

# **The WIPO Treaty for the Protection of Broadcasting Organizations: The history and context of the negotiation**

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Appraising the WIPO Broadcast Treaty and its Implications on Access to Culture  
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## **The 1961 Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations**

In 1961 the International Labour Organization (ILO), the United Nations Educational, Scientific and Cultural Organization (UNESCO) and the Bureau of the International Union for the Protection of Intellectual Property (BIRPI), the predecessor of the World Intellectual Property Organization (WIPO), convened a diplomatic conference that led to the adoption of the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations.

The most commonly expressed rationale for the 1961 Rome Convention was concern regarding the welfare of performers, and this was the earliest issue raised, including work by the ILO dating from 1926, and raised during various revisions of the Berne Convention.

## **The 1961 Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations**

The 1961 Rome Convention created a system for related rights for performers, and producers of sound recordings, to supplement protections that authors have under the Berne Convention. In 1961, a decision was made to give broadcasting organizations a layer of rights, as a reward for their role as an “intermediary” between authors and audiences, essentially on a par with actors, singers, musicians and other performers.

Article 1 (Safeguard of Copyright Proper) of the Rome Convention stated:

*Protection granted under this Convention shall leave intact and shall in no way affect the protection of copyright in literary and artistic works. Consequently, no provision of this Convention may be interpreted as prejudicing such protection.*

# Reflections on the Rome Convention

France: *At the opening of the Conference, the Delegation of France declared that it considered a convention on neighbouring rights both superfluous and untimely: superfluous because most of the situations covered by it can be regulated by contracts, and untimely because international conventions follow rather than precede juridical developments.* (Source: Records of the Diplomatic Conference on the International Protection of Performers, Producers of Phonograms and Broadcasting Organizations, Rome, 10 to 26 October 1961, page 3)

UNESCO: *Performers had always played the part of intermediaries between authors and audiences and that role was no less important from the social than from the cultural standpoint. The same part was also being played, in a new way, by producers of phonograms and broadcasting organizations. The three Organizations had worked in unison to ensure that the future international instrument should be a composite whole, reconciling as far as possible the various legitimate interests at stake, those of the intermediaries as well as those of the authors themselves and those of the general public.* (Source: First plenary meeting, Tuesday, 10 October 1961. Records, pages 6)

# Reflections on the Rome Convention

In 1961 radio and television was primarily focused on free over the air (OTA) broadcasting activities, subject to various forms of public interest and public service regulatory obligations. Some argued that the costs of broadcasting television were significant, and the rights were needed to protect the high investments. Unlike a bookstore, the broadcast typically was freely available to the public without subscription.

The new rights in the Rome Convention permitted the broadcasting organizations to authorize or prohibit, and effectively charge money, for the rebroadcasting of broadcasts, as well as the fixation, reproduction of fixations, and “communication to the public of their television broadcasts if such communication is made in places accessible to the public against payment of an entrance fee.” (Rome Convention, Article 13). Ironically, in a treaty first conceived as an instrument to protect performers, the new rights for broadcasting organizations were available even when a broadcaster did not compensate performers or producers of phonograms.

# UNESCO/WIPO: Group of Experts on the Copyright Aspects of Direct Broadcasting by Satellite - 1985

The mandate of the Group of Experts was to examine the legal problems in the field of copyright raised by direct broadcasting of satellite.

*47: One participant raised the question whether the so-called "pay television, "that is, television broadcasting receivable only by those members of the public who hired or bought the decoder necessary to decrypt the encrypted signals diffused by the broadcaster, could be qualified as broadcasting at all, since the public to which the communication of signals is intended was restricted to those who availed themselves of the additional service of the broadcaster consisting in providing his customers with decoders ("real audience").*

*52. In conclusion, the participants that direct broadcasting of works by means of a satellite (broadcasting satellite service) was broadcasting in the sense of the the Berne and Universal Copyright Conventions. The participants suggested the various aspects of the application of those Conventions when broadcasting is effected through direct broadcasting satellites should be further studied by the Secretariats, in particular as regards....the applicability of non-voluntary licensing."*

## The WIPO 1996 Internet Treaties

In 1996 WIPO adopted the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonogram Treaty (WPPT). The WCT and the WPPT expanded the rights of authors, performers and producers of phonograms.

