



The Draft WIPO Treaty on Broadcasters' Rights

Contents and potential impacts on libraries. Briefing, 23 September 2018

- There are ongoing discussions around a Treaty on Broadcasters Rights at the World Intellectual Property Organisation. This aims to combat worries about piracy of broadcast signals.
- While many countries already do have broadcasters' rights, a new Treaty could lead to their revision, and introduction where they do not already exist.
- As it is currently drafted, the Treaty does not offer sufficient guarantee of the limitations and exceptions on which libraries and archives rely in order to carry out preservation or support education, research and access to heritage. It may also create unlimited terms of protection. It may also lead to fall in revenues going to writers, performers and other rightholders.
- IFLA would welcome examples from its members of library uses of broadcast materials, in order to illustrate the importance of protecting the work of libraries in this area.

The first global legal instrument on copyright, the Berne Convention (1886) created rights for authors, giving them rights over reproductions, translations, performances, and adaptations of their works, for example.

With time and technological change, the numbers and types of actor who can claim copyright (and so either sell their rights, or claim a share in revenues from the use of works) has grown to include photographers, film directors and cinema producers, and performers and producers of phonograms.

A key means of spreading such new rights (or exceptions) is through Treaties negotiated at the World Intellectual Property Organisation. Currently, there are efforts to develop a treaty on broadcasters' rights. This brief focuses on this proposal, the consequences for libraries, and how libraries with broadcast materials in their collections can get involved.

Background: WIPO Treaties

WIPO Treaties have a powerful, if not always direct impact on national laws. Once they are signed at the global level, there need to be a certain number of countries which ratify or accede for them to come into effect. For example, the Marrakesh Treaty required 20 ratifications or accessions – this came in June 2016, three years after the Treaty was signed. The Beijing Treaty on performers' rights (signed in 2012) requires 30, a target it has yet to achieve.

Once a country has acceded or ratified, it is then a question of national law as to whether a Treaty is immediately effective, or whether there then needs to be further implementing legislation. Especially where a Treaty leaves some room for manoeuvre, national legislation offers valuable clarity to all actors concerned.

Ratification can take time – while the WIPO Copyright Treaty of 1996 came into effect via the US Digital Millennium Copyright Act of 1999, and the EU InfoSoc Directive of 2001, it took Canada until 2012 to take the necessary steps to implement the new rules.

The Push for Broadcasters' Rights

A current example of a group seeking to claim rights globally is broadcasters, who buy rights (either from in-house production teams or others to transmit films, TV shows and other audiovisual materials to customers. The act of

broadcasting implies an editorial role, in that they organise schedules, but does not imply any input to the content of programming. Clearly where a broadcaster does produce programmes in-house, this is covered by existing sets of rights.

Broadcasters have long been concerned by the issue of signal piracy – i.e. when another actor takes the signal, and then rebroadcasts it for their own profit. This is a clear example of theft, and makes it harder for broadcasters to recoup their investment in buying the rights to broadcast a work. One response – however – has been to demand that broadcasters enjoy their own rights.

However, it is unclear whether the problem today is with the law itself, or with its enforcement. Moreover, there are questions as to whether an approach based on traditional broadcasting (i.e. signals transmitted over the air or through wires) is relevant, given that people, increasingly access audiovisual content through the Internet, rather than through a broadcast signal.

Work at WIPO

There has been talk of broadcasters' rights since the Rome Convention of 1961. The first ever meeting of the World Intellectual Property Organisation's Standing Committee on Copyright and Related Rights (SCCR) talked about meetings and proposals for a treaty in the field in 1998.

Since then, there have been repeated efforts to find sufficient consensus between Member States to call a diplomatic conference (where final details can be discussed, and a document signed), but no agreement. However, the most recent meeting of SCCR has seen some movement among traditional opponents of the Treaty, as well as apparent progress towards consensus.

