

IT'S TIME FOR A NEW INTERNATIONAL TREATY FOR BROADCASTERS¹

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ABSTRACT

This article analyzes the process that the international negotiation for a new treaty for the protection of broadcasting organizations has followed over the last nineteen years. Since the adoption of the 1961 Rome Convention, technologies and consumer preferences have changed drastically. None of these changes is considered by the international treaties in force. The right of broadcasting organizations has been established internationally and at the level of national legislations as a related right and an integral part of civil law, especially in those countries that follow the author's right system. The situation is different in countries where copyright predominates. First, it must be clear that what are protected are the signals, and not the content that is transmitted. The situation of the rightsholder is analyzed, including what rights must be granted, and the relationship with the works and other contents that are communicated through the program carrier signal. The

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position of authors, performers, and other rightsholders improves when the broadcaster has remedies to prevent unauthorized retransmission of the program-carrying signal. In the same way, the rights of fixation, reproduction, communication to the public and making available are analyzed.

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I. INTRODUCTION

Related rights of broadcasting organizations were initially considered by the Rome Convention (1961) under which broadcasters have the exclusive right to authorize or prohibit the wireless retransmission of their broadcasts, the fixation of their broadcasts, the reproduction of such fixations and the communication to the public of television broadcasts made in places accessible to the public against payment of an entrance fee.³ The essential core of this Convention as regards broadcasters was taken over by the TRIPS Agreement.⁴

³ International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, adopted at Rome on October 26, 1961 [hereinafter Rome Convention]. Ratified by Argentina in Law No. 23.921, Apr. 15, 1991, [27.122] B.O. 8 (Arg.).

⁴ See TRIPS: Agreement on Trade-Related Aspects of Intellectual Property Rights, art. 14.3, April 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994) [hereinafter TRIPS] (establishing that “[b]roadcasting organizations shall have the right to prohibit the following acts when undertaken without their authorization: the fixation, the reproduction of fixations, and the rebroadcasting by wireless means of broadcasts, as well as the communication to the public of television broadcasts of the same. Where members do not grant such rights to broadcasting organizations, they shall provide owners of copyright in the subject matter of broadcasts with the possibility of preventing the above acts, subject to the provisions of the Berne Convention (1971)”).

A first attempt to update these rights was made in 1974 in the Brussels Convention, which establishes the obligation for states parties to take appropriate measures in order to prevent the unauthorized distribution of program-carrying signals transmitted by satellite within or from their territory.⁵ Because this instrument has the sole purpose of protecting original satellite transmissions rather than subsequent retransmissions, the scope of application has proved to be very limited. For that reason, only thirty-seven countries have ratified or acceded to the Convention.

The commercial and technical situation of radio and television has substantially developed since 1961 and 1994, both regarding production and distribution. Some of the changes are common to the entire copyright and media world, such as digitization and the impact of the Internet.⁶ For example, cable retransmission is not included in the Rome Convention because in 1961 it was almost unknown.

⁵ The scope of application is established by Article 2 of the Brussels Convention: “(1) Each Contracting State undertakes to take adequate measures to prevent the distribution on or from its territory of any programme-carrying signal by any distributor for whom the signal emitted to or passing through the satellite is not intended. This obligation shall apply where the originating organization is a national of another Contracting State and where the signal distributed is a derived signal.” But through the limitation set by paragraph 3, the Brussels Convention leaves out many of the current infringements: “(3) The obligation provided for in paragraph (1) shall not apply to the distribution of derived signals taken from signals which have already been distributed by a distributor for whom the emitted signals were intended.” That is to say, that if the original transmission was valid, the subsequent retransmissions shall not fall under the scope of protection. Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite, art. 2.1, *opened for signature* May 21, 1974, 1144 U.N.T.S. 3, 13 I.L.M. 1444 (1974) [hereinafter Brussels Convention].

⁶ Anne Yliniva-Hoffmann & Peter Matzneller, *The Legal Protection of Broadcasters. Challenges Posed by New Services*, in *NEW SERVICES AND PROTECTION OF BROADCASTERS IN COPYRIGHT LAW* 7–27 (Susanne Nikoltchev ed., European Audiovisual Observatory, Strasbourg, 2010).

Nor does the Convention include the more recent activity of webcasting, also known as Internet television service. In many cases webcasting may imply simultaneous retransmission, while in other cases it may be an asynchronous service. The same applies to the so-called quadruple play service that also uses Internet networks to provide audiovisual services or video-on-demand (VOD), allowing the audience to see the programming at the time and from the place of their choosing on a non-linear mode.

Some other recent changes respond to the new preferences of consumers with respect to both content and availability, such as the “fourth screen,” which lets consumers use their mobile devices to access any audiovisual production at the time and place they choose. Some content or signal owners accept and promote this feature, while in other cases the programming is distributed against their will, leading to a wide range of infringements.⁷

These changes in consumer preferences for technology and content have led to the updating of other authors’ rights and related rights in international instruments such as the WIPO Copyright Treaty (“WCT”) and the WIPO Performances and Phonograms Treaty (“WPPT”).⁸ Though

⁷ Though some years have gone by since the publication of this work, it presents a scenario substantially similar to the situation today with respect to consumer preferences for access to content. Roberto Igarza, *La Cuarta Pantalla: Marketing, Publicidad y Contenidos en la Telefonía Móvil*, (Lectorum-Ugerman eds., 2008). In relation to the economic impact of piracy, see Dr. Brett Danaher et al., *Copyright Enforcement in the Digital Age: Empirical Economic Evidence and Conclusions*, WIPO/ACE/10/20 (Aug. 25, 2015), https://www.wipo.int/edocs/mdocs/enforcement/en/wipo_ace_10/wipo_ace_10_20.pdf [https://perma.cc/4RT6-9UJX].

⁸ The WIPO Copyright Treaty, adopted in Geneva on December 20, 1996, is a special agreement adopted under the Berne Convention that deals with protection of works and the rights of their authors in the digital environment. WIPO Copyright Treaty (“WCT”), Dec. 20, 1996, 2186 U.N.T.S. 121, I.L.M. 65 (1997). To date, it has ninety-seven contracting parties. The WIPO Performances and Phonograms Treaty, adopted in

the purpose of the latter is to update the principles and the implementation of the Rome Convention to the new realities, the drafters did not include broadcasters and audiovisual performers, expressing the intention of addressing them in a later, separate negotiation.⁹ The time for actors came with the Beijing Treaty.¹⁰ Therefore, though a certain equilibrium among the interests of the three categories of subjects is found in the Rome Convention, this equilibrium has been disrupted because broadcasters' rights have not yet been adapted to the technological changes.¹¹

TRIPS provisions regarding the rights of broadcasting organizations provide less protection than many national laws, because they refer only to “wireless broadcasting,” excluding transmissions by physical means like cable.¹² This wording, which considers neither the consumers' reality nor the current methods for content distribution, leaves broadcasters unprotected in the international cross-border context. Even though many national laws provide local protection, they fail to consider

Geneva on the same date, also currently has ninety-seven contracting parties. WIPO Performances and Phonograms Treaty (“WPPT”), Dec. 20, 1996, 2186 U.N.T.S. 203, 36 I.L.M. 76 (1997). Both treaties were ratified by Argentina Law No. 25.140, Sept. 24, 1999, [29.237] B.O. 8 (Arg.).

⁹ See Danaher et al., *supra* note 7.

¹⁰ Beijing Treaty on Audiovisual Performances, June 24, 2012, 51 I.L.M. 1214 (2012). The treaty is not yet in force due to an insufficient number of ratifications and accessions.

¹¹ See André Françon, *Should the Rome Convention on Neighboring Rights be Revised?*, 25.4 COPYRIGHT BULLETIN 20-24 (1991).

¹² See Ricardo Antequera Parilli, World Intellectual Property Organization [WIPO], XI Curso Académico Regional OMPI/SGAE Sobre Derecho de Autor y Derechos Conexos para Países de América Latina: “El Derecho de Autor y los Derechos Conexos en el Entorno Digital”, OMPI-SGAE/DA/A SU/05/1 (Oct. 26, 2005), https://www.wipo.int/edocs/mdocs/lac/es/ompi_sgae_da_asu_05/ompi_sgae_da_asu_05_1.pdf [<https://perma.cc/VE6C-3F7W>].

the problem of unauthorized usage beyond national borders.¹³

International negotiations towards an update of the regulatory framework have been in progress for some years. In particular, the WIPO Standing Committee on Copyright and Related Rights (“SCCR”) has been discussing this issue since 1999.¹⁴ This article will set out the main points that modern regulation on related rights of broadcasters should include, as well as the current state of the SCCR discussions. A distinction must be made among four different aspects of this topic: the technical nature of the signal (including radio transmission and other means), copyright over content, related rights over carrier signals, and media regulation. Although these four different aspects are interconnected, they must not be confused by specific legislation.

Reference will also be made to the object of protection, its scope, the rightsholder, the conduct that would

¹³ At a Latin-American level, for example, protection is provided in most countries, with terms of protection of 50 years (Bolivia, Chile, El Salvador, Mexico, Panama, Paraguay, Dominican Republic, Uruguay), 70 years (Brazil, Costa Rica, Ecuador, Nicaragua, Peru), 75 years (Guatemala, Honduras), and in the case of Colombia, 80 years (except if the right owner is a legal person rather than a natural person, in which case the term is 50 years). Moreover, the protection of cable broadcasts is expressly covered in many of these countries and is addressed implicitly in others, where there is no distinction made among the means of retransmission. See Parilli, *supra* note 12, at 14. In Argentina there is no specific domestic regulation and Rome and TRIPS are directly applied. See Federico Vibes, *Propiedad intelectual de las transmisiones de eventos deportivos*, EL DERECHO, 259-376 (2009).

¹⁴ The first step towards the treatment of the subject at the international level was the Manila Symposium on “Broadcasting, New Technologies and Intellectual Property”, held in April 1997 with the participation of many major broadcasting organizations. World Intellectual Property Organization [WIPO], *WIPO World Symposium on Phonograms, New Communication Technologies and Intellectual Property*, WIPO/SYM/MAN/97 (Apr. 28-30, 1997), https://www.wipo.int/meetings/en/details.jsp?meeting_id=3095 [<https://perma.cc/RJ3R-QCNH>].

infringe the rights of broadcasters, the limitations and exceptions to the right, the term of protection, and other basic elements to be included in the draft instrument. This article will also address as needed the technical issues related to the signal, including its broadcasting, rebroadcasting and reception, among others. Although policy questions are not the central subject of this piece, some public policy considerations will be addressed, including the social and economic impact of the draft treaty provisions, given that this matter has been the subject of long and thorough debates. Some concerns that have been raised need to be addressed, such as whether a higher level of protection for broadcasters may strengthen monopolistic positions, if a new imbalance would be created, if other legitimate interests could be affected, and if the price of the services offered by broadcasters could rise artificially. Since the instrument aims to improve broadcasters' capacity to recover the best value for their signals, consideration must be given to whether social benefits are higher than costs, especially those to be undertaken by other agents or interest groups.¹⁵

II. RELATED RIGHTS OF BROADCASTING ORGANIZATIONS

A. What are Related Rights?

The right granted by the Rome Convention and TRIPS is one of the “related” rights, also known as *neighboring rights*, or *droits voisins* in French. These related rights are associated with the exercise of copyright but have a different nature, since they do not protect the

¹⁵ Benjamin J. Bates & David Scott Wells, *Are Broadcaster Rights in the Public Interest? A Social Economic Analysis of the WIPO's Draft Broadcast Treaty*, UNIVERSITY OF TENNESSEE, KNOXVILLE 15 (2007), <http://web.cci.utk.edu/~bjbates/papers/papers/ICA2007-sebt.pdf> [<https://perma.cc/9WHS-XYSK>].

creation itself, but the performance or the entrepreneurial and organizational effort made by individuals or companies for a work to be performed for the public or to be fixed and distributed.¹⁶ This is due to the fact that some kinds of works require the participation of third parties to make them accessible to the general public; examples include literary authors and publishers, and musical composers and singers, among others. Not all of these activities are covered by related rights, but the entities undertaking activities as part of the process of distributing works to the public are certainly not authors because they the activities involve neither creation nor novelty. If there were any case to be made for copyright, these third parties could be considered authors of derivative works.¹⁷

Each category of related rights responds to specific, legitimate interests of their rightsholders, but all categories have in common the fact that under some circumstances the rightsholders may use the works of authors.¹⁸ Exclusive

¹⁶ Carlos Villalba & Delia Lipszyc, *Derecho de los Artistas Intérpretes o Ejecutantes, Productores de Fonogramas y Organismos de Radiodifusión: Relaciones con el Derecho de Autor* 28-29 (Victor P. de Zavallia ed., Buenos Aires, 1976). This view of related rights finds support in case law. For example, see Ricardo Antequera Parilli, Comment, *Andina de Radiodifusión S.A.C. v. Star Global Com S.A., Sala de Propiedad Intelectual del Tribunal de Defensa de la Competencia y de la Propiedad Intelectual de INDECOPI*, CERLALC (Feb. 2009), <http://aplicaciones.cerlalc.org/derechoenlinea/dar/index.php?mode=archivo&id=1995> [https://perma.cc/D8VA-8K5W].

¹⁷ Villalba & Lipszyc, *supra* note 16, at 26. For another option regarding the discussion on the creativity of performers and the qualification of related rights, see Luis Felipe & Ragel Sánchez, *Interpretación, derechos de autor y derechos conexos*, in *Interpretación y Autoría* 61–82 (Reus ed. 2004). See also Ramón Obon León, *Derecho de los Artistas Intérpretes* 65 (Trillas ed. 1996).