*As noted by WIPO, “the purpose of the two treaties is to update and supplement the major existing WIPO treaties on copyright and related rights, primarily in order to respond to developments in technology and in the marketplace. Since the Berne Convention and the Rome Convention were adopted or lastly revised more than a quarter century ago, new types of works, new markets, and new methods of use and dissemination have evolved.”*

(Source: [http://www.wipo.int/copyright/en/activities/internet\\_treaties.html](http://www.wipo.int/copyright/en/activities/internet_treaties.html))

# 1997-1998 - Manila, Cancun, and The WIPO Standing Committee on Copyright and Related Rights (SCCR)

In November 1998, a report on Existing International, Regional And National Legislation Concerning The Protection Of The Rights Of Broadcasting. (SCCR/1/3) was presented at the first meeting of the new WIPO Standing Committee on Copyright and Related Rights (SCCR). The report stated:

*“The WIPO Performances and Phonograms Treaty (WPPT) harmonizes and updates international norms on the protection of performers (except for their “audiovisual performances”) and producers of phonograms, but it does not cover the third traditional category of related rights beneficiaries, namely broadcasting organizations. During the preparatory work that led to the adoption of the WPPT and the WIPO Copyright Treaty (WCT), and at the September- October 1997 sessions of the Governing Bodies of WIPO, several delegations proposed that WIPO include in its program the issue of harmonization of the rights of broadcasting organizations. The WIPO World Symposium on Broadcasting, New Communication Technologies and Intellectual Property, held in Manila in April 1997, and the WIPO Symposium for Latin American and Caribbean Countries on Broadcasting, New Communication Technologies and Intellectual Property, held in Cancun, Mexico, in February 1998, identified several areas where international harmonization and updating of existing norms is necessary and indicated that this activity may have to extend to the rights of distributors of cable- originated programs.”*



# 1997-1998 - Manila, Cancun, and The WIPO Standing Committee on Copyright and Related Rights (SCCR)

At the April 1997 WIPO World Symposium on Broadcasting, New Communication Technologies and Intellectual Property, representatives of broadcasting organizations requested the following set of rights (Source: SCCR1/3):

According to these proposals, broadcasters should be granted exclusive rights to authorize or prohibit the following acts:

- simultaneous or deferred rebroadcasting of their broadcasts, whether these are transmitted via satellite or by any other means;
- simultaneous and deferred retransmission of their broadcasts in cable systems;
- the making available to the public of their broadcasts, by any means, including interactive transmissions;
- the fixation of their broadcasts on any media, existing or future, including the making of photographs from television signals;
- the transmission to the public of programs, transmitted by cable;
- the decoding of encrypted signals; and
- the importation and distribution of fixations or copies of fixations of broadcasts, made without authorization.

## **SCCR/2/5: Submissions received by Member States of WIPO and the European Community (April 1999)**

In May 1999, the Secretariat presented a compilation of proposals by the European Community, Japan, and Switzerland.

While the European Community and Japan proposed certain suggestions the rights to be protected, the Swiss proposal contained specific treaty text for a Protocol on the Protection of the Rights of Broadcasting Organizations Under the WIPO Performances and Phonograms Treaty.

As noted by Switzerland, the proposal was presented as a protocol under the WIPO Performances and Phonograms Treaty (WPPT).

