

**Public consultation on the impact of intellectual property regimes on the enjoyment of right to science and culture**

Broadcasters play a critical role in developing and sustaining an informed society, through ensuring the public's right to receive diversified and independent information. In all parts of the world, the broadcasting sector safeguards certain public interests, such as cultural diversity or media pluralism, and they enhance public awareness and media literacy. Moreover, broadcasters provide a major contribution to the production and distribution of original audio-visual content.<sup>1</sup>

Broadcasting also fosters democratic and other fundamental social values, such as basic freedom of expression, and it is critically important for providing information to the public in times of emergencies.<sup>2</sup> Broadcasting is a key driver of social cohesion and cultural development - vital in an increasingly fragmented world. Broadcasters' programmes serve to enrich and strengthen the cultural and educational values of their countries, and they stimulate artistic expression and creativity by displaying local talent.

Broadcasters play a pivotal role as a vehicle for expression within a democratic society, reaffirming cultural identity. They support the democratization of their regions, through consolidation of the national identity and reinforcing basic notions of local culture while maintaining traditional values. Their programmes, and in particular those from public service broadcasters, serve the information and educational needs of minority and other interest groups, including those with low levels of literacy or living in remote locations.

New technologies used by broadcasters enrich the world with the new audio and audio-visual offerings they bring. But they also carry risks for the world's broadcasters by making it easier to profit from the use of their signals without their consent. The investment that broadcasters make in order to assemble their programme output and distribute their signal on all platforms, old and new, for the public to enjoy news, cultural events and entertainment, must be protected effectively. Currently, whole channels are being re-broadcast over new types of networks and devices without broadcasters' consent. A recent study showed that "Live television today is the fastest-growing segment of copyright infringement".<sup>3</sup> This is a massive misappropriation of broadcasters' signals, without reward.

Therefore, broadcasters call for an urgent global solution to signal piracy. The signal must be protected, on any platform. Updating international protection of broadcast signals is urgent, unfinished business. Currently the applicable instrument dates from 1961 - and reflects the technology of the last century. A Broadcasters Treaty reflecting the technological realities of the 21st Century has been on WIPO's agenda for many years - as the last piece of the rights protection framework - and is an urgent priority, long overdue.

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<sup>1</sup> After press/literature and software, broadcasting is the third largest economic contributor globally in the creative industries sector - almost triple the contribution of the music sector and more than triple the size of the film industry's contribution, see WIPO study "On the economic contribution by the creative industries" (2013), p.12/13.

<sup>2</sup> See recently Report ITU-R BT.2299-0 (04/2014) "Broadcasting for public warning, disaster mitigation and relief."

<sup>3</sup> "The six business models for copyright infringement", a Google & PRS for Music commissioned report with research conducted by BAE Systems Detica, 27 June 2012.

# Key reasons for updating the broadcasters' neighbouring right

## 1. *The Treaty is of interest to all countries in the world:*

- In both developed and developing countries, a healthy and vibrant broadcasting system will continue to meet the interests of the viewing and listening public and provide societal benefits of a free and independent journalism, in addition to social and economic development and employment opportunities. Broadcasters' ability to invest in a wide variety of quality programming, including sports, informational, educational and cultural programming, and to enable access to new services on a variety of platforms will be adversely affected if broadcasters cannot fully exploit and protect their signals. This applies worldwide.
- It would be clearly erroneous to consider broadcast piracy in isolation. In reality, ***broadcast piracy results in the loss of public interest benefits***. When a domestic broadcaster finds that its signals are misappropriated abroad, and that it is unable to take the necessary action, this hits not only the financial health and reputation of the broadcaster but necessarily the balance of payments of the country itself.
- For broadcasters, piracy means also loss of compensation from retransmitting entities, loss of revenue from advertising that are often stripped off the programme, and possible loss of programme quality. Broadcasters pay billions of Dollars and Euros to produce or acquire and distribute content, and paid tens of billions more to convert from analogue to digital, that will push all that content out to the public.
- Take the example of broadcasts of sports events, when broadcasters acquire exclusive rights from event organizers. Such rights can easily cost hundreds of millions of Euros. When such broadcasts are taken without authorization and shown on other channels, this unfairly reduces the value of the broadcaster's rights, its advertising revenue (and reputation) will be substantially reduced, and income from sublicensing will no longer be a feasible prospect. Further implications may be enormous, not only for the broadcaster but the general public interest, since the funding of popular sports events, including major events such as the Olympic Games, will generally be at risk.

## 2. *The Treaty will realize, not impede, the freedom of expression*

- The public's interest is served not by unauthorised use of broadcast signals, but by convenient access to those signals, legitimately offered and fairly rewarded.
- The idea that broadcasters' protection blocks public access to public domain material is ill-conceived, because it confuses the question of use of the signal with use of the content. Anybody is free to take and use public domain material from the same source as the broadcaster did. Equally, nothing in a treaty on broadcasters' rights can affect or curtail exceptions and limitations applicable to copyright-protected material.
- The Treaty would no more remove material from the public domain than does a compilation right, or the use of a public domain work in a sound recording. Like sound recordings or compilations, broadcasts that include public domain works still involve skill, expense and creative effort. A third party should not be allowed to exploit the effort and expense a broadcaster has put into creating, publicizing and disseminating a public domain work without undertaking the same effort. Not protecting such broadcasts would provide disincentives to broadcast such works; and the result will be *less public access* to public domain works.