¹⁸ See György Boytha, *Interrelationship of Conventions on Copyright and Neighboring Rights*, in 25 ACTA JURIDICA ACADEMIAE SCINTIARUM HUGARICAE 407 (1983). According to the author, copyright or authors' right systems were not born to protect creators, but to defend the

rights, understood as those property rights falling within the entire range of copyright and related rights, belong in some cases to authors and in other cases to those exploiting the authors' works, like publishers or media owners.¹⁹

At least from the perspective of commercial development the supply and demand market of contents require precise rules to develop the large investments needed to make intellectual creations available.²⁰ Hence, the legal regime of unfair competition may also contribute to its protection while media is subject to antitrust rules.

Moreover, the original wording of the Berne Convention took into account the interests of both authors and publishers who, since the Gutenberg period, required

investments required to undertake the exclusive exploitation of literary and artistic creations. He gives the example of the privilege granted to printers, which evolved towards the rights of authors when revolutions abolished the exclusive privileges in favor of individual liberties.

¹⁹ The notion of “property” applied to exclusive rights is clear in the National Constitution of the Argentine Republic for the authors. Art. 17, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.). Regarding other exclusive rights, the National Supreme Court qualified them as property starting with Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 16/12/1925, “Pedro E. Bourdieu c. Municipalidad de la Capital Federal,” 145 Fallos 307 (1925) (Arg.). See also 154 Fallos 162; 158 Fallos 178; 167 Fallos 5; 172 Fallos 363; 188 Fallos 39. In Satanowsky’s terms, property is, as defined by the *Magna Carta*, every irrevocably acquired right and every cancellation or payment receipt of an obligation releasing a debtor. As such, it is part of the patrimony. Isidro Satanowsky, *Derecho Intelectual* 42, 44–45 (Tipográfica Editora Argentina 1954). Regarding rights arising from contracts, the Argentine Civil Code classifies them as property: “Rights arising from contracts comprise the property right of the contracting party.” CÓDIGO CIVIL [COD. CIV.] [CIVIL CODE] art. 965 (2014) (Arg).

²⁰ Yliniva-Hoffmann & Matzneller, *supra* note 6, at 8; Carmelo Castiglione, *Los Derechos Conexos no son Conexos (al Derecho de Autor)*, Editorial Lina, Asunción del Paraguay (2017). This author postulates that related rights belong to the field of disclosure or communication, while copyright corresponds to creation. Yet both are exclusive rights.

exclusive rights so there would not be two editors publishing the same book.²¹ From this point of view, the fact that protection is granted considering the place of the first publication and not only the author's nationality is a concession to publishers to protect their editions.²² The same situation applies to Article 14 bis 2) b) of the Berne Convention by which even when some contributions to the making of a cinematographic work are acknowledged, the consent given to bring such contributions shall imply permission to the author of the cinematographic work for its reproduction, distribution or public performance.²³

Though this interpretation of authors' rights to the exploitation and access to the work might be discussed, it is also strengthened since it considers the performer as a user adapting the work by means of his performing or musical art, the phonogram producer as one who makes the fixation of the artist's performance and the broadcaster as a publisher with the right to communicate the work with the appropriate consent of the rightsholder. This would be a point of contact between the author's right and the copyright for which the product (publishing, phonogram or broadcasted signal) is considered as property itself. The market requires exclusive rights and needs both the exclusivity granted to author and the exclusivity derived to the publisher, given that piracy lies with the author's creation and the backing material in which the work is reflected or how it is distributed.²⁴

²¹ See Boytha, *supra* note 18, at 408. This author is of the opinion that the right to translate the works after ten years of publication, is a concession that the Berne Convention makes to the publishers, inserted into a treaty on copyright.

²² Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, as revised at Paris on July 24, 1971 and amended in 1979, art. 3.1(b), S. Treaty Doc. No. 99-27 (1986) [hereinafter Berne Convention].

²³ *Id.* at art. 3(2)(b).

²⁴ Hence, in the copyright countries, phonogram owners and broadcasters are protected within a wide system, without distinction between

Due to this different approach between authors' rights and copyright within the United States there is a higher difficulty to understand the need for a special legal framework for broadcasters than in the author's right countries. This is because in the United States broadcasters' rights are not considered as related rights but as property against unauthorized communication.²⁵ Therefore, some insist there should not be any further rights granted other than their own at the moment of the transmission and, consequently, post fixation rights become unnecessary and counterproductive to the ecosystem. Authors state that, as content is under copyright protection, no additional protection is required; much less if the broadcaster is the content owner. In countries without copyright protection this is quite different since there is no author protection for much of the programming.²⁶

Without attempting to enter into a philosophical debate about the different groups of interests and how they achieve their own protection, we must highlight the mutual interrelations and differences in order to accomplish a coherent system of rights over distinct but complementary objects from the perspective of those who use or communicate a work to the public. This is not about creating new rights but about enforcing or adjusting existing rights to

copyright and related rights. Only performers would have a related right. See Cees van Rij, *The Rome Convention and the Treaty of Rome*, in DIGITAL CABLE RADIO – THE TENSIONS BETWEEN THE MUSIC INDUSTRY AND THE BROADCASTING INDUSTRY 43–55 (Robert W. Allan ed., MAKLU 1994) (summarizing reports presented at the meeting of The International Association of Entertainment Lawyers during MIDEM 1994, Cannes).

²⁵ See Tarun Jain, *Broadcaster's Right Under Copyright Law*, 7 ICFAL UNIV.J. INTELL. PROP. RTS. 9, 15 (2008); see also DELIA LIPSZYC, NUEVOS TEMAS DE DERECHO DE AUTOR Y DERECHOS CONEXOS 401 (Zavalía 1993).

²⁶ See Bates & Wells, *supra* note 15, at 18.

new phenomena.²⁷ Neither is it about protecting obsolete businesses at the expense of consumers but it is about permitting a sustainable incentive system.²⁸

The first protections granted to broadcasters affected their programs or transmissions. One of the achievements of the Rome Convention was to unify protection in a substantive manner, since the domestic legislations had various criteria, much of them *sui generis*, to protect the different rightsholders. In particular, as regards broadcasters, the methods were very diverse and inconsistent if seen from an international perspective. Such lack of uniformity could lead to uncertainties and weak rights valid in some jurisdictions and invalid in some others.²⁹

Many related rights can be found in the domestic legislation without international recognition such as publishers' rights under Argentine Law 25.466 for the Promotion of Books and Reading.³⁰ Similarly, the related

²⁷ In the terms of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society, "(5): Technological development has multiplied and diversified the vectors for creation, production and exploitation. While no new concepts for the protection of intellectual property are needed, the current law on copyright and related rights should be adapted and supplemented to respond adequately to economic realities such as new forms of exploitation." Council Directive 2001/29/EC, 2001 O.J. (L 167) (EC) [hereinafter Directive 2001/29/EC].

²⁸ For example, the rights of authors and editors had to conform to the photocopy phenomenon (reproduction rights) and then to digitalization (digital rights). Thus, rights of authors should persist even if tablets replaced paper. And editors' rights should persist too if digital formats replaced physical formats. Regarding technological and consumer changes in audio-visual works, see Lucie Guibault & João Pedro Quintais, *Copyright, Technology and the Exploitation of Audiovisual Works in the EU*, in *THE INFLUENCE OF NEW TECHNOLOGIES ON COPYRIGHT 7* (Strasbourg: European Audiovisual Observatory 2014).

²⁹ Boytha, *supra* note 18, at 412.

³⁰ "The editor will have the power to prosecute or civilly pursue those who unlawfully reproduced his publishing, and to be party to judicial

right concerning the news and press information is established by Article 28 of Law 11.723.³¹

Another right connected with broadcasting that may be, not without some difficulty, considered as related is established in the so called “Pelé Law” that grants the “right of arena” in Brazil by which the athletic club or sports organization has the exclusive right to capture, broadcast and rebroadcast images of sports events.³² This regulation

proceedings, even as complainant in criminal proceedings. This proceeding is independent from the one pertaining to the author.” Law No. 25466 art. 23, July 25, 2001, [29739] B.O. 2 (Arg.).

³¹ See Law No. 11.723 art. 28, Sept. 26, 1933, [11799] B.O. 1401 (Arg.); FEDERICO VIBES ET AL., DERECHO DEL ENTRETENIMIENTO 82 (2014) (“Unsigned articles, anonymous collaborations, reports, drawings, recordings or information in general of an original and specific nature, published by a newspaper, magazine or other periodical, which has not been acquired or obtained thereby, or by an information agency on an exclusive basis, shall be considered the property of the newspaper, magazine or other periodical, or of the agency. News of general interest may be used, transmitted or retransmitted; but where it is published in its original version its source shall be expressed.”).

³² This right was introduced by the Lei No. 5.988, Art. 100-01, de 14 de Dezembro de 1973, Derecho de Autor, DIÁRIO OFICIAL DA UÑIAO [D.O.U.] de 14.12.1973 (Braz.): “The entity to which the athlete is attached shall have the right to authorize or prohibit, the fixation, transmission or retransmission by any means or processes of public sports spectacle, with paid entry . . . Unless otherwise agreed, twenty percent of the price of the authorization shall be distributed in equal shares to the athletes participating in the performance. The provisions of the previous article do not apply to the fixation of parts of the performance, the duration of which, taken together, does not exceed three minutes for information purposes only, in the press, cinema or television.” According to the original insert in the law, it was considered a related right. See José de Oliveira Ascensão, *The Right to Show*, 24 COPYRIGHT BULLETIN 3 (1990). Currently, it is a *sui generis* right, according to Lei No. 9.615, Art. 42, de 24 de Março de 1998, DIÁRIO OFICIAL DA UÑIAO [D.O.U.] de 24.3.1998 (Braz.) (“The right of arena belongs to sports entities, which is the exclusive prerogative to negotiate, authorize or prohibit the capture, fixation, emission, transmission, retransmission or reproduction of images, by any means or process, of sporting spectacle in which participate.”).

reflects the beginning of an industry, the transition from amateur sport to professional one with a global impact due to telecommunication facilities and the way in which an athlete plays a role similar to the one of an artist or performer, regarding consequences.³³ Moreover, the athletic club or organizations are the businessman in this industry and hence the owner of the right.³⁴

The “right of arena,” as an independent right, is part of a larger genre: the right of the organizer of the entertainment to the fixation, transmission or public performance. This right shall be then coordinated with the right of the broadcaster making the transmission.³⁵ Thus, the sports organization shall hold an exclusive right and later negotiate it with one or more broadcasters from where there shall arise a right over program-carrying signal; in this case, the sports event altogether with the other elements to be added by those assembling and distributing the signal such

³³ It is understood that there is a metaphorical similarity, given that performers are only those who execute or perform literary or artistic works.

³⁴ Antônio Chaves, *Arena Rights. Legislative Problems Concerning Broadcasting of Large Shows (Sports or Other)*, 23 MONTHLY REV. WORLD INTELL. PROP. ORG. [WIPO] 310–19 (1987). The author reminds us that the name derives from ancient gladiators and the combats that took place in the amphitheatres with sand floors.

³⁵ For a complete and fully detailed study on the organization of sport events, see ASSER Institute: Centre for International & European Law International Sports Law Centre, Study on Sports Organisers’ Rights in the European Union - Final Report (Feb. 2014), <http://www.asser.nl/sportslaw/research/past-research-projects/sports-organisers-rights-in-the-eu/> [<https://perma.cc/7HZF-ZQL7>]; see also Johan Lindholm & Anastasios Kaburakis, *Cases C-403/08 and C-429/08 FA Premier League Ltd and Others v QC Leisure and Others; Karen Murphy v Media Protection Services Ltd*, 4 Oct 2011, in LEADING CASES IN SPORTS LAW 271-286 (Anderson, J. ed. 2013).

as interviews, specialists opinions, compilations, repetitions, etc.³⁶

In other countries like Argentina there is not such an exclusive right, but the regulations take for granted the aforementioned exclusivity. For that reason, Article 77 of Law 26.522 of Audiovisual Communication Services (“*Ley de Medios*”) establishes a mechanism so that the exercise of exclusive rights for the retransmission or television broadcast of certain event of public interest, like sports events do not attempt against the rights of citizens to watch such events live and free of charge throughout the national territory.³⁷ The rule for the prohibition of public communication of events without the consent of the organizer is globally accepted and customary is its source of law.³⁸

³⁶ In the case *Cablevisión S.A. c. Metzger* (also known as the “V́ctor Hugo case,” named after the recognized journalist V́ctor Hugo Morales), it was decided that the broadcast signal was protected as intellectual property. Although the judge made a mistake with regards to law framing, since he stated the protection of Law 11.723, in other paragraphs he mentions the Rome Convention. *Cámara Nacional de Apelaciones en lo Comercial (CNCom.), Sala D, [National Court of Commercial Appeals], “Cablevisión S.A. c/ Metzger, Eduardo Juan y otros s/ Ordinario,”* (2014). At the same time, he admits that the ownership of the signal derives from the exclusive contract entered into by the show organiser, the “*Copa Intercontinental Interclubes.*” See Federico Vibes, *Propiedad intelectual de las transmisiones de eventos deportivos*, EL DERECHO, 259-376 (2009).

³⁷ The same can be inferred from Article 80, that also takes for granted the existence of exclusive rights—at least for television—that should not go against the right to information. Law No. 26522 art. 28, Oct. 10, 2009, [31756] B.O. 1 (Arg.).