## WIPO Broadcasting Treaty - 2004 to 2007

SCCR 11 in June 2004 made the following recommendation to the WIPO General Assembly:

*The WIPO General Assembly is recommended to consider, beginning at its September/October session in 2004, the possibility of convening, at an appropriate time, a diplomatic conference on the protection of broadcasting organizations.*

*Twelfth Session of the Standing Committee; the Chair of the present session of the Standing Committee will prepare, for the Twelfth Session of the Committee, a revised version of the Consolidated Text in which the possible protection of webcasting organizations and other proposals having received very limited support will be indicated in square brackets.*

# Of webcasting and Hertzian waves

*The question then is how to continue discussions for webcasters -- those who are simulcasters - broadcasters who are broadcasting their own information? What if we switch off the electricity? What if we cease to use Hertzian waves for broadcasting, and start to use webcasting technology? Would just be webcasting technology then? As we consider this treaty, webcasting should be understood in a broad way. Broadcasting should be understood to be broader than transmission over Hertzian waves. -*

Jukka Liedes, former chair of the WIPO SCCR, September 2005



Source: EFF,  
<https://www.eff.org/es/pages/sept-2005-wipo-informal-consultation-european-community-states-and-group-b-states-and-ngos-pro>)

## WIPO Broadcasting Treaty - 2004 to 2007

As the discussions over the WIPO broadcast treaty progressed from 2004 to 2007, a great deal of attention was focused on proposals to extend the rights not only to cable and satellite operators, but also to webcasting entities. The rationale for extending rights to cable and satellite entities was non-existent, since both services only provided broadcasts to subscribers, and piracy of either satellite or cable services was considered both an infringement of the underlying copyright, and a violation of various theft of service and regulatory regimes.

The webcasting lobby, led by Yahoo and the Digital Media Association (DiMA), was primarily motivated to obtain regulatory and intellectual property protection parity with over the air and cable broadcasters, which they saw as their rivals.

The proposals to extend the Rome Convention--type rights to the Internet alarmed many civil society and Internet rights groups, because it would create a new layer of intellectual property rights, potentially protecting even material in the public domain, or material subject to copyright exceptions, or material freely licensed under creative commons licenses. The new layer also increased the risks of being sued for infringement by entities that neither created nor owned the underlying content, and made it more difficult (and costly) to clear rights.

## WIPO Broadcasting Treaty - 2005 - Brazil's proposal on general public interest clauses

On November 17, 2005, Brazil submitted a proposal that contained general public interest clauses. Brazil noted:

*“Under any circumstances, a new international instrument in this field must strike an appropriate balance between the protection of the rights of broadcasting organizations and the public interest, as well as the rights of other right -holders under the copyright system. **Signal theft should not be addressed at the expense of the rights of other right-holders.** Furthermore, it is important to recall that **broadcasting activities in many countries are intended to have a clear “social dimension”**, by servicing the public interest in areas of direct relevance to social, economic and cultural development, such as education, the promotion of cultural diversity and others. In many countries, in fact, **broadcasting organizations are required to undertake this “public -service” role** in order to receive or renew their license to operate. Any new instrument in this area should therefore seek to preserve this social role of broadcasting organizations, for the benefit of society at large in all countries.” (SCCR/13/3 Corr.) [Emphasis added]*

# WIPO Broadcasting Treaty - 2005 - Brazil's proposal on general public interest clauses

The Brazilian submission proposed the general public interest clause to promote access to knowledge, cultural diversity and development.

Article [x]

## *General Principles*

*Nothing in this Treaty shall limit the freedom of a Contracting Party to promote access to knowledge and information and national educational and scientific objectives, to curb anti-competitive practices or to take any action it deems necessary to promote the public interest in sectors of vital importance to its socio -economic, scientific and technological development.*

## WIPO Broadcasting Treaty - 2005 - Brazil's proposal on general public interest clauses

On limitations and exceptions, Brazil proposed that the 2005 Chair's consolidated text be redrafted as to "specify certain 'public good' exceptions which would be applicable to broadcasts under the proposed new WIPO Treaty.

These exceptions included:

- (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*



# WIPO Broadcasting Treaty - 2005 - Chile's submission on Defense of competition

On November 22, 2005 Chile submitted a proposal that contained a provision on national treatment, defense of competition and exceptions permitted.

