**Appraising the WIPO Broadcast Treaty and its Implications on Access to Culture**

*October 3-4, 2018*

*Geneva*

*Graduate Institute, C1*

*Panel 2:   Rationale, Beneficiaries and Scope – Peter Munkacsi (HU)*

*Panel members will be asked to address four questions: (1) what is the rationale for the treaty, (2) who will be the beneficiaries, (3) to what degree will the treaty be applied to works that are distributed on the Internet, and (4) how realistic is it to limit the beneficiaries to one group of publishers based upon the ownership of a broadcast license?*

1. what is the rationale for the treaty,

It should be noted at the outset that the recent proposal prepared by the Chair of SCCR serve a good basis to realize the rationale of the proposed Treaty.

The rationale of the proposed Treaty is to increase protection of rights of broadcasting organisations and to adapt those rights to the risks of theft of signals. This should be done through conferring exclusive rights on broadcasting organisations which are enforceable and defined in technologically neutral terms. Nothing in the recent proposal prepared by the Chair of SCCR suggests that the Treaty is intended also to cover copyright or related rights of, for example, producers or performers.

The keynote speech delivered by Prof *Hugenholtz*, the presentation by Carole *Croella* and the first panel illustrated well yesterday that the rights of the broadcasting organizations have not been backed by equally strong promoters. The European Union (formerly: European Community) and its Member States and CEBS countries are for a long-time in favour of this norm-setting process because they already provided a quite high level protection.

As it’s clear from 6 Directives (93/83, 2001/29, 2004/48, 2006/115 and 2006/116), those rights are the subject a harmonised European legal framework to ensure the proper function of the internal market. Having integrated a number of developments linked to technological challenges, the new digital environment and the development of the information society, they established a regime with high and homogeneous protection for broadcasting organisations in connection with their broadcasts.

As far as the existing cross-border broadcasting services by satellite as well as cable retransmission of programmes within the EU are concerned in 1993 the satellite and cable directive (SatCab Directive) was introduced. This legislation harmonises national provisions concerning the right of communication to the public by satellite and the right of retransmission by cable.

The cable retransmission right was introduced into the Hungarian copyright law already in 1983, while the term and rules on licensing of satellite broadcasting were incorporated in 1994. Hungary implemented the Sat Cab Directive by amendments of the Copyright Act in 2003. Further modifications clarified these provisions in 2004, 2005 and 2011. Article 28 (2)-(3) of the Copyright Act includes a platform neutral provision on simultaneous retransmissions on platforms other than cable, and on cable as well.

The technological neutrality principle was confirmed by the case law in Hungary as well. The Hungarian Council of Copyright Experts in the opinion No. 43/2007 concluded as follows:

There is no difference between the analogue and digital simultaneous retransmission of TV- and radio programs in terms of copyright protection. The simultaneous retransmission of analogue broadcasting signals in a digital format and in an analogue format is regarded to be the same copyright-wise. In the current copyright legislation such a case when someone transforms the freely accessible digital satellite signal into an analogue signal and transmits it so to the subscribers shall be regarded as simultaneous retransmission as well.

In line with the 2015 Digital Single Market Strategy for Europe, in order to modernize the copyright protection at European level the European Commission has presented 2 years ago a package of legislative proposals, including a proposal for a regulation on online transmissions of broadcasting organisations and retransmissions of television and radio programmes. The proposal aims at promoting the cross-border provision of online services ancillary to broadcasts and facilitating digital retransmissions of TV and radio programmes originating in other Member States. The Commission's proposal also seeks to limit the use of geo-blocking practices in the EU, in the same way as the recent Portability Regulation (directly applicable since 20 March 2018) and Geo-blocking Regulation (will apply from 3 December 2018).

Before the launching of these proposals the Commission carried out an evaluation of Sat Cab Directive, there was a public consultation followed by extensive discussions with stakeholders in 2015 and 2016. Several legal and economic studies on the applications of EU copyright rules to the digital environment were conducted and an impact assessment carried out.

 At the time of the EU preparatory work for the legislative modernisation, in May 2015 a trend analysis in the broadcasting sector was prepared for WIPO at the request of the SCCR The main findings of the document SCCR/30/5 still be considered to be relevant**.** For example, concerning Central and Eastern Europe, the major pay TV platforms in that region are cable and satellite, with small number of prominent IPTV operators. Digitization of cable infrastructure in Central and Eastern Europe is occurring slowly. At end 2014 59.8% of cable homes were served by digital signals. The analysis indicated that the digitisation of cable in Central and Eastern Europe will not complete before 2020.