³⁸ This rule contains by itself all the elements of the customary law: the use, the universality of its acceptance, and the *opinio iuris*, since all agree that it is illegal to transmit a show without authorization from the organizer or the owner of the venue where the show is organized. See de Oliveira Ascensão, *supra* note 30, at 10. In Argentina, we could also apply by analogy Article 56 of Law 11.723, by which “Without prejudice to the ownership right belonging to the author; a work performed in a

The exclusive right over the program-carrying signal coexists and is coordinated with other exclusive rights arising either from contracts or factual situations. For example, the possibility to prevent the access to the place of the event or the exclusive right of the athlete over his or her own image.³⁹ This is regardless of the necessary coordination among the traditional author rights or other related rights such as the rights belonging to musical or visual performers. The required coordination reinforces the need for exclusive rights for the broadcasters since their success is a necessary condition for the success of the owners of other exclusive rights such as authors, performers, audiovisual producers or event organizers.

Here is the “connection” of the related right, which is not assimilation to the author’s right. On the one hand, these rights simplify the communication of rights and they differ from them by their purpose and content, but both are subjective rights, have a limited term, are considered as property, have limitations and exceptions and they both are under international protection.⁴⁰ Among their dissimilarities: they are not works, there is no author, they reveal no originality (so they can be sued for unlawful reproduction but not for plagiarism), they have different terms to be computed in different ways (ones are *post mortem auctoris*, others from the date of fixation). In the case of broadcasters, these dissimilarities arise even when they are the rightsholders of the broadcasted work, whether it was transferred to them or they are both producer and broadcaster.

theatre or public hall may be broadcast or retransmitted by radiotelephone or television, only with the consent of the event organizer.” Law No. 11723 art. 56, [11799] B.O. 1401 (Arg.).

³⁹ See de Oliveira Ascensão, *supra* note 30, at 7.

⁴⁰ See André Kéréver, *Should the Rome Convention Be Revised and, If So, Is This the Right Moment?*, 25 COPYRIGHT BULLETIN 5, 6 (1991).

The rights of authors and performers may be clearly identified in their relationship, though both may contain some part of the artist features. The work is autonomous; it does not depend on any interpretation or particular support. On the contrary, performers need a work to represent. Consequently, their right is much more restricted than the authors' right. The artist has the possibility to prevent only live performances or direct broadcasts except when the performance is already fixed.⁴¹

B. Rights of Broadcasters in the Rome Convention

The Rome Convention protects broadcasting understood as the “transmission by wireless means for public reception of sounds or of images and sounds.”⁴² It includes satellite transmission, when intended to the general public as well as the ones made from ground stations; also, when transmitted by encrypted signals, or if decoders were provided by the broadcaster to the public the same as retransmission of a broadcasting by another organization. Transmissions made by cable or fiber optic are not included.⁴³

⁴¹ See World Intellectual Property Organization [WIPO], *Guía sobre los Tratados de Derecho de Autor y Derechos Conexos Administrados por la OMPI 151* (2003), https://www.wipo.int/edocs/pubdocs/es/copyright/891/wipo_pub_891.pdf [<https://perma.cc/R2GV-B25W>] [hereinafter *Guía sobre los Tratados de Derecho de Autor*]; see also Rome Convention, *supra* note 3, at art. 7.1.

⁴² Rome Convention, *supra* note 3, at art. 3(f).

⁴³ See Takamitsu Kurihara, *Protection of Rights and Interests of Broadcasting Organizations*, in UFITA, VOL. 118, 191-202 (Verlag Stämpfli & Cie AG, Berna, 1992); see also Andrés Llerena, *Derecho de los Organismos de Radiodifusión*, in X CONGRESO INTERNACIONAL SOBRE LA PROTECCIÓN DE LOS DERECHOS INTELECTUALES 175-91 (World Intellectual Property Organization [WIPO] 1995).

In that sense, this definition matches the one brought by the International Telecommunication Convention of the International Telecommunication Union (“ITU”), which matches all telecommunication by means of radio waves. Moreover, according to the ITU a broadcasting service is the one received directly by the public such as sound and televisions emissions, or of any other kind.⁴⁴

Some regulations extend their protection to cable and transmissions by other means, like Article 141 of the Decree-Law 822 of the Republic of Peru (Copyright Law) through which a similar protection is granted, as appropriate, to the stations transmitting programs to the audience by means of a wire, cable, fiber optic or any other similar procedure for the exercise and enjoyment of the rights hereby mentioned. This extensive application of the protection to wireless transmissions was ratified by the courts.⁴⁵ Therefore, if the

⁴⁴ Traditionally, the ITU defined radio waves as electromagnetic waves, with frequencies below 3000 GHz, and spread in space without artificial guides. But, due to technological advances, currently the term “radiocommunication” also includes telecommunications by means of electromagnetic waves above 3000 GHz and spread without artificial guides. See International Telecommunication Union (ITU), CONJUNTO DE TEXTOS FUNDAMENTALES DE LA UNIÓN INTERNACIONAL DE TELECOMUNICACIONES ADOPTADOS POR LA CONFERENCIA DE PLENIPOTENCIARIOS 156 (2015), <http://search.itu.int/history/HistoryDigitalCollectionDocLibrary/5.21.61.es.300.pdf> [<https://perma.cc/XTX9-QAYZ>]. Regarding the distribution of the radio spectrum, it is useful to consult the International Telecommunication Union (ITU), *Radio Regulations* 27 (2016), <http://search.itu.int/history/HistoryDigitalCollectionDocLibrary/1.43.48.en.101.pdf> [<https://perma.cc/C6RA-RFLX>].

⁴⁵ See Ricardo Antequera Parilli, Comment, *Telefónica Multimedia S.A.C. v. Cable Star S.A., Sala de Propiedad Intelectual del Tribunal, INDECOPI court, CERLALC* (Apr. 11, 2001), <http://aplicaciones.cerlalc.org/derechoenlinea/dar/index.php?mode=archivo&id=607> [<https://perma.cc/HTX3-UPET>]. It was decided that even though the Rome Convention only grants protection as regards wireless transmissions, and consequently, retransmissions by wire or cable are not protected, nothing indicates that parasitic behavior might not be

activity under protection is appropriated for the purposes of those deciding the broadcasting, its programs and date and time of transmission, such characteristics may also be found in those making the wired transmissions or by other means such as fiber optic.⁴⁶

Nevertheless, not all the jurisprudence concords; in some isolated cases, which have been criticized by the legal doctrine, it has been decided that the simultaneous, full and unalterable rebroadcast made by cable of the signal of National Television may not be classified as cable, and as a result may not be considered as an exploitive act but as the delivery of a technical means for the open signal to get to an undetermined number of users.⁴⁷ Irrespective of whether the operating cable is a broadcaster or not, and under what circumstances, as regards the right to the transmission by cable there are actually two main problems under discussion: a) remuneration of actors and performers for cable transmissions, and b) if it is necessary to ask for authorization or cable traditional broadcasters should be remunerated by the cable retransmission of their signals.⁴⁸

avoided with actions derived from unlawful competition or unjust enrichment. *See also* Ricardo Antequera Parilli, Comment, *Telefónica Multimedia S.A.C. v. Telesat E.I.R.L., Sala de Propiedad Intelectual del Tribunal, INDECOPI court*, March 28, 2001, case *Telefónica Multimedia S.A.C. v. Telesat E.I.R.L.*, CERLALC (Mar. 28, 2001), <http://aplicaciones.cerlalc.org/derechoenlinea/dar/index.php?mode=archivo&id=610> [<https://perma.cc/A2HG-QB9R>].

⁴⁶ *See* Ricardo Antequera Parilli, Comment, *Tribunal de Justicia de la Comunidad Andina*, CERLALC (Dec. 1, 1999), <http://aplicaciones.cerlalc.org/derechoenlinea/dar/index.php?mode=archivo&id=605> [<https://perma.cc/G5XF-KL89>].

⁴⁷ *See* Ricardo Antequera Parilli, Comment, *Corte de Apelaciones de Santiago, Tercera Sala*, CERLALC (June 23, 2011), <http://aplicaciones.cerlalc.org/derechoenlinea/dar/index.php?mode=archivo&id=2202> [<https://perma.cc/8FX4-8DTH>]. That decision affected both the rights of authors and broadcasters and of other owners too.

⁴⁸ “Working Group on the Problems in the Field of Copyright and So-Called Neighbouring Rights Raised by the Distribution of Television

This last aspect is part of the so called *must carry - must offer* and is still under discussion in some countries, for example Colombia.

Article 13 b) of the Rome Convention also grants broadcasting organizations the right to authorize or prohibit “the fixations of their broadcasts.” This must be understood as a synonym for recording. Technically it consists of the capture of an image or group of images and/or sounds of a transmission by a means which may allow its subsequent reproduction both in a sound or audiovisual format.”⁴⁹ The right belongs to the original broadcasting organization and not to the distributor of the signal who is only in charge of the retransmission of the signal.

The Rome Convention also protects broadcasting organizations concerning broadcast communication to the public but only when such communication is made upon payment of an entrance fee. These days, this turns out to be an outdated situation, even more when its effectiveness is subject to the internal legislation of each country.

C. TRIPS Provisions

There is a small difference among the terms of Article 14.3 of TRIPS in comparison with the Rome Convention. While the Rome Convention sets forth that “broadcasting organizations shall enjoy the right to authorize or prohibit”, TRIPS only establish that “[b]roadcasting

Programmes by Cable,” Paris, June 13 to 17, 1977, COPYRIGHT: MONTHLY REV. OF THE WORLD INTELL. PROP. ORG., 1977, at 246-51.

⁴⁹ See Ricardo Antequera Parilli, Comment, *Oficina de Derecho de Autor*, INDECOPI, CERLALC (June 26, 2000), <http://aplicaciones.cerlalc.org/derechoenlinea/dar/index.php?mode=archivo&id=609> [<https://perma.cc/4Q8H-3XY5>]. This decision is one of the most complete ones regarding the explanation of the rights recognised to broadcasting organizations in the scope of the Rome Convention.

organizations shall have the right to prohibit...” Such distinction could be innocuous if interpreted as Delia Lipszyc, according to whom the term “right” must be understood in the context of the second paragraph by which in case these rights are not granted to the broadcasting organizations, they should be granted a similar right over the transmitted contents protected under authors’ rights. Given that the said reference is made to the Berne Convention, such right is none other than the right to authorize and prohibit.⁵⁰ But these authors’ rights shall not belong necessarily to broadcasting organizations since TRIPS indicates that “where Members do not grant such rights to broadcasting organizations, they shall provide owners of copyright in the subject matter of broadcast” from where we may infer that those rights could belong not to the owner of the signal but to the owner of the content.⁵¹

Clearly, this TRIPS provision carries off certain problems of interpretation. The second paragraph sets forth that whenever members do not grant such right to broadcasting organizations, they shall provide owners of authors’ rights on the subject matter of broadcast with the possibility of preventing the above acts subject to the provisions of the Berne Convention.⁵² How should this exception be understood? It may seem enough for the non-party countries of the Rome Convention to enjoy an alternative protection to contents through copyright. Owners of authors’ rights of broadcasted works would thus have protection as regards the fixation of contents, the reproduction of the fixation of broadcasted works, the wireless retransmission of assembled works in the transmission or communication to the audience of broadcasted works. This will depend on whether such

⁵⁰ LIPSZYC, *supra* note 25, at 56–57.

⁵¹ TRIPS, *supra* note 4.

⁵² See Llerena, *supra* note 43, at 185.

contents may be protected as work, if such works meet the requirements of originality and authorship regarding the domestic regulations of the country claiming protection. Thus, the criteria to regard contents as a work or not should be analyzed on the basis of such legal systems.

It is my understanding that this is not a protection granted to the broadcasting organization but to the owner of the works contained in the transmission. Nevertheless, if the broadcasting organization was also the producer or “author” of the contents such organization would hold both roles. This could be the interpretation we give to the second paragraph of Article 14.3 of TRIPS. Thus, it shall not be necessary to grant an extra right to broadcasting organizations for their transmissions in those countries where rights are granted to the owner of broadcasted works⁵³. Accordingly, in Anglo-Saxon regimes, where transmissions are protected by *copyright*, there would be no need to grant related rights to broadcasting organizations. This argument as put forward by Davies could be used in the negotiation in WIPO to enable the access to the Treaty to *copyright* countries.⁵⁴

Additionally, Article 2.1 of the Berne Convention sets forth the protection for works “expressed by a process analogous to cinematography” which could be framed in the wider concept of “audiovisual work.”⁵⁵ It should be a matter for legislation in the countries of the Berne Union to prescribe that works shall be fixed in some material form so in some countries live television broadcasts could have no

⁵³ See A HANDBOOK ON THE WTO TRIPS AGREEMENT 52, 52–53 (Hantony Taubman et al. eds., Cambridge University Press 2012).

⁵⁴ See Gillian Davies, *The 50th Anniversary of the Article 151(c) of the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations: Reflections on the Background and Importance of the Convention*, 2 QUEEN MARY J. OF INTELL. PROP. 206 (2012).

⁵⁵ Berne Convention, *supra* note 22, at art. 2.1.

protection.⁵⁶ Thus, countries like United Kingdom or China grant author protection to works even if they are not fixed, while Japan or Korea does not.⁵⁷

This brings certain uncertainty to broadcasting organizations in legislations effectively granting authors' rights to television works since the scope of protection shall be given by the state in which protection is claimed, where protection could be granted or not and to dissimilar extents depending on the territory.

Hypothetically, a broadcasting organization could be considered both as author and owner of the broadcasted signal in some countries, and none of them in other countries.

