

In support of a modern Treaty for broadcasters

A joint declaration

We, the undersigned regional and national broadcasting organizations, welcome the opportunity that now exists to move forward at WIPO decisively towards a consensus text on the protection of broadcasters in the twenty-first century. This opportunity has been created by the constructive engagement between governments in informal discussions in the SCCR.

With the objective of a *Diplomatic Conference in 2014*, the Working Document (SCCR 24/10) will need urgent further work, and the analysis in the comparative document (SCCR 24/11) submitted by the Japanese government is a useful guide in this respect.

For broadcasters it is essential that the treaty contain relevant protection for broadcasting organizations operating in the first quarter of the twenty-first century.

The obvious starting point is to provide broadcasters with rights which belong in the same “family” as the rights granted to authors under the Berne Convention and the WIPO Copyright Treaty (WCT); and to phonogram producers and performers under the Rome Convention, the WIPO Performers and Phonogram Producers Treaty (WPPT) and the Beijing Audiovisual Performances Treaty (BAVPT).

In the academic literature¹ one finds the following unequivocal judgement:

“The truth is that there is no logical reason, based on the need for literary or artistic creation, why each of these subject matters [sc. sound recordings, broadcasts and live performances] should not be protected under the Berne Convention. ... Rather than protection of the kind accorded to authors ... what has been sought is protection for the financial investment involved in the making of a recording or broadcast.”

The only effective means of protecting their investments required for producing and transmitting broadcast signals is by way of rights granted to broadcasting organizations.

¹ Sam Ricketson and Jane C Ginsburg, *International Copyright and Neighbouring Rights* Oxford University Press, second edition 2006, §§19.02 – 19.03 pp 1206 ff. And to similar effect see Stephen M Stewart assisted by Hamish Sandison *International Copyright and Neighbouring Rights* Butterworths, second edition 1989, §§7.11 – 7.12 pp 190 – 191.

The General Assembly's mandate regarding "signal-based protection"

The scope of the General Assembly's mandate² regarding the meaning of the phrase "signal-based approach" was intended to make clear that broadcasters would only be protected in respect of the signal itself and not the content, hence eliminating concerns that broadcasters could acquire additional rights in the content by virtue of the treaty.

This signal-based approach is broad enough to provide broadcasters with a sufficient measure of protection in their broadcasts, by focusing on the broadcasters' rights in the signal, separate and apart from the underlying content, and to protect that signal against any form of retransmission.³

Technology and scope

It is imperative that the treaty be "technologically neutral" as between the means which broadcasters adopt in order to fulfill their purposes as broadcasters. This is wholly consistent with the General Assembly's mandate to confine protection to broadcasters "in the traditional sense".

If one looks back over the last 90 years there is no doubt that there have been significant changes both in the technical means used and the numbers that can be reached by broadcasters.

Radio signals in the 1920s were only receivable within a radius of a few miles of the transmitter and the audience might amount to a few thousands. Today the audiences for the Olympics, a royal wedding or the election of a US President are worldwide, are measured in hundreds of millions and are delivered not only over the air by radio and television (analogue and digital) but by way of satellite, cable, mobile phone, and over the internet, and not only according to a schedule but via services that allow viewers and listeners to catch-up or to preview programmes or to watch minor events⁴

To take an analogy, think of the Model T, which started coming off the Ford assembly line in the first decade of the last century, and then think of the Mitsubishi MiEV, a modern electric vehicle. Both are designed to transport people along roads, and both are categorised as automobiles.

It does not make sense to say that somewhere along the timeline there was a frontier which was crossed, so that beforehand there were "automobiles in a traditional sense" and afterwards there was something else. Rather, we see

² See WO/GA/33/10 p.38.

³ A signal-based approach which was confined solely to protecting the instantaneous transmission of the broadcast signal would clearly be unable to deliver effective protection to broadcasters.

⁴ For example, during the Olympics UK "red button services" allowed UK viewers to watch events such as canoeing on the Internet, which would not have attracted sufficient numbers to warrant transmission on a mainstream broadcast channel.

automobiles in terms of their functionality, not the particular mode of technology or engineering which enables them to transport people via the roadways.

In the same way, broadcasters have always been defined by their activity of planning, producing and/or acquiring a daily programme output, which is put in a schedule for transmission to the public. Functionality remains the best way to recognize broadcasters.

Protecting broadcasters “in the traditional sense” is completely consistent with a technologically neutral approach that is forward looking, and not based on arbitrary distinctions of the methods or technology used by broadcasters to deliver their services to the public.

A two-stage process?

Almost 10 years ago, a treaty proposal was submitted that envisaged protection for broadcasting services via wireless means, by cable and over computer networks. When it was later agreed to postpone the protection of webcasting services, it was on the basis that there would be a two-stage process: first, a treaty whose beneficiaries would be restricted to broadcasting and cable-casting organizations which delivered their services by technologically specified means restricted to over the air, satellite and cable; second, at some later stage, another treaty, again restricted in a technological sense, for such services delivered over the internet.

In 2012, a two-stage process no longer has any credibility. The current realities of broadcasting in the digital era have made it imperative to include all technologies and platforms by which viewers in every part of the world want to receive the broadcasters' services.

The signatories to this Declaration urge member states to adopt a treaty that is technology-neutral so as to allow for the protection of broadcasters' services irrespective of the platform by means of which they are delivered.

Broadcasters could see as a possible way forward to include language in the treaty that would offer contracting parties the possibility to adopt such a technologically neutral approach within a specified period of time.

Signatory Unions

ABERT	Brazilian Association of Broadcasting
ABU	Asia-Pacific Broadcasting Union
ACT	Association of Commercial Television in Europe
AER	Association of European Radios
AUB-UAR	African Union of Broadcasters
CBU	Caribbean Broadcasting Union
EBU	European Broadcasting Union
IAB	International Association of Broadcasting
NAB	National Association of Broadcasters (USA)
NABA	North American Broadcasters' Association