January 13, 2025

To: Delegates to the WIPO SCCR

RE: Treaty for the Protection of Broadcasting Organizations

Knowledge Ecology International (KEI) opposes the scheduling of a diplomatic conference for convening the WIPO Treaty for the Protection of Broadcasting Organizations based upon the current draft text.

As discussed below, the text would be more acceptable if there were changes to narrow the scope of protection, particularly in order to ensure that the so-called signal protection does not extend to post-fixation uses of works.

No case has been made to justify a new treaty for broadcasting organizations. The negotiation is occuring at a time when traditional over-the-air (OTA) free broadcasting is rapidly being replaced by encrypted and often password protected digital streaming services, all of which are undergoing explosive growth under current laws.

In the 1961 Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, the broadcasters operated in a world of free over-the-air television and radio services that often had public services obligations. The older Rome Convention should not be used to justify a new IP right for services that are radically different in every respect.

The SCCR has struggled with its mandate to restrict the treaty to a signal-based approach for traditional broadcasting. Confusion over what this means persists. In the latest draft (SCCR/45/3) there are proposals to extend protection to on-demand transmissions. One-to-one transmissions are not the one-to-many transmissions that the term broadcasting describes, let alone traditional broadcasting. Moreover, post-fixation rights should not be described as protecting a signal.

Post-fixation rights for broadcasting or streaming services are a layer of rights that will require users to clear, even if none exist in the content transmitted, or if the interests of the copyright owner conflict with the interest of the broadcaster.

As has been noted many times during the negotiations, the broadcasters are seeking rights not only in content they create, but in content created by others, for which the broadcaster is not required to license or remunerate, and the rights would extend even to works in the public domain, or works infringed by the broadcasting organization, and create predictable conflicts with the interests of copyright holders.

Despite the very weak case for protection, and the potential harm to the public and users of works, and to copyright holders, the proposed draft treaty proposes limitations

and exceptions to the broadcasting right which are, by definition, narrower than those existing in national copyright or related rights laws.

In Article 11 of the current proposal, contracting parties “may”, but not “shall”, have “the same kinds of limitations or exceptions with regard to the protection of broadcasting organizations as they provide, in their national legislation, in connection with the protection of copyright in literary and artistic works, and the protection of related rights.” But even here, the exceptions are also constrained by an additional restrictive three-step test in Article 11.3, which not only is redundant to any three-step that restricts exceptions in international copyright agreements, but extends areas where no three-step test currently exists.

The 1961 Rome Convention does NOT have a three-step test.

The Berne Convention for the Protection of Literary and Artistic Works does not apply a three-step test to the exceptions for quotations (mandatory in Article 10.1), education (Article 10.2), or the mandatory exception for news of the day in Article 2.8).

The WTO TRIPS Agreement provision on exceptions for the protection of broadcasting organizations is set out in Article 14, and quite pointedly does not contain a three-step test.

To summarize the situation with exceptions, the broadcasting organizations seek a layer of rights over material that they do not create, own, license, remunerate or even use lawfully, and also do not broadcast, and they want the most restrictive conditions on exceptions of any existing copyright or related rights agreement.

KEI recognizes that the current draft of the treaty includes some useful flexibility in Article 10. However, even this flexibility is conditioned on Paragraph 2 of Article 5 on National Treatment, which provides that a Contracting Party may lower the rights granted to a broadcasting organization that is considered a national of another Contracting Party. To be clear, Paragraph 2 of Article 5 is designed to create the same type of upward rachet on rights which has led to extended (life-plus-70-year) copyright terms.

We believe that this instrument is likely to be implemented in a restrictive manner. Broadcasters have unique political influence, given their role in disseminating news and commentary about governments.