D. The Relation Between Authors' Rights and Related Rights

The right of authors of the different types of works, the rights of performers and other related rights require coordination and harmonization, especially in the international scope. Rightsowners need each other so that the works, performances and different fixations or means of distribution are available to users. In the Rome Convention, the different interests and subjects become evident, to such an extent that the convention was compared to a marriage of three, a same blanket covering three different people. It is called marriage of convenience, where interest is over love. The artist obtains profits from the phonogram producer and the broadcasting organization, and for that reason, he married them. The broadcasting organization needs from the artists and from the phonogram producers to design their programs, and that is why he had to marry them. The phonogram producer obtains benefit from artists, and without broadcasters, he would not sell a single album or

⁵⁶ See Berne Convention, *supra* note 22, at art. 2.2.

⁵⁷ See Kurihara, *supra* note 43, at 199.

tape, so he married them. The three of them also get benefit from authors, without being authors. However, authors need from them for their work to reach the public.⁵⁸

Clearly, there is a mutual influence among the different groups of interests by which a dynamic balance should be achieved, even more bearing in mind the changing context of authors' right in which it seems to prevail the use of works instead of its prohibition.⁵⁹

Accordingly, the rights of the creators of works shall be coordinated with the rights of the users and of those intermediaries who make the work available to the public. In any case, it must be highlighted that the protection of the signal shall not cover the transmitted contents.⁶⁰ According to INDECOPI "the reproduction rights granted to the

⁵⁸ See Víctor Blanco Labra, *The Rome Convention: A Three-Cornered Marriage (A Love Triangle?)*, 25 COPYRIGHT BULLETIN 17, 17–19 (1991).

⁵⁹ This is how the drafters of the Rome Convention understood the need for coordination. Article 24 sets forth that the convention shall be open for accession by member states of the Berne Convention or the Universal Copyright Convention. On the other hand, there is consensus that the Rome Convention implies a certain equilibrium among the three groups of interest represented therein. See Boytha *supra* note 18, at 418, 427; see also Françon, *supra* note 11, at 20–24; Davies, *supra* note 54, at 215.

⁶⁰ Nevertheless, authors' right over contents and the right of the signal owner might be simultaneously infringed. The distinction may cause overlapping or coordination difficulties as referred herein. See Kéréver, *supra* note 40, at 6. For problems presented by cable and satellites, see Antonio Delgado, *Utilización de Obras Audiovisuales por Satélite y Cable. La Intervención de las Sociedades de Autores*, in 5 INTERNATIONAL CONGRESS ON THE PROTECTION OF INTELLECTUAL RIGHTS 213 (Zavalía 1990). See also Ulrich Uchtenhagen, *Transmisiones por satélite*, in VIII CONGRESO INTERNACIONAL SOBRE LA PROTECCIÓN DE LOS DERECHOS INTELECTUALES 253–97 (Asunción 1993); Ricardo Antequera Parilli, Comment, *Tercera Sala de la Cámara Penal del Juzgado de 1ª Instancia del Distrito Judicial de Santiago, República Dominicana*, CERLALC (December 27, 2001), <http://aplicaciones.cerlalc.org/derechoenlinea/dar/index.php?mode=archivo&id=833> [<https://perma.cc/MA76-YCVW>].

organization do not give such organization the right to authorize the reproduction of the content (audiovisual works, audiovisual productions, music, etc) if they do not own those rights. In this way, a broadcasting organization could not authorize the reproduction of an audiovisual or musical work included in its broadcast.”⁶¹ In Italy, the jurisprudence has stated that the rights of the broadcasting organization exist without prejudice of the rights of authors and other owners of rights. The object of the broadcaster’s right is never the work in itself, that is why radiotelevision broadcasts of works of third parties must always observe the right of authors.⁶²

This was a critical distinction when the Rome Convention was discussed because the authors were afraid that related rights would violate their own rights.⁶³ Beware of the theory that a greater number of rightsholders might

⁶¹ Ricardo Antequera Parilli, Comment, *Oficina de Derecho de Autor del INDECOPI*, CERLALC (June 26, 2000), <http://aplicaciones.cerlalc.org/derechoenlinea/dar/index.php?mode=archivo&id=606> [https://perma.cc/F2F7-5BHV]. INDECOPI is the national authority from Perú in copyright. “The National Institute for the Defense of Free Competition and the Protection of Intellectual Property (“Indecopi”) was founded in November 1992 through Executive Order 25868. Its function is to promote the market and protect the rights of consumers. It also encourages in the Peruvian economy a culture of fair and honest competition, holding harmless all forms of intellectual property — from trademarks and author’s copyright to patents and biotechnology.” *About Indecopi*, INDECOPI, https://www.indecopi.gob.pe/web/indecopi_ingles/sobre-el-indecopi [https://perma.cc/JB7V-RBAX].

⁶² Mónica Torres Cadena trans., *Corte de Casación Penal*, CERLALC (Sept. 19, 2000), <http://aplicaciones.cerlalc.org/derechoenlinea/dar/index.php?mode=archivo&id=606> [https://perma.cc/7LQ4-QKBW].

⁶³ See Kéréver, *supra* note 40, at 8; VILLALBA & LIPSZYC, *supra* note 16, at 31, where the objection submitted by the CISAC against the ratification of States of the Rome Convention, and that if the case should be the pertinent reservations should be made. See also VAN RIJ, *supra* note 24, at 44.

limit the piece of the pie pertaining to each one.⁶⁴ This implicit game of “zero-sum” is only possible in a static situation and in a society with no cultural changes. The digital world situation shows us that fears become baseless and that citizens preferences evolve over time.

In the draft regulation, this division should be clear, so the exclusive rights of broadcasters are established to authorize or prohibit the use of their signals and to achieve the objectives pursued: to prevent piracy and unfair or parasitic trade of those trying to benefit without having done the pertinent investments. This is clear in Article 12 of the Rome Convention about the remuneration rights of performers and producers of phonograms over any communication to the public of phonograms published for commercial purposes.⁶⁵ This right to remuneration, which is not an exclusive right to authorize or prohibit, implies a certain equilibrium concerning the rights of authors over their fixated works. Yet, ultimately, to reinforce related rights is not the same as to have them be equal to the rights of author.⁶⁶

This coordination with priority on authors’ right was firstly expressed in Article 1 of the Rome Convention which

⁶⁴ See Davies, *supra* note 54, at 214, 219.

⁶⁵ According to the Rome Convention, the exclusive right of performers and phonogram owners to authorize and prohibit has been sacrificed for the benefit of broadcasters, since Article 12 establishes that once the recording has been commercialized, they only have right to a fair remuneration, that is to say, a legal license. See VAN RIJ, *supra* note 24, at 46.

⁶⁶ See Kéréver, *supra* note 40, at 13. According to Labra, without communicators (related rights) we would go back to the days of minstrels and the world would lose many authors’ work. For that reason, the rights are fairly protected by the Rome Convention, and consequently authors’ rights are recognized as supreme over related rights. In similar terms was the opinion of Dr. Tiscornia, Argentine representative in the debates of the Rome Convention, who ascertained that an author’s right had priority. See Labra, *supra* note 58, at 19; VILLABLA & LYPSZYC, *supra* note 16, at 45.

sets forth that “Protection granted under this Convention shall leave intact and shall in no way affect the protection of copyright in literary and artistic works. Consequently, no provision of this Convention may be interpreted as prejudicing such protection.”⁶⁷ In a similar way the text under discussion in the SCCR establishes: “Protection granted under this Treaty shall leave intact and shall in no way affect the protection of copyright and related rights over the conveyed matter by the broadcasted signals. Consequently, no provision of this Treaty may be interpreted as prejudicing such protection.”⁶⁸ As a conclusion, the suggested wording is more specific than the one in the Rome Convention since it only refers to the signals.⁶⁹

The copyright system gives less emphasis to the distinction between authors’ rights over works and related rights over products, since in both cases the aim is to ensure control over physical or intangible reproduction.

⁶⁷ Rome Convention, *supra* note 3, at art. 1.

⁶⁸ World Intellectual Property Organization, *Standing Committee on Copyright and Related Rights*, SCCR/27/2 REV. (Apr. 28 – Mar. 2, 2014), https://www.wipo.int/edocs/mdocs/copyright/en/sccr_27/sccr_27_2_rev.pdf [<https://perma.cc/EG6K-AUJW>] [hereinafter WIPO SCCR/27/2].

⁶⁹ Domestic and regional legislations also comprise these diverse rights and respect due towards the rights of authors. For example, in Article 8 of Directive 93/83/CEE, from September 27, 1993, regarding the coordination of certain disposition regarding author’s rights and related rights in the field of satellite broadcasting and cable distribution, the Council stated: “[t]he Member States shall ensure that when programs from other Member States are retransmitted by cable in their territory the applicable copyright and related rights are observed and that such retransmission takes place on the basis of individual or collective contractual agreements between copyright owners, holders of related rights and cable operators.” Council Directive 93/83/CEE, art. 8, 1993 O.J. (L 8) 20.

Undoubtedly, a distinction must be made between incentives to creation and incentives to investment or production.⁷⁰

A primal rule to achieve the said balance is the so called “formal reciprocity”, unlike “substantial” or “material” reciprocity. In Argentina it is enshrined in the Law 11.723. This regulation establishes the minimum required for foreign works: “all the provisions of this Law shall apply equally to scientific, artistic and literary works, published in foreign countries, irrespective of the nationality of their authors, provided that they belong to nations which recognize intellectual property law.”⁷¹ This disposition has been traditionally interpreted as internally receiving the national treatment and the reciprocity: we shall recognize the rights of a foreign citizen equally to those of a national citizen as long as the foreign country recognizes the rights of our nationals.⁷²

Formal reciprocity does not require equal or equivalent legislation regarding substantial contents. It is not required to equally compare all the regulations of both legal systems in search of an identity among the rights for their owners. This would be the case of material or substantial reciprocity. On the contrary, our country requires formal reciprocity in the intended sense without further detail of the protection level.⁷³

⁷⁰ See Adolf Dietz, *Protection des Personnes Créatives par la droit d’auteur – Les cinq piliers du droit d’auteur modern de l’Europe Continentale*, 243 *REVUE INTERNATIONALE DU DROIT D’AUTEUR* 100–71. (2015). For example, in the United States of America, where there are not established rights for performers or phonograms producers, and they are free to broadcast music for free, but at the same time, they must secure the right of authors by means of a license. See VAN RIJ, *supra* note 24, at 45.

⁷¹ See Law No. 11.723 art. 13, Sept. 26, 1933, [11799] B.O. 1401 (Arg.).

⁷² See MIGUEL EMERY ET AL., *PROPIEDAD INTELECTUAL: LEY 11.723: COMENTADA, ANOTADA Y CONCORDADA CON LOS TRATADOS INTERNACIONALES* 123–25 (ASTREA ED. 2014).

⁷³ See LIPSZYC, *supra* note 25, at 597.

Material reciprocity seeks for legislation uniformity which is a difficult practice. In contrast, formal reciprocity ensures that nationals of other countries enjoy the same level of protection as the national of the same country by means of the invocation of the law of the place where the protection is claimed (*lex loci protectionis*). Article 11 bis (1) (ii) of the Berne Convention is an example of this coordination based on formal reciprocity: “(i) [a]uthors of literary and artistic works shall enjoy the exclusive right of authorizing . . . (ii) any communication to the public by wire or by rebroadcasting of the broadcast of the work, when this communication is made by an organization other than the original one”⁷⁴ It may seem clear that authors shall have the right to prohibit wired or wireless broadcast of their works. Logically, the regulation of the related rights of the broadcasting organization shall be effective in parallel to the related rights of the authors of the broadcasted works; that is to say, covering both wired, wireless or any other kind of transmission.

As indicated in the second paragraph of Article 11 bis of Berne Convention,

it shall be a matter for legislation in the countries of the Union to determine the conditions under which the rights mentioned in the preceding paragraph may be exercised, but these conditions shall apply only in the countries where they have been prescribed. They shall not in any circumstances be prejudicial to the moral rights of the author, nor to his right to obtain equitable remuneration which, in the absence of agreement, shall be fixed by competent authority.

⁷⁴ See Berne Convention, *supra* note 22, at art. 11 bis (1) (ii).

This helps avoid a uniform rule, but it enables a valid local regulation in the place where the protection is claimed.⁷⁵

Thus, the exclusive rights of the author do not turn into an obstacle for the broadcast of his work. But if the right of the broadcasters does not allow them to control the subsequent retransmissions, the broadcaster could not remunerate the authors for them, a situation that would harm the authors themselves.

Acts of third parties done without the consent of the broadcaster should not be valid from the point of view of authors' right. This would bring uncertainty to the users of broadcasted works. For example, it will be necessary to know if such right will still be an exclusive right to prohibit or be replaced by a fair compensation, by means of payment through collective management organizations.⁷⁶

Where Article 11 bis (1) (ii) refers to an organization other than the original one, and nothing is said about the relation between the original broadcaster who has the author's authorization and the other organization, this last organization could be making an illicit transmission.⁷⁷ So, if the signal is retransmitted without consent of the

⁷⁵ Regarding this interpretation of this Article of the Berne Convention, see Robert Ditrach, *On the Interpretation of Article 11 bis (1) and (2) of the Berne Convention*, 19 COPYRIGHT: MONTHLY REV. WORLD INTELL. PROP. ORG. 294 (1982).

⁷⁶ As established, for example, by Articles 8 and 9 from Directive 93/83/CEE of the Council, from September 27, 1993, on coordination of certain dispositions regarding the rights of authors in the field of satellite broadcasting and cable distribution. Council Directive 93/83/CEE, art. 8-9, 1993 O.J. (L 8,9) 20. See H. Cohen Jehoram, *Cabletelevision, Satellites and Copyright*, 2-3 NORDISK IMMATERIELLT RÄTTSSKYDD 188 (1985); see also Delgado, *supra* note 60, at 224.

