Joint NGO letter on the proposed WIPO treaty on broadcasting

May 28, 2018

Dear Delegates to WIPO SCCR 36

We are concerned that negotiations on a broadcasting treaty have not clarified a number of important issues, nor addressed core concerns from civil society and copyright holders.

At the outset, we are supportive of measures to address the legitimate concerns of broadcasters as regards piracy of broadcast signals. We are looking forward to seeing appropriate measures to address such challenges, provided they are well defined and limited to solving those problems, and avoid unintended consequences to impede access to and use of works, or harm copyright holders.

Our primary concerns are the following:

1. Term of protection/post fixation.
2. Limitations and Exceptions.
3. Public Domain works or works freely licensed by creators.
4. Confusion over an ever-expanding definition of beneficiaries.
5. Streaming on demand.
6. Works originated on the Internet.
7. Role of large Internet companies in streaming video.
8. Non-discriminatory and reasonable licensing terms

1. Term of protection/post fixation

Chairman Daren Tang's text[1] (SCCR/35/12) proposes a 50 year term of protection for the rights, which is a proposal backed by some broadcast groups and countries supporting the broadcasters.[2] Clearly, this implies the broadcasters will obtain post fixation rights in works they did not create nor license. A 50 year term of protection makes a mockery of the notion that this is a signal based treaty or is only concerned with signal piracy, as it effectively extends the protection beyond the term of copyright, and is a recipe for disaster as regards orphan works (just as individual countries are in the process of trying to solve the orphan works problem). To

[1] Revised Consolidated Text on Definitions, Object of Protection, Rights to be Granted and other Issues, prepared by the Chair. SCCR/35/12

[2] "The term of protection to be granted to broadcasting [or cablecasting] organizations under this Treaty shall last, at least until the end of a period of 50 years computed from the end of the year in which the programme-carrying signal was transmitted."

protect against signal piracy, a short term of 24 hours would make more sense than 5 decades from the date of every broadcast.

Under no circumstances should post fixation rights apply to every mere re-transmission of a broadcast signal -- a policy that would in practice result in perpetual protection of the signal, and give broadcasters more durable protections than copyright holders

2. **Limitations and Exceptions**

There have been a number of proposals as regard limitations and exceptions, but almost no debate in the SCCR has ensued on this crucial issue. The proposals for exceptions in the Chairman's text are narrow, and give broadcasters more robust rights than copyright owners or performers themselves.

If the broadcasters' right does not extend to post fixation rights, or has an extremely short term, the exceptions language may be less important. But since broadcasters are seeking rights that last for half a century, i.e. post fixation rights, the exceptions become extremely important.

For any treaty involving post fixation rights, the exceptions in the broadcast treaty should include both mandatory and permissive exceptions. Mandatory exceptions should include those in Berne (news of the day and quotation), as well as for education and training purposes, personal use and preservation and archiving. The agreement should also permit non-mandatory exceptions that address both specific uses and more general frameworks such as fair dealing or fair use. Compulsory licenses should not be prohibited. If the treaty creates a layer of rights for entities that do not create, own or license the underlying works, this layer should not be used to prevent legitimate reuses of the copyrighted works.

In no event should the exceptions for broadcasting rights be less enabling for users than the exceptions that apply to copyright.

3. **Public Domain works or works freely licensed by creators**

In no cases should the treaty give broadcasters post fixation rights in works that are in the public domain, or openly licensed.

4. **Confusion over an ever-expanding definition of beneficiaries**

There is confusion over who will be the beneficiaries of the treaty. The General Assembly mandate is to limit the treaty to broadcasting in the traditional sense (see page 57 of WIPO/GA/34/16), yet during the SCCR negotiations, BBC and several Spanish language broadcasters have pressed to include Internet streaming services, under the theory that WIPO would create special rights that television broadcasters would have, even when the context was delivered over the Internet, that other entities using the Internet would not have. This

assumption needs to be examined critically, to ensure it is not a naive and unrealistic assumption that a right can be given to one set of businesses and denied to another doing the same thing. And, if the right ends up being given to everyone streaming anything on the Internet, how does this change the evaluation of the costs of managing the rights, and unintended consequences?

5. Streamed on demand

The BBC, the Spanish language broadcasters and some others have asked that the right extend not only to live broadcasts, but also to material later streamed on demand to individuals. If the treaty extends to materials streamed on demand to individuals, there is no longer a special case for broadcasters. Millions of entities and persons stream content on demand, without a special broadcaster right, often over platforms like YouTube. It's absurd to create a special right for streaming works on demand over the Internet, just because the company doing the streaming is a broadcast company and the work was once broadcast.

6. Works originally streamed on the Internet

Even more expansive are the proposals by the same broadcasters to extend the broadcasters' right to works originally streamed on the Internet, thereby eliminating any distinction between broadcasters and every other Internet user.

7. Role of large Internet companies in streaming video

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 (https://tv.youTube.com/), Hulu tv (https://www.hulu.com/live-tv[3]), Yahoo, Twitter,[4] Sling TV, Facebook (https://www.facebook.com/moviestv/), Spotify[5], Apple Music, Google Play Music, and Pandora, all companies that could qualify as broadcasters by owning a single broadcast station.[6]

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[3] https://techcrunch.com/2017/05/01/hulu-scores-deal-with-nbcu-for-its-live-tv-service-will-now-carry-all-four-major-broadcast-networks/

[4] http://uk.businessinsider.com/twitter-inked-slew-sports-entertainment-live-streaming-deals-2017-7

[5] Based in Sweden.

[6] Christopher Harrison, Why Pandora bought an FM radio station, the Hill. June 11, 2013. http://thehill.com/blogs/congress-blog/technology/304763-why-pandora-bought-an-fm-radio-station. Or be acquired by or merge with a broadcast or cable organization, such as Yahoo's pending acquisition by Verizon.

The existing content on the YouTube platform is enormous and Google is hardly a struggling company, so it seems odd that WIPO is rushing to create a legal regime that appears to give Google even greater rights over works they never created or licensed that it already has.

8. Non-discriminatory and reasonable licensing terms

To the extent that a broadcast treaty creates rights of any kind that impact users outside of the robust limitations and exceptions we favor, member states should have the flexibility to require licensing on reasonable and non-discriminatory terms, or remuneration rights regimes, as an alternative to exclusive rights,

Conclusion

The 2007 GA mandate asked the SCCR to consider “convening of a Diplomatic Conference only after agreement on objectives, specific scope and object of protection has been achieved.” The WIPO GA has asked the SCCR to “update the protection of broadcasting and cablecasting organizations in the traditional sense.” At the SCCR, the definition of “in the traditional sense” is now used less and less, and “future proofing” the protection more and more, without any real understanding of how a new WIPO treaty will upset the existing arranges and rights that copyright holders and users now enjoy. In particular, WIPO needs to discuss the role of giant largely U.S. based Internet platforms now delivering video or audio content, and how any new rights for companies that deliver third party owned content will redistribute income between right holders and platforms and between countries, and impede access to works.

Sincerely

Centre for Internet and Society, India (CIS-India)
Civil Society Coalition (CSC)
COMMUNIA International Association on the Digital Public Domain
Electronic Frontier Foundation (EFF)
Electronic Information for Libraries (EIFL)
Fundación Karisma
Global Expert Network on Copyright User Rights
Innovarte
Instituto Proprietas
International Federation of Library Associations and Institutions (IFLA)
Knowledge Ecology International (KEI)
Le Conseil international des Archives (CIA)/ International Council on Archives (ICA)
Public Knowledge (PK)
Third World Network (TWN)