

A WIDER NET?

THE PROPOSED WIPO BROADCASTING TREATY: WHAT DO YOU DO WITH RIGHTS YOU DON'T NEED?

Following the 13th Standing Committee on Copyright and Related Rights (SCCR) in November 2005, the World Intellectual Property Organization (WIPO) issued an optimistic press release titled "Momentum grows to update broadcaster's rights". This held out the prospect of a Diplomatic Conference to be convened, with the view of adopting a WIPO Broadcasting Treaty in early 2007. In WIPO's view, this would complete the trio of Internet Treaties that began in 1996 with the WIPO Copyright Treaty (updating Berne rights), and the WIPO Performances and Phonograms Treaty (updating the rights of Record Producers and Performers under Rome).

After almost a decade of tortuous negotiations, a new push has been led by the US Digital Media Association (DiMA) that includes major internet firms Amazon, AOL, Apple, Microsoft, RealNetworks and Yahoo. Their aim is to extend the 20-year exclusivity available under the Rome Convention to webcasters too. Article 13 of Rome provides broadcasting organisations with four rights to authorise or prohibit (a) rebroadcasting; (b) fixation of broadcasts; (c) the reproduction of fixations (if not in accordance with private and fair use exceptions spelled out in Article 15); and (d) communication of a TV broadcast to the public against an entrance fee.

For the new WIPO Treaty, up to 13 different rights have been discussed (9th SCCR, 2003): (1) fixation; (2) reproduction of fixations; (3) distribution of fixations; (4) rebroadcasting (simultaneous); (5) cable retransmission (simultaneous); (6) retransmission over the internet (simultaneous); (7) deferred broadcasting/ cable/ internet transmission based on fixation; (8) making available of fixed broadcasts; (9) communication to the public (in places accessible to the public against entrance fee); (10) obligations regarding technological measures of protection and rights management information; (11) decryption of encrypted broadcasts; (12) rental of fixations; and (13) making available of unfixated broadcasts.

Broadcaster's rights are peculiar. Copyright students often interject: "But copyright owners already enjoy an exclusive right to broadcast!" If works, even if transmitted, cannot be reproduced, distributed or communicated to the public why do we need a second layer of rights protecting the broadcaster? There is no easy answer to this. It is hard to understand why we have these rights at all (and always remember that some countries with a flourishing broadcasting industry, such as the United States, did only import the Rome rights with Article 14 of the 1994 TRIPS Agreement).

Looking at the preliminary work to Rome (1961) and in the WIPO Standing Committee, the rationale for legislative intervention is generally vague, such as that broadcasting is "an essential factor of cultural, social and economic development", and that we need tools "to prevent exploitation and misappropriation of broadcast signals by unauthorised parties" (Document WO/GA/32/5, prepared by WIPO secretariat for the General Assembly 2005).

What precisely is the threat to the commercial viability of broadcasters (and webcasters for that matter)?

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Threat one: The broadcast signal is retransmitted, and consumers may turn to a competitor to receive it. This is potentially a problem, although I have not seen much evidence of growing

signal piracy. For most broadcast content, retransmission would infringe Berne rights anyway. It is also worth pointing out that cable retransmission is regulated in many countries by a compulsory licence.

Threat two: Some broadcast content may not be covered as copyright subject matter under Berne, for example, factual information, live shows, and sport. Such content may be recorded, and subsequently exploited by commercial competitors. This could undermine the investment of the first broadcasting organisation.

Threat three: Advances in digital technology and consumer electronics may cause a greater impact of the consumer's private actions on content providers. For example, personal video recorders (PVRs) storing programmes on hard disks could deprive broadcasters of revenues from repeats or DVD sales.

Regarding threat one, Rome (and TRIPS Art. 14) already appears to deliver everything content providers need to operate successfully. Any discussion of the appropriate term against signal diversion strikes me as absurd – as one day will be as good as 50 years.

Regarding threat two, the WIPO Treaty proposals appear disingenuous, as they threaten to impose an extra layer of rights on all content, be they Berne works or public domain works. This extra layer can be acquired by a webcaster or broadcaster just by virtue of making available or transmitting such content. The implications of this approach are hard to fathom, particularly for webcasters. For content that requires substantial investments, but is not statutory subject matter under Berne, the debate needs to consider the empirical role of investment incentives. This touches on similar issues as the contested database right (I'll discuss this in one of my next columns).

Regarding threat three, it is my view that it is not the job of the World Intellectual Property Organization to protect a particular business model. In many countries, conditional access systems for premium content are covered by hacking legislation. The appropriate locus for this debate is in domestic policy. There is no need to impose a particular view globally which may turn out to have unintended consequences.

In summary, the proposed WIPO Broadcasting Treaty appears an example of the old copyright reflex "more is better", which is rapidly going out of fashion. Do DiMA members, such as Yahoo, know what they would do with their new rights if they succeeded at WIPO? I doubt it, but would welcome your views.

About the author

Martin Kretschmer is Professor of Information Jurisprudence and Joint Director of the Centre for Intellectual Property Policy & Management (www.cippm.org.uk) at Bournemouth University, UK. He is also project director (with Prof. Lionel Bently) of a major Arts and Humanities Research Council (AHRC) project on copyright history at the Centre for Intellectual Property & Information Law, Cambridge University (2005-7). Previously, Martin was consultant editor at BBC Worldwide (1994-5) and a faculty member at City University's Cass Business School, London (1996-9).