⁷⁷ See Victor Hazan, *The 'Body Other than the Original Broadcaster' in Cable Transmissions—Article 11 bis (1) (ii) of the Berne Convention*, 20 COPYRIGHT: MONTHLY REV. WORLD INTELL. PROP. ORG. 228-36 (1984).

broadcaster, authors might not be able to receive their remuneration, since from the point of view of authors those are acts of communication to the public that shall not be under the scope of Article 11 bis (1) (ii).⁷⁸

Some numbers might be useful to reinforce these concepts. In Argentina, communication to the public by radio and television, cable included, meant a collection of profits of \$1440 million during 2016 for three collective management organizations (approximately \$90 million). SADAIC (music authors and composers), took in \$712 million, representing the 41% of their profits. AADI-CAPIF (musical performers and phonogram producers) received \$525 million, 54% of their profits; and SAGAI (audiovisual performers) collected \$204 million, representing 89% of their profits. There is no information for the other two entities: ARGENTORES (dramatic-literary authors) and DAC (directors of audiovisual works). The mutual need is thus reflected.

On the other hand, cultural expressions without an author's right frame of protection due to term expiration among other examples, like folklore, may be effectively protected by the right of performers, like musicians, actors and dancers, or by the rights of those fixating those expressions on phonograms or broadcasted by means of radio signals. Here, the regulation of broadcasting organizations has a very relevant function to strengthen the rights of those performers and other right holders.

E. Regulatory Standards of the Telecommunication Market

The definitions of “signal” given by the domestic or international technical organizations of communications as the ITU may be useful, though they have a different purpose,

⁷⁸ See Jehoram, *supra* note 76, at 192.; *see also* Delgado, *supra* note 60, at 228.

given that they aim to establish certain regulations over the use of the radio spectrum, such as frequencies, standards, freedom of speech, cultural diversity etc. In this regard, the term “broadcasting organization” might have different meanings, because it applies to those entities transmitting, receiving, or a combination of the two, including necessary equipment and facilities, but with no reference to control or decision over the program or contents.⁷⁹

In all regulations “radio communication” is considered as telecommunication by radio frequency waves and “broadcasting services” as a radio communication service by which transmissions are aimed directly to the public. They always include sound and images. However, a different approach is given by the Berne Convention, which does not take into consideration the technical elements defined by the ITU but guarantees authors the right to authorize communication to the public by any means, wired or not, of signs, sound, or images, including every type of means, even those are not directly intended to the public.

Therefore, the definition given to “broadcasting” by the Rome Convention in Article 3 (f) “the transmission by wireless means for public reception of sounds or of images and sounds”⁸⁰ differs from the technical definitions of the ITU which includes any means of wireless communication irrespective of the mode of transmission or reception or if it is intended directly for the public. This different approach has caused the SCCR to dismiss the idea that the broadcasting organization, for the purposes of the owner of the related right, is an organization that enjoys a license or government authorization.⁸¹

⁷⁹ See MEGUMI OGAWA, PROTECTION OF BROADCASTERS’ RIGHTS 26 (Martinus Nijhoff ed., 2006).

⁸⁰ Rome Convention, *supra* note 3, at art. 3.

⁸¹ That was the former position of Argentina, who understood that “broadcasting organization” was the entity authorized by each contracting party, capable of emitting sound or visual signals, or both,

Meanwhile, the 1974 Brussels Convention seeks to protect the emitting organization without reference to the public and replaces the term “emission” with “emitted signal.” In this regulation “signal” is an electronically-generated carrier capable of transmitting programs. “[P]rogram” is a body of live or recorded material consisting of images, sounds or both, embodied in signals emitted to ultimate distribution. Then the Convention makes a distinction between “emitted signal” as any program-carrying signal that goes to or passes through a satellite, and “derived signal” as a signal obtained by modifying the technical characteristics of the emitted signal, whether there have been one or more intervening fixations.⁸² In this sense, the object of protection is determined only as the emitted signal carrying a program that goes to or passes through a satellite. This leaves the signal disseminated to the public out of the scope of protection.

In the terms of the Brussels Convention, the signal is not aimed to the public and it is impossible for the public to receive reception. The party under protection is the party originating the signal, who might not necessarily be a broadcaster since broadcasts are directed to the public. Thus, in its own sphere, the responsibility regarding the author’s rights does not lie with the originating party but with the person or organization directing the broadcast to the

susceptible of perception, by a plurality of reception subjects. “Broadcasting organization” is also any entity authorized to tele-distribute. See World Intellectual Property Organization [WIPO], *Protection of Broadcasting Organizations: Terms and Concepts*, SCCR/8/INF/1 (Aug. 16, 2002), https://www.wipo.int/edocs/mdocs/copyright/en/sccr_8/sccr_8_inf_1.pdf [https://perma.cc/7S5R-TE52] [hereinafter WIPO SCCR/8/INF/1]; World Intellectual Property Organization [WIPO], *Agenda Item 4: Protection of the Rights of Broadcasting Organization Proposal by Argentina*, SCCR/3/4 (July 29, 1999), https://www.wipo.int/edocs/mdocs/copyright/en/sccr_3/sccr_3_4.html [https://perma.cc/DA26-KQVF].

⁸² Brussels Convention *supra* note 5, art. 1.

public, who oversees distribution, and defines to whom it shall be distributed to and when. The signal belonging to the right owner in accordance with the Brussels Convention is not directed to the public, due to a technical impediment. The characteristic of that signal, transmitted by satellite, makes it inaccessible by the public, since it requires further decoding and distribution by the broadcaster. Communication to the public will be given in the third phase and probably by a different subject; hence, no distinction is made between wired or wireless means, as it is irrelevant for their protection under the terms of the Brussels Convention.

This is the reason why holders of authors' rights and related rights are not capable of addressing the originating person or organization of the signal or to the satellite operator, but only to the distributor of the signal that communicates it to the public. Here, rightsholders find a certain lack of protection that is not covered either by the Rome or Berne Conventions. Only those transmissions that have the initial intention of addressing the public would be protected; that is, when the originator of the signal intervenes in other phases and not only in the organization of the programming or its mere provision in a satellite to be taken, distributed or transformed by the distributor.⁸³

A review should be done to ascertain if the lack of consistency between the rights of communication to the public held by authors or performers under the WIPO Treaties, which are different from broadcasters' rights, and might prejudice authors who are outside the scope of protection granted to broadcasters. As a result, the latter do not pay for the use of unprotected content. Thus, the definition of "broadcasting" under Article 2(f) of the WIPO Performances and Phonograms Treaty should be coordinated with a future treaty for broadcasters, with the Beijing Treaty, and any other international legal tool to avoid

⁸³ See Boytha, *supra* note 18, at 417.

inconsistencies between the application scopes of each instrument. The problem arises since in the WIPO Treaties, broadcasters play the role of users, while in the broadcaster organizations treaty, they act as rightsholders.

At the domestic level, this different focus is revealed in separate regulations. Related rights of broadcaster organizations are often part of author protection rules, while telecommunication rules have their own regime. For example, Article 2 of Mexico's Federal Radio and Television Law states:

This is a public order law with the main purpose to regulate broadcasting services. A Broadcasting service is that given through the electromagnetic waves propagation of audio, or audio and associated video signals, making use or exploitation of the radio electric frequency bands attributed by the State, precisely for that service, with which the people can receive directly and freely the signals of it, using the suitable devices for it. The use of space referred to in the previous paragraph through channels for broadcasting services shall be done only by prior concession or permission granted by the Federal Executive in the terms of the present law. For the purposes of the present law, broadcasting services means radio and television.⁸⁴

Another source of conflict in the regulation of telecommunications is the so-called *must carry-must offer*: the relation between signal suppliers of free television signals, cable operators, and other kinds of closed television. *Must offer* refers to the obligation of open television licensees to offer their contents to cable television operators

⁸⁴ Ley Federal de Telecomunicaciones y Radiodifusión [LFT], Diario Oficial de la Federación [DOF], 14-07-2014 (Mex.).

for their retransmission.⁸⁵ Depending on the country, this obligation may be of constitutional level, like in Mexico.⁸⁶ In some cases, it will be by means of compensation or a gratuitous obligation. On the other hand, *must carry* refers to the obligation of the provider of close television to retransmit open television signals. Clearly, this is about public policies, and though it affects the rights to authorize and prohibit the broadcaster organizations, it shall not be affected by the future treaty. Even in those cases when the right of the owner of the broadcasted contents might be affected, conflicts should be settled in their respective field.⁸⁷

The other main issues of telecommunications policy are the property of the media; the relationship with freedom of speech; cultural diversity; national cultural heritage; boys-, girls-, and teenager-related programming; and antitrust legislation.⁸⁸ Some of these topics present points in common with related rights of broadcasters and should be settled according to the rules of constitutional interpretation, so that each regulation is limited to its own field of application. In that sense, document SCCR/34/4 provides a declaration related to the definition of broadcaster organization: “[f]or the purpose of this treaty the definition of broadcasting organization does not affect the Contracting Parties’ national

⁸⁵ See *Regulacion “Must Carry-Must Offer”*, ORGANIZACIÓN DE TELECOMUNICACIONES DE IBEROAMÉRICA [OTI] 5 (2016), <https://www.otitelecom.org/documentos-de-inteligencia/white-papers/regulacion-must-carry-must-offer/> [https://perma.cc/LFA8-6RG9] (last visited Jan. 2, 2019) [hereinafter *Regulacion “Must Carry-Must Offer”*].

⁸⁶ See Decreto por el que se reforman y adicionan diversas disposiciones de los artículos 60, 70, 27, 28, 73, 78, 94 y 105 de la Constitución Política de los Estados Unidos Mexicanos, en materia de telecomunicaciones, Diario Oficial de la Federación [DOF] 11-06-2013 (Mex.).

⁸⁷ *Regulacion “Must Carry-Must Offer”*, *supra* note 85, at 6.

⁸⁸ In a wider sense, see VIBES ET AL., *supra* note 31, at 38.

regulatory framework for broadcasting activities.” It is the right solution.

III. THE REGULATION OF THE RIGHT OF BROADCASTING ORGANIZATIONS

Since the discussion on the future treaty started, the member states brought several proposals to the SCCR. The last one, from Singapore, included a rather comprehensive text.⁸⁹ Because of these proposals, the Secretary was required to prepare a consolidated text, which was done in early 2004. After the prior negotiations to convene a diplomatic conference failed in 2007, the subject remained in agenda-making slow progress.⁹⁰ Currently, the document under analysis is the one prepared by the Chair with the collaboration of the General Secretary⁹¹ Since the second semester of 2014, the works have been focused on “Revised Consolidated Text on Definitions, Object of Protection, Rights to be Granted and other Issues (Document SCCR/34/4).⁹²

It is necessary to achieve the enough consensus in these aspects to enable the call for a diplomatic conference, given that according to the mandate of the WIPO Assembly,

⁸⁹ World Intellectual Property Organization [WIPO], *Standing Committee on Copyright and Related Rights Eleventh Session Geneva, June 7 to 9, 2004*, SCCR/11/2 (Dec. 26, 2003), https://www.wipo.int/edocs/mdocs/copyright/en/sccr_11/sccr_11_2.pdf [<https://perma.cc/S7P7-9XRH>].

⁹⁰ Tom Rivers, *A Broadcasters’ Treaty?*, in *COPYRIGHT LAW, A HANDBOOK OF CONTEMPORARY RESEARCH* 486 (Paul Torremans ed. 2007).

⁹¹ WIPO SCCR/27/2, *supra* note 68.

⁹² Recently, the President of the Committee summarized the latest discussions. World Intellectual Property Organization [WIPO], *Revised Consolidated Text on Definitions, Object of Protection, Rights to Be Granted and Other Issues*, SCCR/35/12 (Feb. 12, 2018), https://www.wipo.int/edocs/mdocs/copyright/en/sccr_35/sccr_35_12.pdf [<https://perma.cc/G5JC-5XA3>].

it is understood that in the SCCR sessions, an agreement shall only be reached on the basis of a signal-based approach. In addition, it shall only be possible to propose a diplomatic conference when an agreement is reached regarding the purposes, the specific scope of application, and the object of protection.⁹³

Three causes may be identified to justify the slow progress. First, technological developments prevented the proper identification of the object of protection. In this sense, the signal and the means of making it accessible to the public are updated technologically over the years. The second major reason for the delays was the changing international context and the expectations of member states regarding the benefits of intellectual property after the entry into force of TRIPS. Some states were overwhelmed in large multilateral negotiation and in the following years, they were highly sensitive to any new international engagement because they did not want to take chances to be bound in an unbalanced way, given they had already suffered a loss in the access to knowledge.⁹⁴ The third reason for these delays can be found in the changing international context related to the Internet, and in the bid between a free Internet without payments and those who suffer from piracy due to this lack

⁹³ World Intellectual Property Organization [WIPO], Report on the Special Sessions of the Standing Committee on Copyright and Related Rights Regarding the Proposed Diplomatic Conference on the Protection of the Rights of Broadcasting Organizations, WO/GA/34/8 (July 23, 2007), https://www.wipo.int/edocs/mdocs/govbody/en/wo_ga_34/wo_ga_34_8.pdf [<https://perma.cc/T6HK-4J7M>] [hereinafter WIPO WO/GA/34/8].

