

***Limitations and Exceptions in Second Revised Draft Text of the Broadcast Treaty***

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The 43rd meeting of the World Intellectual Property Organization Standing Committee on Copyright and Related Rights will consider a [Second Revised Draft Text for the WIPO Broadcasting Organizations Treaty](#) (“Second Revised Draft”). A question that is likely to be posed is whether the text contains sufficient consensus to move toward a diplomatic conference. Considerable questions have been raised about the need for and scope of rights in an anti-piracy treaty that would ultimately cover content of signals that are already protected by other copyright and related rights treaties, for example by [KEI](#) and [Professor Bern Hugenholtz](#). This note focuses on the limitations and exceptions provisions of the Second Revised Draft. For comments embedded in a redlined version of the Draft showing changes from the version presented in SCCR 42, see PIJIP’s [redlined version of the Second Revised Draft](#).

***Extension of Draft Treaty to Fixation***

The need for limitations and exceptions in the broadcast treaty depends on the scope of protection that the treaty puts in place. In the Second Revision, the scope of protection includes a proposed exclusive right to authorize “fixation” of a signal (Art. 7). Extending the protection to fixation could require authorization from the broadcaster to record (fix) the content of the signal, such as for time or format shifting or to use the content for quotation, education, research or other purposes.<sup>1</sup>

***Public interest uses of broadcasts***

Uses of broadcasts, including fixing the contents of a signal for later use, are essential for many important public interests. Recorded broadcasts are used by archives to preserve history and culture, for example in the kind of African media collection that was destroyed in the University of Cape Town fire.<sup>2</sup> Both recordings and retransmissions of live broadcasts are used in education, including in online education of the kind that proliferated during school closings

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<sup>1</sup> This provision is new and controversial. The 2007 General Assembly instructed that the Broadcast Treaty be a signal-based instrument and not include any “post-fixation” rights. The Explanatory Notes suggest that fixation rights are a core of the Treaty “Fixation may be a most relevant step in the unauthorized exploitation by a third party of the value represented by the signal.” The Notes explain that a fixation right can be part of a signal-based treaty because “[t]he right of fixation concerns only the very act of fixation,” and at “the moment of fixation, the programme-carrying signal is still a live signal. The Treaty thus remains a treaty providing “a signal-based” protection.” See Hugenholtz, Bernt, “[The WIPO Broadcasting Treaty: Comments on the Second Revised Draft](#)” (2023). Joint PIJIP/TLS Research Paper Series. 84, at p. 9.

<sup>2</sup> Wendell Roelf, S.Africa’s UCT campus salvaging books from burned library, Reuters, (April 20, 2021) (describing the contents of an extensive African media collection destroyed by fire).

forced by the COVID-19 pandemic.<sup>3</sup> Both live and recorded broadcasts may be used by researchers, including to enable media monitoring through text and data mining.<sup>4</sup> Broadcasts and captioning are used to facilitate translation, including to increase accessibility for people with disabilities.<sup>5</sup> Accordingly, the exceptions and limitations of the treaty are vital.

#### *Article 11 Second Revised Draft Text of the Broadcasting Treaty*

After much [criticism from public interest organizations](#) and government delegations, the Second Revised Draft substantially re-writes the limitations and exceptions provision. The first revision of draft text for the Broadcast Treaty proposed an extremely narrow limitations and exceptions provision modeled on Article 13 of the Beijing Treaty. The provision required that any exceptions (1) be of the “same kinds” as provided in a country’s copyright law, and (2) meet the demands of a confining version of the three-step test:

#### **Revised Draft Text For The WIPO Broadcasting Organizations Treaty SCCR 42**

##### Article 10, Limitations and Exceptions

(1) Contracting Parties may, in their national legislation, provide for 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.

(2) Contracting Parties shall confine any limitations of or exceptions to rights provided for in this Treaty to certain special cases which do not conflict with a normal exploitation of the programme-carrying signal and do not unreasonably prejudice the legitimate interests of the broadcasting organization.