- The Treaty will not prevent the public's legitimate private use of the broadcast signal and its content, because the Treaty would provide countries with the same flexibility in creating and implementing limitations and exceptions to the Treaty as exists with respect to other protected works.

### **3. The Treaty will stimulate, not stifle, innovation**

- The Treaty will have *no impact on ISP liability*. When an ISP is notified of an infringing work, the process is the same regardless of whether the required removal involves an MP3, video or text file. However, ISPs are exempted from liability for acts of copyright infringement committed by their users under certain conditions that protect ISPs by requiring that the end-user (and not the ISP) initiated the transfer and that the transfer process was automatic and took place without the knowledge of the ISP. This exemption remains valid under the Treaty as the ISP liability for signal theft would follow the same rule. Thereby, the Treaty would not change the mechanism of ISP liability, because the responsibility of an ISP would remain the same.
- The Treaty will not hinder *the development of new consumer devices*. Any country should remain to be entitled to provide for the same kinds of limitations or exceptions with regard to the protection of broadcasting organizations as it provides for, in its national legislation, in connection with the protection of copyright in literary and artistic works, in accordance with the internationally recognized "3-step-test". Thereby, the Treaty would not harm the legitimate use and development of time shifting devices such as digital video recorders (DVRs), because (a) the Treaty does not require broadcasters to protect their broadcast with TPMs, and (2) the rights granted to broadcasters would not include the control of private home use to the extent it is covered by limitations or exceptions.

### **4. Granting updated rights to broadcasters will serve the public interest**

The Treaty will not prevent consumers from watching archives of sporting or news events. In fact, if there were inadequate protection for broadcasters, why would any broadcaster be interested in paying anything at all to broadcast the event to sports event organizers, who are largely dependent on TV rights revenue? Far from making it more difficult for consumers, treaty protection ensures that consumers will be able to continue to watch the type of sports and news events which they expect.

### **5. Necessary for the Treaty are rights according to modern technologies**

The purpose of the broadcasters' Treaty is to provide modern, technology-neutral rights for broadcasters, the absence of which would make the Treaty basically worthless.

- The almost hundred WIPO Member States which have acceded to the Rome Convention are already obliged to provide rights to broadcasters which are based on signal fixations. The WCT, WPPT, and the new Treaty for the audio-visual performers all have fixation-based rights.
- Without effective rights (such as the "making available" right), broadcasters will lose the incentive to create new productions, distribute high quality content, and foster new distribution streams, such as secondary digital channels. Broadcasters need such rights also for investing in cross-border post-broadcast offerings of their broadcasts, as consumer demand for such time - and place – independent access to broadcasts is heavily increasing everywhere in the world.

- The European Union provided updated rights for broadcasters in order to address the new technologies and they have been in effect for over a decade without problems.

### **6. The Treaty does not impinge on authors', performers' or producers' rights**

All the rightholders in the content of broadcasts will automatically benefit from the reinforced position of broadcasters against pirates of their broadcasts. When a broadcaster obtains an injunction against unauthorized use of the broadcast signal, the order to cease and desist stops equally unauthorized use of the programme content.

- Owing to the independently existing rights in the programme content, these other rightowners will naturally also continue to be able to exercise their own respective rights against pirates or any other infringing parties. It goes without saying that, in cases where a broadcaster wishes to grant a licence to a third party, it can only grant rights which it holds itself. Thus, use of the programme-carrying signal by a third party will always (except for situations of mandatory licensing) be subject to permission from the content rightholders.
- At the same time, producers remain entirely free to license their own rights to third parties on the broadcasters' territory, as long as such does not conflict with the rights granted by them to the broadcaster(s) concerned. However, this is simply a contractual matter, which is *entirely independent* from, and cannot be dealt with by, the broadcasters' Treaty.
- In a "Joint Position of Rights Holders" statement released in January 2007, thirteen international NGOs representing authors, music publishers, performers, phonogram producers and film producers with a direct interest in the broadcaster treaty expressed support for a treaty that would "update the protection granted to broadcasters, giving them the tools to address the core issues in today's technological and business environment, while avoiding any prejudice to the interests of contents rights holders, as well as preserving the obligations and flexibilities established by other international treaties".

### **7. The broadcasters' treaty updates existing rights, not adding a "new layer"**

- Phonogram producers are granted neighbouring rights protection in respect of the entrepreneurial activity in producing a phonogram, different and separately from the copyright protection of the author/composer of the musical work contained in the phonogram. Likewise, broadcasters are granted neighbouring rights protection in respect of their broadcasts, independent of the protection of the broadcast content.
- Moreover, not all broadcast content is protected. Some material may not qualify for copyright protection in the first place (lack of originality/creativity). Although this may seem surprising, news and sports programming is not infrequently considered to fall into this last category. In that case, the only means to protect broadcast coverage of the 60th anniversary of the D-Day landings in Normandy or the Royal wedding in the UK is through protection of the broadcast signal. Without such protection, these events will migrate to pay services or might simply not be broadcast at all.

In sum, broadcasters are a critical element to the cultural and educational environment of all countries, so that in order to continue this valuable service, signal piracy must be addressed by an international treaty to provide modern, rights-based protection analogous to the updated rights found in other WIPO copyright and related rights' treaties.