⁹⁴ Among other signs of those apprehensions we can mention the launching of the WIPO Development Agenda, at the request of Argentina and Brazil. See Peter K. Yu, *Five Disharmonizing Trends in the International Intellectual Property Regime*, 4 *INTELLECTUAL PROPERTY AND INFORMATION WEALTH: ISSUES AND PRACTICES IN THE DIGITAL AGE* 73 (Peter K. Yu ed., Praeger Pubs. 2007).

of limits.⁹⁵ As a sample, it is worth mentioning the last round of this universal battle, as was the recent amendment adopted by the European Parliament on 12 September 2018 on the proposal for a directive of the European Parliament and of the Council on copyright in the Digital Single Market.⁹⁶

However, in my opinion, currently the main obstacle lies in the different objectives and tools used by both systems: authors' rights and copyright. For the first, a related right is required to provide an adequate level of protection to the program-carrying signal. While, in the United States of America, a related right is not required for broadcasting organizations to achieve satisfactory protection; hence they are not part of the Rome Convention. I believe that the North American position is based on a defense of its internal needs, while the treaty is intended mainly to give security to the broadcasting organizations against the illegal reception and distribution of the signal in cross-border traffic. This position of the United States weakens the activity and investments of its own companies outside the United States. While internally they have an adequate level of protection, this is not the case when these companies act internationally. In the case of entities such as Argentina, Mexico, Colombia, the European Union, and many others, with a single system of related rights, we managed to protect both the national and international

⁹⁵ For a brief history, see Rivers, *supra* note 90, at 510. See also Carlos Fernández Ballesteros, *Internet: "El Lugar de los Grandes Pecados Atroces"*, in ESTUDIOS DE DERECHO DE AUTOR Y PROPIEDAD INDUSTRIAL, HOMENAJE AL LICENCIADO JOSÉ LUIS CABALLERO CÁRDENAS 185 (Martín Michaus Romero & José Luis Caballero Leal ed. 2015).

⁹⁶ Amendments adopted by the European Parliament on 12 September 2018 on the proposal for a directive of the European Parliament and of the Council on copyright in the Digital Single Market, EUROPEAN PARLIAMENT, <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2018-0337+0+DOC+XML+V0//EN> [<https://perma.cc/PU57-WEXS>] (last visited Jan. 2, 2019).

activity of our broadcasters. And by the principle of national treatment, we also respect the rights of foreign broadcasters.

**A. *Subjective Scope: Who Are the
“Broadcasting Organizations”***

It is necessary to establish the holder of related rights as one of the elements determining the scope of protection.⁹⁷ Due to the technical means required, in most cases it will be an organization, and hardly any activity, even on a small scale, can be carried out by an individual person. Both the Rome Convention and TRIPS consider the “broadcaster organization” as the rightsholder, without definition, though they do define the phonogram producer. Nevertheless, there seems to exist a certain understanding that in such agreements the expression broadcaster organization includes those in charge of the task of organizing or assembling the signal and not just the mere property of media.⁹⁸ Ultimately, the broadcaster is the one who assembles and schedules, under its direction, a set of contents that take part of the broadcasting schedule made available to the general public by its transmission.⁹⁹ On the contrary, the independent producer of the program or the owner of the cinematographic or audiovisual work contained in the broadcast must not be considered a broadcaster. Therefore, it is irrelevant that the

⁹⁷ See Rivers, *supra* note 90, at 498.

⁹⁸ See OGAWA, *supra* note 79, at 27.

⁹⁹ We also infer that from the definition of “originating organization” contained in Section iv of Article 1 of the Brussels Convention, by which “[originating organization], is the person or legal entity that decides what programme the emitted signals will carry.” See Brussels Convention, *supra* note 5, at art. 1. It is clear that the organization is not the owner of the content, whether under copyright protection or not. On the other hand, the Paraguayan law 1328/1998 of Author’s Rights and Related Rights gives a definition in Article 2.28: “physical or legal person that programs, decides and executes the transmissions.” Llerena, *supra* note 43, at 175.

subject of the related right is at the same time the owner of the transmitted contents, although, in certain types of programs, the same subject can meet both conditions.¹⁰⁰

However, the expression requires higher accuracies, both due to the technological convergence in telecommunications and audiovisual services and to the emergence of Internet platforms that, on the one hand, transmit or retransmit radio and television, whether in a simultaneous or delayed manner, and on the other hand elaborate their own contents or make them available in any place and at any time. A map of the relevant actors shows us that the situation is far more complex than fifty years ago, when only radio and television existed along with some few closed circuits of sound and image (embryo of cable operators). Then, the satellite emerged as well as residential access to its emissions. Each new actor introduced new ways for the transmission of content that could, with certain expectation, be entitled to related rights.

Traditional broadcasting, although it was born wireless, has long been possible through cable. A programmer or producer develops a program, live or recorded, which is broadcast by cable. This broadcast is called cablecasting, where the transmission medium changes, but not the programmer's own task, consisting of assembling the programming into a signal, does not. In all the cases, broadcasting includes the reception by the public.¹⁰¹

In my opinion, the definition in the future treaty should not depend on the means of transmission but on the objective activity, where the initiative, the publisher responsibility and the organization of the programming are the most relevant acts.¹⁰² The broadcasting organization,

¹⁰⁰ See *Guía sobre los Tratados de Derecho de Autor*, *supra* note 41, at 146.

¹⁰¹ Jehoram, *supra* note 76, at 188–95.

¹⁰² See Rivers, *supra* note 90, at 499–500.

once the signal is assembled, can make a first transmission either live or delayed, and fix the signal for subsequent retransmissions by cable, satellite, and even by Internet, or else make such program available through some system for the public to access them at any time. Those different means in which the users access their signal should not lessen their rights or their responsibility for subsequent acts.

Indeed, the mere transmission should be excluded if the activity of the broadcaster organization has no connection with the origin, assembling, or programming of the signal intended for the public. This is the case in the EU and other legislations.¹⁰³

As I have already stated, protection should not be subject to governmental approval, which shall exist or not, depending on the public law system of each country has regarding licenses or authorizations for the use of the radio spectrum.¹⁰⁴

In Document SCCR/27/2, “broadcaster organization” is “the legal entity that takes the initiative for packaging, assembling, and scheduling program content for

¹⁰³ See Council Directive 2006/115/EC, art. 7, 2006 O.J. (L 376/28) ¶¶ 2–3 (EC) on rental rights and lending rights and on certain rights related to copyright in the field of intellectual property:

2. Member States shall provide for broadcasting organisations the exclusive right to authorise or prohibit the fixation of their broadcasts, whether these broadcasts are transmitted by wire or over the air, including by cable or satellite.
3. A cable distributor shall not have the right provided for in paragraph 2 where it merely retransmits by cable the broadcasts of broadcasting organisations.

¹⁰⁴ Hence, the definition by *Ley Federal del Derecho de Autor de los Estados Unidos Mexicanos* defines “broadcasting organizations” in its Article 139: “For the purposes of the present law, broadcasting organizations are privatized entities capable of transmitting sound or visual signals or both of them, susceptible of perception, by a plurality of recipients.” *Ley Federal del Derecho de Autor [LFDA]*, art. 139, *Diario Oficial de la Federación [DOF]* 24-12-1996 (Mex.).

which it has, where necessary, been authorized by rightsholders, and takes the legal and editorial responsibility for the communication to the public of everything which is included in its broadcast signal.”¹⁰⁵ Nevertheless, Document SCCR/34/4, a text still under discussion, adds elements bringing accuracy to the definition of “broadcasting organization” as

the legal entity that takes the initiative and has the editorial responsibility for broadcasting [*or cablecasting*], including assembling and scheduling the programs carried on the signal. *Entities that deliver their program-carrying signal exclusively by means of a computer network do not fall under the definition of a “broadcasting organization” [or a “cablecasting organization”]*¹⁰⁶

The last phrase excludes from the protection those operators that take the initiative, assume editorial responsibility, and schedule the programs, but do not make the first transmission using traditional methods. Mere passive distributors are also left out, as well as the ones who only retransmit but do not take the initiative or carry out any editorial activity of the program, and also those platforms with content for the choice of the public with no order or program grid.¹⁰⁷

¹⁰⁵ See WIPO SCCR/27/2, *supra* note 68.

¹⁰⁶ See World Intellectual Property Organization [WIPO], *Standing Committee on Copyright and Related Rights*, at 6, SCCR/34/4 (May 5, 2017), https://www.wipo.int/edocs/mdocs/copyright/en/sccr_34/sccr_34_4.pdf [<https://perma.cc/2SZD-SU6Q>] [hereinafter WIPO SCCR/34/4].

¹⁰⁷ About passive rebroadcasts, see Parilli, *supra* note 46.

B. Objective Scope: “Programme-Carrying Signal”

In the terms of the Rome Convention, “broadcasting” is protected and understood as “the transmission by wireless means for public reception of sounds or of images and sounds”.¹⁰⁸ TRIPS use the term “broadcasts.” However, the Brussels Convention protects the “emitted signal” or “signal emitted” which refers to any program-carrying signal that goes to or passes through a satellite. In that context, “signal” is any electronically-generated vector capable of transmitting programs, while “program” is a body of material consisting of images, sounds or both, registered or not, and embodied in signals emitted for the purpose of ultimate distribution.”¹⁰⁹

As mentioned by Delia Lipszyc, broadcasts as an object of broadcasting organizations’ rights are each one of those, whether they contain works protected by copyright or not, like sporting events, public interest events, etc. The object under protection is then the broadcast: the container regardless of the content.¹¹⁰

Thus, for example, “radio work” should not be confused with “broadcast work,” and even less with “radio broadcast.” The first is a radio program bearing the requirements of authorship and originality, and as such is protected by authors rights. The second is a pre-existing work, of any type assembled in a signal for its distribution. The third is the program-carrying signal (of any kind),

¹⁰⁸ Rome Convention, *supra* note 3.

¹⁰⁹ Brussels Convention, *supra* note 5, at art. 1.

¹¹⁰ See LIPSZYC, *supra* note 25, at 400–01; see also José Luis Caballero Leal, *Nuevas Amenazas Contra el Derecho de Autor*, in ESTUDIOS DE DERECHO DE AUTOR Y PROPIEDAD INDUSTRIAL, HOMENAJE AL LICENCIADO JOSÉ LUIS CABALLERO CÁRDENAS 226 (Martin Michaus Romero & José Luis Caballero Leal ed. 2015) (stating that where it is set forth that the rights of the broadcaster shall by no means affect the rights of authors).

broadcast by a broadcasting organization. Only this last option shall be protected by the related rights.¹¹¹

This program-carrying signal or broadcast is not the mere radio wave, but an “electromagnetic wave propagated in space without artificial guide.” This last definition is the technical definition for Hertzian waves, as wave motion of the electromagnetic field suitable for telegraphy and broadcasting, propagated in space when the electric shock occurs.¹¹² The signal object of the related rights shall be the electromagnetic wave capable of carrying information (in this case data, images, or sounds) with an organization sufficient for the constitution of “programs.” But the object of protection is not the program, but the carrying signal (in the terms of the Rome Convention). Hence, in the texts we have been analyzing, the following definition has been adopted: “program-carrying signal” means an “electronically generated carrier, as originally transmitted and in any subsequent technical format, carrying a program”¹¹³ Moreover, and to further clarify the matter, it is indicated that “[t]he protection granted under this Treaty extends only to program-carrying signals as broadcast *including pre-broadcast signals* transmitted by, or on behalf

¹¹¹ See Ricardo Antequera Parilli, Comment, *Sala de Propiedad Intelectual del Tribunal de INDECOPI*, CERLALC (Feb. 23, 2009) <http://aplicaciones.cerlalc.org/derechoenlinea/dar/index.php?mode=archivo&id=2203> [https://perma.cc/U758-XLC3].

¹¹² Carlos Corrales, *La Transmisión por Satélite y la Cuestión del Simple Transporte de Señales, con Especial Referencia a las Obras Audiovisuales*, in 7 CONGRESO INTERNACIONAL SOBRE LA PROTECCIÓN DE LOS DERECHOS INTELECTUALES 395 (World Intellectual Property Association [WIPO] 1992).

¹¹³ WIPO SCCR/34/4, *supra* note 106. In general, the development of the technical terms used in the debate on the new Treaty are available in the WIPO text, though some of the new technologies like VOD are not considered. See WIPO SCCR/8/INF/1, *supra* note 81.

of, a broadcasting [*or cablecasting*] organization, but not to programs contained therein.”¹¹⁴

It is evident then that the protection of “program-carrying signals” does not refer to the technical sense of the physical sciences or of the telecommunications discipline, but to a signal containing a scheduling program developed by a broadcasting organization, which has assembled images and sounds, whether protected or not by copyright. However, that signal generated electronically is not necessarily transported by Hertzian waves, like it used to be three decades ago.¹¹⁵

Currently it is possible to broadcast the signal by wired means in digitized packs of coded information that is decoded later. Even cable television now allows a “one-to-one” connection and not only “one-to-many.”¹¹⁶ Initially, cable operators had multiple signals intended for a considerably large group of users. Nowadays, it is possible to send a second individualized signal to selected users, for example to provide them with telephone service and/or Internet or even to enable them to download personalized programs like on demand videos.¹¹⁷ Also, this interactivity is possible due to satellite television.

¹¹⁴ *Id.*

¹¹⁵ The two basic technologies available for “air” transmission are VHF (very high frequency) and UHF (ultra-high frequency). Both use part of the electromagnetic spectrum, though UHF technologies are of lower rank and require more relayers. The normal situation is where the spectrum broadcasters used was managed by the State by means of licenses, to avoid signal interferences. The shift from analog to digital signal has not modified the basic scheme and does not have any effect over the related right of broadcasters. See Carlos Corrales, *supra* note 112.