Few years before the mentioned analysis, around 2010, a three-part study on the *Socioeconomic Dimension of the Unauthorized Use of Signals* has provided a lot of useful information on the markets, technology, piracy and the social and economic aspects of broadcasting. It correctly describes the fast-evolving modes of broadcasting and the challenges by the new business models and technology. The study also demonstrates the usefulness of broadcasting as an information, education, entertainment and national cultural promotion tool. This applies all over the world albeit to greatly varying degrees.

The third part of the study [*Study on the Social and Economic Effects of the Proposed Treaty on the Protection of Broadcasting Organizations* – SCCR/21/2], the so called “Picard Study” addresses the rationale of the proposed Treaty and the differences between unauthorized reception, unauthorized decryption, unauthorized retransmission, unauthorized fixation and post fixation uses.

1. who will be the beneficiaries

The Picard Study explores the effects of the proposed treaty on various stakeholders, within the framework of policy objectives aimed at protecting against piracy, promoting growth and competitiveness, providing public access to information and content, encouraging creativity, enhancing competition, facilitating political participation, and supporting development.

The Picard Study identifies stakeholders and their interests relative to copyright, investigates the extent to which the interests of stakeholders will be affected by provisions of the proposed Treaty, and looks at the social benefits that the treaty would bring. I just briefly summarise what the assessment shows:

Broadcasting organizations would gain explicit and additional protection for their signals that is not included in any existing treaty. However, broadcasting organizations would be disadvantaged as the proposed instrument excludes webcasting activities which are increasingly becoming parts of broadcasting operations worldwide;

Authors and performers, production firms, and rights holders/licensors will benefit from the updated protection of the broadcast signal. It does not interfere with existing rights and limitations/exclusions benefiting these stakeholders. It provides some protection against potential abuse of intellectual property rights that can hinder creativity. The treaty is also likely to reduce private enforcement costs by somewhat simplifying and clarifying issues in legal proceedings;

Rights provided under the treaty could allow broadcasting organizations to control access and use of the signals and content transmitted through the signal. For audiences and consumers the treaty provides no direct benefits, but boosting the market power of broadcasting organizations;

The proposed Treaty will benefit the economies and increase tax receipts of home nations of broadcaster/cable/satellite operators who obtain additional revenue through exploitation of the rights provided, while creating further burden for states to ensure effective enforcement measures.

It should be added from European point of view with regard to the mentioned copyright reform that the preferred options in relation to online transmissions and retransmissions of TV and radio programmes would reduce the transaction costs linked to the clearance of rights faced by broadcasters for their cross-border online transmissions and by retransmission services provided over "closed" electronic communications networks (e.g. IPTV). They are also expected to enhance the cross-border distribution of and access to broadcasters' TV and radio programmes.

Concerning the licensing of VoD rights, the preferred option would help removing contractual blockages and could therefore improve the availability of European audiovisual works on VoD platforms.

1. to what degree will the treaty be applied to works that are distributed on the Internet,

As I mentioned earlier nothing in the recent proposal prepared by the Chair of SCCR suggests that the Treaty is intended also to cover copyright or related rights. (see page 3. II. (1) of the document SCCR/36/6).

1. how realistic is it to limit the beneficiaries to one group of publishers based upon the ownership of a broadcast license?

Within the EU there are varied approaches to the licensing of cable, satellite, IPTV and online retransmissions regarding audiovisual works. Licensing arrangements for cable retransmissions are subject to mandatory collective licensing arrangements. This system was introduced by Art 9 of the SatCab Directive in order to avoid a scenario in which cable operators would need to clear a very high number of individual rights.

Hungary has applied a system of mandatory collective licensing for all rights relating to retransmissions on platforms other than cable;

There is varied approach to the licensing of broadcasters’ online services (catch-up TV/radio, simulcasting, on-demand) across the Member States**.** Individual licensing tends to be applied for online services in countries that generally follow this approach or where there is an absence of collective licensing systems. Even where voluntary collective licensing systems have been established, individual licensing can remain a major form of licensing practice.

*Conclusion*

My brief explanation has highlighted the importance of finalising the more than two decades work in order to increase protection of rights of broadcasting organisations and to adapt those rights to, in particular, the risks of theft of signals. Without an updated level of international protection broadcasters will not be able to fulfil properly the mentioned functions of broadcasting such as information, education, entertainment and national cultural promotion and cannot keep pace with technological change.

As a final sentence I recall the positive atmosphere of the GA from last week relating SCCR when all regional groupings demonstrated flexibility which has allowed the assembly to reach a positive decision on this dossier. I hope it is the time again when the common work of WIPO members, experts from stakeholder, NGO and civil society side will result in a positive outcome on the issue of “Orphans of Rome”, the broadcasting organizations.