## *Defense of Competition*

- 1. The Contracting Parties shall take adequate measures, especially when formulating or amending their laws and regulations, to prevent the abuse of intellectual property rights or the recourse to practices which unreasonably restrain trade or adversely affect the international transfer and dissemination of technology.*
- 2. Nothing in this Treaty shall prevent the Contracting Parties from specifying in their legislation licensing practices or conditions that may in particular cases constitute an abuse of intellectual property rights having an adverse effect on competition in the relevant market.*
- 3. Each Contracting Party may take appropriate measures consistent with the Agreement on Trade -Related Aspects of Intellectual Property Rights to prevent or control such practices.*

## WIPO Broadcasting Treaty - 2004 to 2007

Considerable opposition to new broadcaster rights was mounted by groups representing authors, performers and producers. Groups representing performers and phonogram producers found it galling that a broadcasting organization would obtain new economic rights, even while they did not pay anything to the entities that performed or owned sound recordings. And, eventually some U.S. based technology companies began to pay attention to the WIPO negotiations, with Intel, IBM, AT&T and other companies eventually taking positions in opposition to a treaty that would extend Rome Convention type broadcaster rights to the Internet.

As the debate progressed at WIPO, the positions of member states were miles apart on nearly all important substantive issues, but there was growing support by several members to move away from the broad economic rights favored by the broadcasters, and toward a narrower “signal protection” approach, that did not give broadcasters rights in program content, and to narrow the treaty to “traditional” broadcasters, which, in some formulations, included cable and satellite services, but excluded webcasting. In 2006, the SCCR began to separate webcasting from “traditional” broadcasting and cablecasting.

# WIPO General Assembly 2007 mandate on the Broadcasting Treaty

In June 2007, Second Special Session of the SCCR provided the following conclusions:

*In the informal discussions it became evident that, during the session, it would not be possible to reach an agreement on the objectives, specific scope and object of protection with a view to submitting to a diplomatic conference a revised basic proposal as mandated by the General Assembly.*

The WIPO General Assembly of 2007 “*decided that the subject of broadcasting organizations and cablecasting organizations be retained on the agenda of the SCCR for its regular sessions and consider convening of a Diplomatic Conference only after agreement on **objectives, specific scope and object of protection has been achieved.***” [Emphasis added]

## **2013 - The resumption of serious work (at the Geneva level)**

In December 2013, at SCCR 26, WIPO held the first major talks on the broadcast treaty since 2007. During these talks, Japan and the EU both made proposals for a treaty with extensive new rights for broadcast organizations, defined to include cable television and satellite services that require paid subscriptions.

The US made a proposal for a much less ambitious treaty, for “Broadcasting Organizations.” There would be a single right “to authorize the simultaneous or near--simultaneous retransmission of their broadcast or pre--broadcast signal over any medium,” including delivery of the broadcast over the Internet. The US proposal would only extend the right to the broadcast signal, and not to the content, and would not include any post fixation rights.

During the debate at the SCCR, no country voiced support for the US proposal. India objected to the proposal to extend the right to Internet transmissions. Japan, the EU and several other countries pressed for more expansive economic rights for broadcasting entities.

## Contours of the 2013 US proposal

- A "near--simultaneous" retransmission is one that is delayed only to the extent necessary to accommodate time differences or to facilitate the technical transmission of the signal.
- A "pre--broadcast signal" is a signal transmitted to the broadcasting organization for the purpose of subsequent transmission to the public.

## **June 2015 - SCCR 30 - Information Session on Broadcasting**

On June 29, 2015, prior to the formal session of SCCR 30, WIPO “*convened an information session chaired by John Simpson of the BBC, and featured lobbyists or business executives from broadcasters from India, Brazil, the Caribbean and the England based Africa News Networks. The choice of the India and Brazil broadcasters were widely seen as an effort to pressure those two countries to accept the broadcasters demands for broader and wider rights, that are opposed by copyright holders and consumers.*”

(Source: Manon Ress, On day 2 at SCCR 30, Anne Leer tells delegates to make broadcasters happy, extend treaty to Internet).