¹¹⁶ See World Intellectual Property Organization [WIPO], *Current Market and Technology Trends in the Broadcasting Sector*, at 18, SCCR/30/5 (June 2, 2015), https://www.wipo.int/edocs/mdocs/copyright/en/sccr_30/sccr_30_5.pdf [<https://perma.cc/2WUE-5DV3>] [hereinafter WIPO SCCR/30/5].

¹¹⁷ *Id.*

The same content-carrying signal might be available for the user by means of IPTV (Internet Protocol Television), a TV signal subscription-based system that uses a broadband connection on IP protocol. It may be offered together with Internet access, using the same infrastructure of the operator but with a differenced broadband. This is not online TV, but TV on IP protocol, offered by operators in a closed system.¹¹⁸

On the other hand, online TV is a website or a platform that allows users to watch TV shows or other content, many of which do not pertain to broadcasters. These are the so called online or web-TV services, or over-the-top services (OTT), available by Internet connection, either fixed or wireless, or by data transmission to mobile devices like smartphones. These OTT services uses open Internet.¹¹⁹

All these means in which the program-carrying signal is directed to the public should be considered by the Treaty under discussion, in a neutral manner. What is relevant is not the technical element, but the way in which these contents are distributed. The signal is a means of transport, not a fixation of the program, although the signal as a vehicle can be fixed. Hence, the traditional concept of broadcasting must include all available technical resources to carry out the activity, including digital means of transmission and storage.¹²⁰ In addition, the easier the

¹¹⁸ See Margaret Rouse, *IPTY (Internet Protocol television)*, TECHTARGET (Mar. 2017), <http://searchtelecom.techtarget.com/definition/IPTV> [<https://perma.cc/2MRP-GWPF>].

¹¹⁹ See Margaret Rouse, *What's the difference between pay TV, over-the-top (OTT) TV and over-the-air (OTA) TV?*, TECHTARGET (July, 2018), <https://whatis.techtarget.com/reference/Whats-the-difference-between-pay-TV-and-over-the-top-OTT-TV> [<https://perma.cc/D2TY-CEU9>].

¹²⁰ Thus, new regulations should be established for private copies, since the storage for successive copies or made available are outside the original provisions for physical samples. See Yliniva-Hoffmann & Matzneller, *supra* note 6, at 12.

access to the means to make the signal available is, the higher the risk of piracy or signal theft is. The WIPO Assembly, in its session of September 24 to October 3, 2007, established that they should work “on the basis of a signal-centered focus.”¹²¹

However, in the SCCR some delegations recurrently raise the ephemeral character of the transmission, claiming that there is no possibility of establishing subsequent rights based on the fixation. Consequently, each retransmission should be considered as a new transmission. However, although from the technical point of view it is true that each transmission is new, this does not prevent that an adequate and effective protection can be established regarding acts not authorized to third parties on that signal. In addition, it should be clarified that it is not just any signal, but rather a “content carrier signal”.

This precision avoids the mistake of considering that the ephemeral nature of the signal would not allow establishing, for example, a term of protection, or that this term should be counted again with each new transmission. So, the expression “signal-based approach” is used only to explain that the separate protection of the program signal’s content is irrelevant.

C. International Scope of Protection, International Public or Private Law?

One of the main difficulties presented by the Rome Convention was the binding character in internal scope on the member states. As the general interpretation establishes, this Convention is an instrument of International Public Law, establishes commitments from the States regarding the nationals of other States, and does not create rights to its nationals, except the different constitutional regimes on the

¹²¹ WIPO WO/GA/34/8, *supra* note 93.

incorporation of international law to domestic law. Thus, the Rome Convention is of indirect implementation in most of the cases, except if there was a national regulation empowered to invoke international treaties directly in the courts.¹²² The Constitutions of some countries, such as Argentina, Chile, or Mexico, establish that the rights embodied in international treaties shall deserve direct recognition by the courts.¹²³

At a certain moment, the broadcasting organizations considered that the States should sanction the necessary norms to implement the Convention so that it would be effective. In the absence of these national standards, the growing problems of piracy, both satellite and wire, were not solved. Consequently, in the international negotiations carried out by WIPO, a “Model Law concerning the Protection of Performers, Producers of Phonograms and Broadcasting Organizations was prepared.”¹²⁴

¹²² Rome Convention, *supra* note 3, at art. 26.

¹²³ For example, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.) establishes “Section 31.- This Constitution, the laws of the Nation enacted by Congress in pursuance thereof, and treaties with foreign powers, are the supreme law of the Nation . . .”.

¹²⁴ Intergovernmental Committee created by Article 32 of International Convention on the Protection of Artists Performers or Executers, Producers of Phonograms and Broadcasting Organizations, WIPO, 4th sess., (Dec. 3-4, 11, 1973); World Intellectual Property Association [WIPO], *Item 3 of the Provisional Agenda*, OIT/UNESCO/OMPI/ICR.4/10 (Apr. 16, 1974), https://www.wipo.int/mdocsarchives/OIT_UNESCO_OMPI_ICR_II_1974/OIT_UNESCO_OMPI_ICR_II_2_E.pdf [<https://perma.cc/SU8K-EAXH>]; World Intellectual Property Organization [WIPO], *Examen du projet de loi type relative a la protection des artistes interpretes ou executants, des producteurs de phonogrammes et des organismes de radiodiffusion*, OIT/UNESCO/OMPI/ICR.4/7 (Nov. 20, 1973), <http://unesdoc.unesco.org/images/0000/000065/006553FB.pdf> [<https://perma.cc/3JC5-4GNC>]. The other main issue the Model Law intended to balance was the relationship between performers and broadcasting organizations: when were the fixation or rebroadcast rights

According to the draft under consideration¹²⁵:

The Beneficiaries of Protection are: 1) Contracting Parties shall accord the protection provided under this Treaty to broadcasting [or cablecasting] organizations that are nationals of other Contracting Parties. 2) Nationals of other Contracting Parties shall be understood to be those broadcasting [or cablecasting] organizations that meet either of the following conditions: (i) the headquarters of the broadcasting [or cablecasting] organization is situated in another Contracting Party, or (ii) the program-carrying signal was transmitted from a transmitter situated in another Contracting Party. 3) In the case of a program-carrying signal by satellite the transmitter shall be understood to be situated in the Contracting Party from which the uplink to the satellite is sent in an uninterrupted chain of communication leading to the satellite and down towards the earth. 4) The provisions of this Treaty shall not provide any protection to an entity that merely retransmits program-carrying signals.¹²⁶

These criteria or connecting points have not changed substantially since 2007.¹²⁷ It only remains as an open discussion the possibility that some countries may adopt only one of the criteria or make a reservation by which both requirements should be completed simultaneously: the party shall have legal domicile in another contracting Member State and the broadcast must be done from another contracting State (necessarily a different State). In the case of the signals broadcasted by satellite, either those directly

included in the broadcast authorization, or when could other acts be carried out from fixed actions?

¹²⁵ WIPO SCCR/34/4, *supra* note 106.

¹²⁶ The effects of this point of connection are like the ones provided by the Rome Convention. See JØRGEN BLOMQUIST, *PRIMER ON INTERNATIONAL COPYRIGHT AND RELATED RIGHTS* 41 (Edward Elgar Pub. Ltd., 2014).

¹²⁷ See Rivers, *supra* note 90 at 496.

received by the public and those sent to a ground station, the scope of application shall be given both by the location of transmission and the location of reception, either by a distributor or directly by the public. Similarly, cable entities which are producers of their own signal and broadcast it through cable, in contrast with those cable entities which only rebroadcast signals of third parties, shall enjoy the same protection as traditional broadcasters, in the different territories part of the treaty.

This new treaty must have effects in the extended international traffic offered by the Internet by means of a rather uniform protection to guarantee minimum rights. The Rome Convention works accordingly, but in a more restricted scope. Currently, it is possible to have weak rights since, without a common ground, a signal may be captured with little effort and redistributed by Internet or cable.

One possibility is to establish an alternative, to give countries freedom to have different protection systems for the program-carrying signal. It would be an improved version of what TRIPS envisioned, so that if a country grants property rights to the program-carrying signal in its national legislation, such as copyright does with respect to the content of the signal, it would not be necessary for that country confer a related right. If the signal –emitted or fixed– is the subject matter of a property right in that country, regardless of whether the content of the signal qualifies or not for copyright protection as a work, it would be enough for this alternative. This sign of tolerance vis-à-vis the purism of the author's right and copyright systems, allows the international regime to positively value and harmonize the different legal cultures. The only requirement should be that the protection of the signal must be independent and exclusive.

This last proposal should be clearer than the text included in many of the Free Trade Agreements (FTA) signed by the United States. Taking the Korean text as an

example, there is established that “(b) Notwithstanding subparagraph (a) and Article 18.6.3(b), neither Party may permit the retransmission of television signals (whether terrestrial, cable, or satellite) on the Internet without the authorization of the rightsholder or rightsholders of the content of the signal and, if any, of the signal”.¹²⁸ This rule can be interpreted in different ways in the copyright and author’s right systems. For the first, the owner of the signal would require the permission of the owner of the content to make some kind of claim for the unauthorized use of the signal. In the systems of civil law, the claim of the owner of the signal will always be independent of what the content owner can do for himself. Notwithstanding the lack of clarity, these FTA rules are a good precedent at the international level to prevent the signal from being retransmitted over the Internet without authorization.

IV. RIGHTS TO BE CONSIDERED BY INTERNATIONAL REGULATIONS IN ACCORDANCE WITH THE NEW TECHNOLOGIES

In previous years proposals the ensured rights of broadcasters were structured on exclusive rights (to authorize and prohibit), rights to prevent or the obligation of the States to provide an adequate and effective protection against certain acts like the capture or retransmission of the

¹²⁸ Free Trade Agreement between the United States of America and the Republic of Korea, art. 18.4.10(b), June 30, 2007. *Free Trade Agreement between the United States of America and the Republic of Korea*, OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, <https://ustr.gov/trade-agreements/free-trade-agreements/korus-fta/final-text> [<https://perma.cc/N6YR-BBEA>] (last visited Jan. 2, 2019). In the same sense, see the Free Trade Agreements with Australia (AUSFTA) art. 17.4.10 (b), Bahrain (art. 14.4.10.(b)), Colombia (art. 16.7.9.), among others. *Free Trade Agreements*, OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, <https://ustr.gov/trade-agreements/free-trade-agreements> [<https://perma.cc/QWD5-JDX3>] (last visited Jan. 2, 2019).

pre-broadcast signal.¹²⁹ Though in different documents there were not uniform schemes, many acts were included by different applicants; some of the acts overlapped and others had different wording. The following acts were considered in the different documents:

- Retransmission,
- Cable retransmission,
- Retransmission by computer networks,
- Fixation,
- communication to the public,
- Reproduction of authorized fixations, if fixations were authorized but reproductions were not,
- Distribution,
- Making available,
- Decoding,
- Signal protection prior to transmission,

Some of the differences between the different documents, including those presented by the representative organizations of the broadcasters, is largely due to the fact that, over the years, advances in technology did not make some types of protection necessary or foreseeable.

For example, in 1997, on the Manila Symposium, the importance of simulcasting or webcasting to industry and consumption trends was not foreseen given that Internet facilities were not so widespread as nowadays.¹³⁰ This asynchronous entry into the list of acts covered by the

¹²⁹ See Rivers, *supra* note 90, at 501; see also Jain, *supra* note 25, at 21.

¹³⁰ See Rivers, *supra* note 90, at 502 (*simulcasting* implies parallel transmission of the same information, either by more than one means or more than one service by the same means, one of which could be Internet, as an additional service brought by the broadcaster, whereas *webcasting* is the transmission by radio or television by Internet, generally carried out by aggregators).

protection has generated many difficulties and delays in the negotiation, since it requires new explanations and the necessary consensus on the part of the Member States.

As we have seen so far, many of the current types of signal transmission and retransmission were not considered in the current international regulations. Thus, the phenomenon of the transmission and retransmission of cable signals which has over 40 years of existence is not covered by the scope of protection of the Rome Convention or TRIPS.¹³¹ Furthermore, there are some important imbalances, since such acts undoubtedly require authorization from copyright owners and other owners of related rights, but not from broadcasting organizations regarding their signals.¹³² Broadcasters' investments need certain control in regards to the use of the signal in order to capture the value and cash flow derived from their use.¹³³ An imperfect system, with evident market failures, undoubtedly discourages industry investments.

The main interest of the broadcaster is not always in the prohibition, which reduces his audience. But it is relevant that these uses are authorized and that those who benefit from new ways and places of access pay for the service received.¹³⁴ Thus, if the expenses in business

¹³¹ See Kurihara, *supra* note 43, at 196;

¹³² Ysolde Gendreau, *THE RETRANSMISSION RIGHT: COPYRIGHT AND THE REDIFFUSION OF WORKS BY CABLE 2* (1990). Initially, it was also a problem to solve whether if the cable operator could record the broadcast signal and then rebroadcast them by cable. There is no objection he transmits his own signals or programs, or contents of third parties without a license. Though, it refers to the right of authors regarding cable retransmission.