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<sup>3</sup> See UNESCO, Survey on National Education Responses to COVID-19 School Closures (2021) (reporting that TV based education has been used in 87% of countries worldwide and radio based education in 61%).

<sup>4</sup> Ying LiYongbin WangJian YanYing-Jian Qi , The Application of Data Mining in Satellite TV Broadcasting Monitoring, Conference: Proceedings of the Second International Joint Conference on Computational Sciences and Optimization, Sanya, Hainan, China, 24-26 April 2009, Volume 2 (discussing use of algorithms and a “data mining method” in satellite TV broadcasting monitoring).

<sup>5</sup> See Amelia Brust, Artificial intelligence helps Voice of America translate broadcasts worldwide, Federal News Network (Feb 18, 2020); Ram Sagar, Netflix Is Using AI For Its Subtitles, Analytics India Magazine (May 6, 2020).

The First Revised Draft was composed of language adapted from Article 15(2) of the Rome Convention<sup>6</sup> and Article 10(2) of the WIPO Copyright Treaty,<sup>7</sup> without the enabling provisions in Article 15(1) of the Rome Convention and Article 10(1) of the WCT. The Second Revised Draft adds a Rome Convention-like first paragraph identifying permissible exceptions:

### **Second Revised Draft Text for the WIPO Broadcasting Organizations Treaty**

#### Article 11, Limitations and Exceptions

(1) Contracting Parties may, in their domestic legislation, provide for specific limitations or exceptions to the rights and protection guaranteed in this Treaty, as regards:

- (a) private use;
- (b) quotation;
- (c) use of short excerpts in connection with the reporting of current events;
- (d) use for the purposes of teaching or scientific research;
- (e) preservation in archives of the programme material carried by the programme-carrying signal;
- (f) access to cable of certain programme-carrying signals.

(2) Irrespective of paragraph 1 of this Article, Contracting Parties may, in their national legislation, provide for 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.

(3) Contracting Parties shall confine any limitations of or exceptions to rights provided for in this Treaty to certain special cases which do not conflict with a normal

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<sup>6</sup> Rome Convention 1961, Article 15. Permitted Exceptions:

1. Any Contracting State may, in its domestic laws and regulations, provide for exceptions to the protection guaranteed by this Convention as regards:

- (a) private use;
- (b) use of short excerpts in connection with the reporting of current events;
- (c) ephemeral fixation by a broadcasting organisation by means of its own facilities and for its own broadcasts;
- (d) use solely for the purposes of teaching or scientific research.

2. Irrespective of paragraph 1 of this Article, any Contracting State may, in its domestic laws and regulations, provide for the same kinds of limitations with regard to the protection of performers, producers of phonograms and broadcasting organisations, as it provides for, in its domestic laws and regulations, in connection with the protection of copyright in literary and artistic works. However, compulsory licences may be provided for only to the extent to which they are compatible with this Convention.

<sup>7</sup> WIPO Copyright Treaty, 1996, Article 10, Limitations and Exceptions:

(1) Contracting Parties may, in their national legislation, provide for limitations of or exceptions to the rights granted to authors of literary and artistic works under this Treaty in certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.

(2) Contracting Parties shall, when applying the Berne Convention, confine any limitations of or exceptions to rights provided for therein to certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.

exploitation of the programme-carrying signal and do not unreasonably prejudice the legitimate interests of the broadcasting organization.

The structure of Article 11 is important. For an exception to comply, it must be listed in paragraph 1 or provided in the country's copyright law as provided for in paragraph 2, and pass the terms of a specific confining version of the three step test paragraph 3. A country may not have a broadcast-specific exception that is not identified in paragraph 1 and is not included in a country's copyright law. The remainder of this section describes some of the key terms and concepts in the provision before turning to what is missing.

#### Article 11(1)

##### *may*

The provision is that it is entirely permissive, even for the purposes (e.g. quotation) that are subject to mandatory exceptions for copyright.