If the treaty grants post-fixation rights, via restrictions on the use of copies of works that are stored by users or and subsequently made available through on-demand services, it will create a new thicket of rights that users will have to clear, or risk infringement liability. Making things worse is the provision in Article 14 on formalities, which limits the requirements for formalities to “appropriate information to identify the broadcasting organization,” but excludes additional information, such as the rights that the broadcasting organization may or may not assert in the reuse of the transmission.

We appreciate that the draft treaty has in Article 2(a) defined broadcasting organizations as a legal entity that provides programmes that form a “linear programme-flow,” and that a reference to a “linear transmission” is included in the Article 2(g) definition of “stored programmes,” but note that this is a limited and weak restriction, when used in connection to “providing access to the stored programmes in such a way that members of the public may access them from a place and at a time individually chosen by them.”

Today the leading streaming services are often large companies with global reach, like YouTube (30,000 hours of user-generated and supplied video added every hour), Amazon Prime, Netflix, Disney+/Hulu/ESPN+, Apple TV+, Paramount+, Peacock, Facebook, Spotify, Twitch, TikTok, Tencent Video, Zee5, SongLIV, as well as new services like Zoom or Microsoft Teams, which schedule and stream a variety of events, often for clubs, civic organizations, educational institutions, businesses and governments, large and small.

If the treaty creates an automatic intellectual property right in all content stored from linear streams, it will create new property rights layered over a massive number of streams, including user-generated content uploaded to platforms that qualify under the very loose definition of a broadcasting organization.

For many individuals, groups, governments and other organizations creating the content, streaming entity storage services will be the only practical way to access archived content.

It is doubtful that the proponents of the broadcast treaty intend such a result, but it will be the outcome for predictable implementations of the current draft.

It is possible to narrow the current proposal in ways that make the agreement more acceptable and less harmful, including most significantly, if the treaty can eliminate post-fixation rights, and/or limit the agreement to a far narrower set of activities, such as live sporting and entertainment events. It is unfortunate that many of the broadcasting lobby groups have opposed such changes, and for this reason, allowing the text, with all its flawed provisions and broadcasters’ expectations, to enter a diplomatic conference, is too risky.

Exit strategies

KEI recognizes that for many delegations, there is considerable (and understandable) broadcast treaty fatigue, and a desire to remove the broadcast treaty from the SCCR agenda in order to focus on topics considered more relevant in the 21st century, such as the relationship between AI and intellectual property rights (a topic unfortunately never discussed in connection with the broadcast treaty, despite its relevance) KEI shares the frustration that so much time has been consumed by this confusing and flawed proposal, largely because of the unique political influence of the broadcasting lobby groups. But just pushing this mess into a diplomatic conference in order to create space for more interesting topics is not the only option. Owning up to the fact that consensus does not exist on the most basic provisions of the agreement, is one option. Other

options are to bite the bullet on the issue of post-fixation rights, and/or to limit the scope of the treaty to live sporting and entertainment events, while eliminating some of the gratuitous and unnecessary provisions on topics such as restrictions on formalities.

Another possible exit strategy would be to authorize the Secretariat, in consultation with experts nominated by WIPO members, to draft a model law to address the narrow but legitimate need to have adequate legal tools needed to address piracy of signals, drawing on existing state practices.

Sincerely,

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Additional reading

Two papers published in 2023 about the broadcasting treaty. The first paper is 48 pages long, and among other things, provides a detailed history of negotiations on the broadcasters right in various treaties. The second paper provides detailed comments on a 2023 version of the negotiating text, including suggestions for changes to the text to make it more acceptable.

2023. James Love. The Trouble With the WIPO Broadcasting Treaty. Joint PIJIP/TLS Research Paper, Series. 85. March 2023.
https://digitalcommons.wcl.american.edu/research/88

2023. Love, James P., “Comments on the September 6, 2023 Draft of a WIPO Broadcasting Treaty, the Definitions, Scope of Application, National Treatment and Formalities.” Joint PIJIP/TLS Research Paper, Series 110. (October 2023)
https://digitalcommons.wcl.american.edu/research/110