## December 2015 - SCCR 31 - KEI's views on broadcasting and cablecasting

*“From our point of view, it is important and useful to have separate definitions. At some point, you may want to consider whether or not in implementing the treaty a country would have the flexibility of only applying the treaty to over the air broadcasting, partly because for some, including the United States, but other countries as well, there are very different regulatory regimes that exist for over-the-air television and radio than apply to cable systems.*

*The Rome convention, supposedly what is being updated here, was designed for free over-the-air services. And just in terms of this treaty, the over-the-air broadcasters have the strongest case, that they are providing a public service that no one pays for. Things like cable services are just businesses, where everyone has to pay to get the service and they are subject to all kinds of special laws to make it so that you don't get the service if you don't pay.*

*Fee based cable services are quite a bit different than like a radio or television thing that is available to the public free for everyone....The only people from the cable industry trying to get this are big Hollywood type industries that own multiple cable channels, and see themselves as the beneficiary in that respect.” (James Love, SCCR 31)*

## Developments in 2018

In May 2018, 11 civil society groups sent an open letter to WIPO negotiators expressing concern over the current state of play with respect to the broadcasting treaty. On the subject of streamed content, we noted:

*“While many delegates see this as a treaty that will benefit local broadcasters, that is likely only to be true in the short term. And even in the short term, the more ambitious versions of the treaty are also designed to create economics rights for large foreign corporations that “schedule the content” for cable and satellite channels, such as Disney, Vivendi, and Grupo Globo. In the longer run, the treaty appears to be creating a new legal regime that will create rights for the giant technology firms largely based in the United States, that are creating global platforms for video and sound recording content, including Amazon Prime, Netflix, Hulu, YouTube, Google/YouTube TV, Hulu TV, Yahoo, Twitter, Sling TV, Facebook, Spotify, Apple Music, Google Play Music, and Pandora, all companies that could qualify as broadcasters by owning a single broadcast station.”* (NGO letter to WIPO SCCR delegates expressing grave concerns about proposed WIPO treaty for broadcasting, <https://www.keionline.org/27938>)



## Developments in 2018

The Chair's Revised Consolidated Text (June 13, 2018) on Definitions, Object of Protection, Rights to be Granted and Other issues (SCCR/36/6) is the current basis of WIPO negotiations on the Broadcasting Treaty. (KEI's analysis of the proposal can be found here: <https://www.keionline.org/27998>)

Here are some reactions to WIPO Broadcasting Treaty from June 2018 (collected by KEI during SCCR 36):

*IFLA: "The proposal on the table not only offers the wrong solution to the problem in hand, but in doing so creates new problems. These range from lost revenues for other rightholders, and new barriers to libraries, archives and museums in their work of preserving and giving access to audiovisual heritage, in the absence of complete exceptions and limitations"*

*EFF: "In an age where everyone can be a broadcaster online, it makes less sense than ever to be granting companies special rights over content merely for having broadcasted it. When such content is protected by copyright anyway, this secondary layer of rights is superfluous and will complicate licensing. When it isn't protected by copyright, then the outcome is even worse; inhibiting access to the public domain for as long as 50 years after broadcast. If it attempts to do anything more than protect broadcasters against signal piracy, the Broadcasting Treaty would be positively harmful."*

# WIPO 2018 General Assembly mandate

On September 28, 2018, the WIPO General Assembly adopted the following decision:

Proposed Agenda Item 14 Decision Paragraph

The WIPO General Assembly:

1. took note of the “Report on the Standing Committee on Copyright and Related Rights” (document WO/GA/50/3);
2. directed the SCCR to:
  - a. make best efforts to achieve consensus on the remaining outstanding issues related to the proposed treaty on the protection of broadcasting organizations during SCCR/37 and SCCR/38 and
  - b. take stock of the progress made at SCCR/38 and if consensus has been reached on outstanding issues, propose a recommendation to the General Assembly to approve a date and venue for a diplomatic conference to adopt the treaty; and
3. directed the SCCR to continue its work regarding the other issues reported on in document WO/GA/50/3.

# Broadcasting timeline

[Timeline](#) showing developments in broadcasting technology

# THANK YOU

## For more information

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