Key areas of discussion in the [current version of the text](#) include:

1. **The object of protection:** the current text focuses on 'programme-carrying signals' transmitted over wires or wireless means. This may exclude signals transmitted over computer networks (i.e. streaming or downloading). Rights would apply to simultaneous or near-simultaneous transmissions (i.e. showing a programme live, showing highlights or offering a catch-up service), and may also apply to deferred transmissions (offered at a time and place chosen by the viewer).
2. **Beneficiaries of protection:** the current definition of broadcasting organisations implies any organisation with a licence to broadcast. It excludes organisations which only transmit programmes online, although this implies that if Netflix or YouTube were to buy a broadcasting licence somewhere in the world, they would count as broadcasting organisations. It also excludes organisations that only retransmit other organisations' signals.
3. **Rights granted:** broadcasting organisations would have the right to authorise (and so charge for) any further transmission of their signals to the public, including allowing them to access it at a time and place of their choosing.
4. **Limitations and exceptions:** the current text makes it entirely optional for countries to apply exceptions and limitations relative to other rights to new broadcasting rights. As such, it is possible that broadcasters may enjoy more powerful rights than other rightholders.
5. **Technological protection measures (TPMs):** there is the usual effort to provide legal protection to technical measures which prevent infringement of rights. However, fortunately, the current proposals suggest that where such TPMs prevent the use of exceptions and limitations, they should not enjoy protection.
6. **Term of protection:** the current text leaves open whether protection should apply for 50, 20, or an unspecified number of years after a signal is broadcast. This implies that if a broadcasting organisation retransmits a signal, the clock returns to zero, and the term of protection starts again.

Potential Impacts on Libraries

Given that rights are exclusive by default, they also impact upon the activities of libraries, archives and museums, unless these institutions benefit from exceptions or limitations. New rights could therefore affect the following activities:

- Giving researchers access to broadcast materials in library collections
- Uploading of broadcast materials to digital libraries, or the wider internet
- Re-use of broadcast materials by library users as part their own creations
- Use of library collections to develop videos or exhibition materials
- Use of broadcast materials in teaching, either within the library or in wider institutions

Such activities today sometimes take place under exceptions and limitations (for example, access for researchers, or use in exhibitions), sometimes through licensing (for example use in education, use to create new programming). A broadcasting treaty, notably one without effective exceptions and limitations, would risk making all of these activities more difficult for the following reasons:

- Libraries may face differing sets of exceptions and limitations for different rights in programmes. This will create complexity and work for librarians in working out what they are allowed to do with works in their collections.
- Libraries may face a new set of obligations to clear rights for works, including in situations where such clearance is not necessary as concerns other rights (i.e. copyright, performers' rights etc).
- The risk of works being classed as orphan (i.e. not all rightholders can be identified and/or contacted) will rise. For example, if a broadcasting organisation closes (because it goes out of business, or even because it comes from a country which no longer exists, such as Yugoslavia, East Germany or the Soviet Union), it may be impossible to identify who can offer rights.
- In many countries, collective management organisations dealing with broadcasting rights are either lacking, or are unrepresentative or not necessarily well-regulated. This reduces the chances of there being effective means of giving libraries simple tools for clearing rights (when this is required).

The situation is not ideal for other rightholders either:

- Writers, performers, directors and producers of original content may well lose out when broadcasting organisations take a cut of royalties.
- Where a broadcast programme becomes 'orphaned' due to the disappearance of a broadcasting company, other rightholders will be prevented from licensing its use.
- The potential for broadcasters to restart the clock whenever they re-transmit a programme means that their rights are potentially eternal, long out-lasting the rights of other rightholders.

In summary, new broadcasting rights risk causing harm not only to libraries, but also to other rightholders. Measures which focus more specifically on fighting the piracy of signals and effective enforcement, and which give meaningful protection to library exceptions and limitations, would be much more likely to achieve results without damaging others.

Examples from libraries and archives on legitimate uses of broadcast material for public interest purposes would help us explain the risks behind creation of such a Treaty without the appropriate safeguards for public interest activities.