##### *specific*

The paragraph confines countries to the provision of "specific" exceptions. This is contrary to the flexibility recognized in Marrakesh Treaty Article 10(3) that expressly authorizes countries to implement exceptions through open general exceptions such as fair use and fair dealing exceptions.<sup>8</sup>

##### *private use*

It is useful to specifically mention the ability, if not the requirement, to adopt exceptions for private use. This is particularly important in the current version of the treaty, which extends to fixation of lawfully received broadcasts. Without an exception for private use, consumers could be prevented from time or format shifting broadcasts to different devices even when they lawfully accessed the signal.

##### *quotation*

It is mandatory under the Berne Convention to permit quotations of all copyrighted works. But by making this exception only permissive in the Draft, it permits countries to block quotation of the content of signals through more restrictive broadcast rights.

##### *use of short excerpts in connection with the reporting of current events;*

Similar exceptions are contained in the Rome and Brussels conventions.

##### *use for the purposes of teaching or scientific research;*

This exception is contained in the Rome Convention.

##### *preservation in archives of the programme material carried by the programme-carrying signal*

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<sup>8</sup> Marrakesh article 10(3) states that countries are permitted to implement limitations and exceptions "through limitations or exceptions specifically for the benefit of beneficiary persons" or may adopt "other limitations or exceptions," which "may include judicial, administrative or regulatory determinations for the benefit of beneficiary persons as to fair practices, dealings or uses."

This is a new limitation and exception not found in any other treaty. It would represent the first copyright or related rights treaty to expressly protect “preservation in archives.” This inclusion of a preservation right shows that the Broadcast Treaty can innovate based on the lessons and priorities of the limitations and exceptions agenda.

*access to cable of certain programme-carrying signals*

This is a new exception not found in this form in any other treaty. The intent appears to be to permit countries to enable rebroadcasting over cable or other wire-line transmission through so-called “must carry” obligations.

Article 11(2) - same kinds as copyright

The Second Revised Draft Text clarifies that the “same kinds” of limitations and exceptions in copyright may be provided for broadcast “irrespective of paragraph 1.” In other words, an exception need not be listed in paragraph 1 to be provided if it exists in a country’s copyright law. But the provision is permissive -- a country may provide fewer exceptions than it provides for copyright.

Article 11(3) - “shall confine”

The third paragraph of the article continues to propose that all exceptions, even those authorized in paragraphs (1) and (2), be subject to the three-step test. It uses the confining version of the three step test from WCT Article 10(2), without the enabling version from WCT Art. 10(1) that would permit countries to adopt additional exceptions consistent with a standard. It has not been demonstrated that the three step test has any applicability to a purely signal-based treaty. It is not included in the Brussels Convention or Rome Convention.

*Missing exceptions in the Second Revised Draft*

Despite some improvements in Article 11, the provision continues to be one of the most restrictive of any copyright and related rights treaty by combining a closed list of exceptions in Articles 11(1) and (2) with a confining version of the three step test.

The list of permitted exceptions in Article 11(1) does not include all those permitted in other copyright or related rights treaties. Rome convention Article 15(1) permits “(c) ephemeral fixation by a broadcasting organisation by means of its own facilities and for its own broadcasts.” Article 15(2) of the Rome Convention also provided: “compulsory licences may be provided for only to the extent to which they are compatible with this Convention.” Neither of these provisions appear in the Second Revised Draft.

As noted above, the WCT and WPPT both include an enabling version of the three step test. The enabling version in the 1996 Internet Treaties, based on Article 9(2) of the Berne convention, provides that “Contracting Parties may, in their national legislation, provide for limitations of or exceptions to the rights granted ... in certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.” This provision permits adoption of exceptions for any purpose, whereas the Second Revised Draft requires that exceptions meet the terms of paragraphs (1) and (2).

Another highly relevant treaty is the Brussels Convention, which like the Second Revised Draft regulates “pre-broadcast” transmissions between broadcasters and content suppliers. Article 4 of the Brussels convention contains specifically permitted exceptions for quotation and, only for developing countries, for education and research.<sup>9</sup> These exceptions provide some expression in Article 11 of the Second Revised Draft Text. But Brussels Convention Article 7 on abuse of monopoly is not included.

