the Rome Convention.

Moreover, creating an obligation to award at least 50 years of protection to broadcasts could produce decidedly non-uniform results. Countries that do not currently grant any rights in broadcasts would face no retroactivity requirement for broadcasts, regardless of their country or origin.³³ With such varying application among countries, this provision adds nothing to the preamble goal of uniformity. Additionally, this term extension is not necessary to help broadcasters prevent signal theft.

D. Conclusion.

The Standing Committee has recognized the global importance of providing broadcasters with legal protection against the theft of their signals. A treaty that lays down rights and obligations to address signal theft would provide a welcome and effective means of curtailing this harm. As explained in detail above, *a better treaty would:*

³¹ It is also possible that a broadcaster would own the copyright in the content that it is broadcasting. The renewability of broadcast protection would remain unchanged under this circumstance.

³² See Draft Treaty art. 20 (“Contracting Parties shall apply the provisions of Article 18 of the Berne Convention, *mutatis mutandis*, to the rights of broadcasting organizations provided for in this Treaty.”); Berne Convention art. 18(1) (“This Convention shall apply to all works which, at the moment of its coming into force, have not yet fallen into the public domain in the country of origin through the expiry of the term of protection.”).

³³ See Draft Treaty art. 5 (“Each Contracting Party shall accord to nationals of other Contracting Parties, . . . the treatment it accords to its own nationals . . .”).

- *Provide an explicit right to prohibit signal theft;*
- *Refrain from introducing a new definition of fixation;*
- *Avoid providing broadcasters with additional rights that conflict with copyright holder's rights;*
- *Grant limitations and exceptions that are consistent with copyright law and personal use;*
- *Eliminate TM protections or limit any TM protection obligation to signals;*
- *Limit the protection to a single transmission to avoid perpetual protection; and*
- *Refrain from extending the minimum term of broadcast protection beyond 20 years.*

The Draft Treaty misses the opportunity to provide targeted signal theft protection, and instead introduces exclusive rights for broadcasters that could interfere with existing copyright policies. The Draft Treaty's approach to the substance of broadcast protection could therefore inhibit fulfillment of the broader goals of uniformity, non-prejudice of copyright protection, and access to knowledge.