### **Brussels Convention Relating To The Distribution Of Programme-Carrying Signals Transmitted By Satellite, 1974**

#### **Article 7**

This Convention shall in no way be interpreted as limiting the right of any Contracting State to apply its domestic law in order to prevent abuses of monopoly.

#### *Suggested amendments*

To ensure that broadcast rights do not trample on the rights of the public, the following innovations could be considered:

- Add mandatory exceptions, at least for all those areas subject to mandatory exceptions in copyright such as quotation and the making of accessible formats for people with vision impairments;
- Change the “may” to a “shall” in Article 11(2) so broadcast rights must be subject to the same exceptions as copyright. This is critical if the treaty includes a fixation right.
- Change Article 11(3) to the enabling version of the three step test by changing “Contracting Parties shall confine” to “Contracting Parties may, in their national legislation, provide”
- Add to the list of exceptions in Article 11(1) references to all relevant exceptions that are mentioned in the Rome Convention, Brussels Convention, and in other multilateral copyright and related rights treaties including:
  - ephemeral fixation, Rome Art 15(1)
  - authorization of compulsory licenses, Rome Art. 15(2)
  - official publications, Berne Art 2(4)
  - abuse of monopoly, Brussels Art 7
  - TPM exceptions, Beijing art. 15 Agreed Statement<sup>10</sup>

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<sup>9</sup> Article 4 of the Brussels Convention provides:

No Contracting State shall be required to apply the measures referred to in Article 2(1) where the signal distributed on its territory by a distributor for whom the emitted signal is not intended (i) carries short excerpts of the programme carried by the emitted signal, consisting of reports of current events, but only to the extent justified by the informatory purpose of such excerpts, or (ii) carries, as quotations, short excerpts of the programme carried by the emitted signal, provided that such quotations are compatible with fair practice and are justified by the informatory purpose of such quotations, or (iii) carries, where the said territory is that of a Contracting State regarded as a developing country in conformity with the established practice of the General Assembly of the United Nations, a programme carried by the emitted signal, provided that the distribution is solely for the purpose of teaching, including teaching in the framework of adult education, or scientific research.

<sup>10</sup> Agreed statement concerning Article 15 as it relates to Article 13:

- application to the digital environment, WCT Art 10 Agreed statement<sup>11</sup>
  - creation of accessible formats, Marrakesh Art. 4
- Consider modern exceptions that occur in recent regional agreements, such as:
  - duty to promote “balance”, CTPP, RCEP
  - data mining research, EU CDSM Directive
  - protection from contract override, EU CDSM

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It is understood that nothing in this Article prevents a Contracting Party from adopting effective and necessary measures to ensure that a beneficiary may enjoy limitations and exceptions provided in that Contracting Party's national law, in accordance with Article 13, where technological measures have been applied to an audiovisual performance and the beneficiary has legal access to that performance, in circumstances such as where appropriate and effective measures have not been taken by rights holders in relation to that performance to enable the beneficiary to enjoy the limitations and exceptions under that Contracting Party's national law. Without prejudice to the legal protection of an audiovisual work in which a performance is fixed, it is further understood that the obligations under Article 15 are not applicable to performances unprotected or no longer protected under the national law giving effect to this Treaty.

<sup>11</sup> Agreed statement concerning Article 10 of the WCT:

It is understood that the provisions of Article 10 permit Contracting Parties to carry forward and appropriately extend into the digital environment limitations and exceptions in their national laws which have been considered acceptable under the Berne Convention. Similarly, these provisions should be understood to permit Contracting Parties to devise new exceptions and limitations that are appropriate in the digital network environment.

See Agreed statement concerning Article 16 of the WPPT and Agreed statement concerning Article 13 of the Beijing Treaty (“The Agreed statement concerning Article 10 (on Limitations and Exceptions) of the WIPO Copyright Treaty (WCT) is applicable mutatis mutandis”).