¹³³ See Bates & Wells, *supra* note 15, at 4. Even though I disagree with the conclusions of the authors, it is true that the regulatory framework addresses the monetary flow. *Id.*

¹³⁴ *Id.* at 31 (insisting that the main benefit of the broadcaster is found in the signal penetration and the size of the audience). Nevertheless, these conclusions may not be generalized, since the different models of

advertising shifts from television and radio towards the Internet, and Internet contents are available without control or possibility to monetize the transmitted signals retransmitted by others, communicated to the public or made available without sharing the resulting advertising revenues, there is an evident imbalance detrimental to owners of content and broadcasters.¹³⁵

A. Fixation Right

The Rome Convention and the TRIPS Agreement grant broadcasting organizations the right to authorize or prohibit “the fixation of broadcasts”¹³⁶ Article 14 (3) of the TRIPS Agreement and different domestic legislations act similarly. They do not give a definition of what should be considered as fixation, but there is no doubt that fixation is the recording of the broadcast, in whole or in part, of only one frame.¹³⁷ Fixation could be any kind of physical media, like old videotapes, analog VCR, or a digital recording. In the documents under analysis right now in the SCCR, a fixation right is not mentioned, though previous versions did contain such a right.¹³⁸ It appears to be a minimally essential

broadcasting shall have their own form of value capture. *See* WIPO SCCR/30/5, *supra* note 116.

¹³⁵ The trend towards a decrease in advertising in TV and radio is slight, probably held by the trust and loyalty of the brands towards sport events as the Olympic Games or the World Tournaments. *See* WIPO SCCR/30/5, *supra* note 116.

¹³⁶ Rome Convention, *supra* note 3; TRIPS, *supra* note 4.

¹³⁷ *See* Kurihara, *supra* note 43, at 193.

¹³⁸ *See, e.g.*, World Intellectual Property Organization [WIPO], *Standing Committee on Copyright and Related Rights*, SCCR/5/5 (May 3, 2001), https://www.wipo.int/edocs/mdocs/copyright/en/sccr_5/sccr_5_5.pdf [<https://perma.cc/LNP3-XYMF>]; World Intellectual Property Organization [WIPO], *Protection of the Rights of Broadcasting Organizations Submissions Received from Member States of WIPO and the European Community by March 31, 1990*, SCCR/2/5 (Apr. 6, 1999),

requirement. Although the fixation and later sale of physical copies is no longer usual, there is no doubt fixations are used for subsequent communications of the signal to the public or to make them available.¹³⁹

As I mentioned earlier, many countries' regulations include the right to fixation or reproduction. Under 112(e) of the U.S. Copyright Act, the broadcaster has the right to make ephemeral recordings about its transmission under the figure of a legal license.¹⁴⁰ Nevertheless, it is a limited right, from which it can be deduced that any other type of fixation shall constitute an infringement to the copyright of authors and performers whose works and performances are broadcasted.¹⁴¹ Perhaps this is the reason why the question might have been excluded from the current texts in order to avoid entering into the discussion of *post-fixation rights*. In conclusion, the reproduction of broadcasts, which require a previous fixation, should also be covered by the new international instrument. Those rights are independent, though they are clearly linked to one another. In fact, at least one fixed copy is required, for technical reasons, for the usual practice of *streaming* and other ways of rebroadcasting

https://www.wipo.int/edocs/mdocs/copyright/en/sccr_2/sccr_2_5.html
[<https://perma.cc/5UMS-LX9E>].

¹³⁹ See Bates & Wells, *supra* note 15, at 28. In fact, at the current state of technology and according to consumer trends, the economic value of fixation is an indirect value, a previous step to other types of signal use. In the case *Gestevisión Telecinco S.A.*, the court recognized that deferred retransmission requires the infringement of the exclusive right to authorize and prohibit the fixation of the broadcast on a material base. Ricardo Antequera Parilli, Comment, *Juzgado de lo Mercantil núm. 2 de Barcelona*, CERLALC (Sept. 15, 2008), <http://aplicaciones.cerlalc.org/derechoenlinea/dar/index.php?mode=archivo&id=2201> [<https://perma.cc/Y7VM-CRYE>].

¹⁴⁰ 17 U.S.C. § 112(e) (2002). Disposition equivalent to the exception contained in Article 15(1)(c) of the Rome Convention, which permits “ephemeral fixation by a broadcasting organisation by means of its own facilities and for its own broadcasts.” Rome Convention, *supra* note 3.

¹⁴¹ See Jain, *supra* note 25, at 12.

and deferred transmissions.¹⁴² Fixation shall also be required for the *video on demand* services to which I will later refer to.

The exclusive right to fixation is also relevant to evaluate the legitimacy of the acts carried out by the different systems of digital recording, some provided by the same broadcaster and some by third parties. Those are denominated the Personal video recorders (PVRs) and the Intelligent Recording Technologies (IRTs). In the first case, through a supplementary fee, the provider delivers an additional service for the recording of the signal in a virtual memory accessible by private means, to be later seen by the user at any convenient time in a given period, such as a month.¹⁴³

In the first place, it should be analyzed if such recording is a private copy done by the user (and as such included in the exception for private copies in the countries that provide for it), or if the copy is done by the provider. If the provider of the service of recording and lodging is not also the owner of the signal, it is necessary to simultaneously broadcast towards that third party, so they can place the content in their servers. Then, on a second stage, there would be a rebroadcast from the lodging provider to the user when he wants to make the viewing. Though this second stage may not be considered as communication to the public—there is no public, it is only one user—such actions could be considered as making it available.¹⁴⁴

¹⁴² See Yliniva-Hoffmann & Matzneller, *supra* note 6, at 9.

¹⁴³ See Yliniva Hoffmann & Matzneller, *supra* note 6, at 14; see also Margaret Rouse, *Personal Video Recorder (PVR)*, TECHTARGET (Sept. 2005), <https://whatis.techtarget.com/definition/personal-video-recorder-PVR> [<https://perma.cc/5L23-RBB3>].

¹⁴⁴ See Yliniva Hoffmann & Matzneller, *supra* note 6, at 15–16 (commenting on the cases *ProSiebenSat1 v. Shift.TV*, *RTL v. save.tv* and *RTL v. Shift.TV*, from April 22, 2009, from the German Federal Court (BGH)).

Courts disagree on how to analyze different situations. In the case *Cartoon Network LP v. SCS Holdings, Inc.*, the Court of Appeals held that the recording service provided by the same broadcaster was not a case of making it available through VOD because the recording was made by the user; thus a new license was not required.¹⁴⁵ On the contrary, the *Paris Tribunal de Grande Instance* established it was a recording done by the provider and not by the user, after the communication was made available to the public.¹⁴⁶

On the other hand, Intelligent Recording Technologies (IRTs), are the software that enables users to make their own recordings on a device or computer, with the additional possibility of removing an advertisement. This would be an example of a private copy, provided there is not a subsequent rebroadcast or communication to the public that it is made available. These cases could be covered by the exceptions for private copies or fair use.

The exclusive right to fixation is also relevant to establish the legitimacy of peer-to-peer technologies that turn the traditional receptor in a simultaneous transmitter in benefit of third parties to the subscription service. In some cases, it will be a legal service, as long as the broadcaster authorizes the exchange platform, so its own users can use it

¹⁴⁵ See *Cartoon Network LP v. SCS Holdings, Inc.*, 536 F.3d 121 (2d Cir. 2008). Cablevision made available to users a Remote Storage Digital Video Recording System (RS-DVR) service. The plaintiffs complained to Cablevision because they understood that their operation directly violated the exclusive rights of reproduction and public communication over their protected works. “In sum, because we find, on undisputed facts, that Cablevision’s proposed RS-DVR system would not directly infringe plaintiffs’ exclusive rights to reproduce and publicly perform their copyrighted works, we grant summary judgment in favor of Cablevision with respect to both rights (53)”

¹⁴⁶ See *Tribunal de Grande Instance [TGI] Paris 3ème chambre, 1ère section Jugement*, Nov. 25, 2008. The Tribunal understood that Wizzgo was not covered by the exception of private copying, and therefore its acts involved unauthorized reproduction and communication to the public.

as a way to attract new clients or to give its users a wider possibility of enjoyment. But if the peer-to-peer system does not rely on the will of the transmitter, it would be an unlawful act.¹⁴⁷

Regarding that, we could mention *Joost* and *CyberSky*. The first one is a platform, by which the user who, in the absence of content in his computer, shall be automatically connected with a central computer and given temporary access to content. Users are associated with them, there are chat rooms referred to in the programs, exchange of experiences, etc. It is supported by advertisements and has the authorization of the broadcasters' part of the network.¹⁴⁸

On the contrary, *CyberSky* is software that allows a subscriber to record and share contents with others. In this case, it was resolved that the software provider is responsible for facilitating interchanges, given that this is the way he advertises it.¹⁴⁹

The exclusive right to fixation that broadcasters might have shall not affect in any way the rights of other right owners. Even in a case involving the inclusion and assembly of the signal belonging to audiovisual, music, literary or choreographic works, or to performers or owners of phonogram rights, those rightsholders shall keep their independent faculties, both to negotiate other agreements that allow them to include those contents in other signals to

¹⁴⁷ See Yliniva-Hoffmann & Matzneller, *supra* note 6, at 17.

¹⁴⁸ *Id.* at 18.

¹⁴⁹ See *id.* (commenting on *CyberSky* Case). In the opinion of the BGH, in decision from January 15, 2009, it is irrelevant if the owner of the signal or the content owners have established technological measures for protection. The infringement did not consist in the violation of (non-existent) measures but in the delivery of means for fixation, copy or exchange. BGH Jan. 15, 2009, Az. I ZR 57/07, <http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&az=I%20ZR%2057/07&nr=48631> [<https://perma.cc/L76B-WSNR>].

make adaptations or synchronizations, or to avoid illegal acts by third parties by means of legal or administrative proceedings independent from those that broadcasters might bring. Furthermore, the permission granted by an author in exercise of his exclusive right for a work to be broadcasted does not affect his right to deter their recording or fixation.¹⁵⁰ This new Treaty shall not affect such power and the author will be able to negotiate this power.¹⁵¹

The possible exceptions and limitations to the exclusive right of fixation shall harmonize with the set of exceptions and limitations of each rightsholder to avoid confusion or uncertainty to users. In that sense, the exceptions that rule the rights of authors should be the framework for all of the other exceptions.

B. Communication to the Public or Public Performance

Communication to the public through broadcasts and rebroadcasts is very usual. It is on transportation, shopping or entertainment centers, circulation places, waiting rooms in medical practices, patients' rooms in hospitals and, of course in common areas of hotels. Even though this kind of public communication also affects the owner of the program-carrying signal,¹⁵² it is not included in the text in discussion in the SCCR. In the current text, they only have "the exclusive right of authorizing the retransmission of their programme-carrying signal *in such a way that members of*

¹⁵⁰ Berne Convention, *supra* note 22.

¹⁵¹ The subsistence of that power was questioned some time ago at the beginnings of cable retransmission. The discussion is already settled, and an independent principle has been consolidated. *See generally* GENDREAU, *supra* note 132.

¹⁵² Rome Convention, *supra* note 3, at art. 13(d); TRIPS, *supra* note 4, at 14.3.

the public may access it from a place and at a time chosen individually by them.”¹⁵³

Domestic and regional regulations do include this right, such as Article 3 of the European Directive (INFOSOC)¹⁵⁴ or 17 U.S.C. § 106 in the United States of America.¹⁵⁵ Additionally, *American Broadcasting Cos., Inc., v. Aereo, Inc.*, (573 U. S. (2014)) is a very relevant case.¹⁵⁶

Aereo Inc. sold a service that allowed subscribers to watch television shows on the Internet at almost the same

¹⁵³ WIPO SCCR/34/4, *supra* note 106.

¹⁵⁴ Directive 2001/29/EC, *supra* note 27. (“Member States shall provide for the exclusive right to authorize or prohibit the making available to the public, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them: (...) (d) for broadcasting organizations, of fixations of their broadcasts, whether these broadcasts are transmitted by wire or over the air, including by cable or satellite.”).

¹⁵⁵ 17 U.S.C. § 106 (2012) (“Exclusive rights in copyrighted Works. Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following: ... (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly.”). Similarly, see 47 U.S.C. § 325 (a), (b) (“(a) False distress signals; rebroadcasting programs. No person within the jurisdiction of the United States shall knowingly utter or transmit, or cause to be uttered or transmitted, any false or fraudulent signal of distress, or communication relating thereto, nor shall any broadcasting station rebroadcast the program or any part thereof of another broadcasting station without the express authority of the originating station. (b) Consent to retransmission of broadcasting station signals (1) No cable system or other multichannel video programming distributor shall retransmit the signal of a broadcasting station, or any part thereof...”)

¹⁵⁶ *American Broad. Cos. v. Aereo, Inc.*, 134 S. Ct. 2498 (2014); Daniela Cassorla, *Copyright Cowboys: Bringing Online Television to the Digital Frontier*, 24 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 783 (2014) (giving a historical analysis of the United States case law on the right of public communication of broadcasting organizations and on the enforcement of the 17 U.S.C. § 106).

time that the show broadcasted by air. The subscriber that wanted to watch a show that was being broadcasted would select it from a menu on the Aereo website. The Aereo system, which consisted of thousands of little antennas and other equipment lodged in a centralized warehouse, responded by tuning the antenna assigned to the use of one subscriber to the selected show. A transcodicator translated the signals broadcasted by the Internet. The server saved the data in a specific folder of the subscriber in the Aereo's hard drive and began to broadcast the show to the screen of the subscriber once it saved some minutes of the show. The broadcast continued with a certain delay until the subscriber received the full presentation.¹⁵⁷ The Court assimilated this practice to cable, so it was understood that Aereo should have a license to be able to broadcast. It constituted both an infringement to public communication and required an unauthorized fixation.¹⁵⁸

On the other hand, Article 15 of Decision 351 of the Andean Community establishes that public communication is “any act by which two or more persons, whether or not they are gathered together in the same place, may have access to the work without the prior distribution of copies to each one of them, and especially the following: “e) the retransmission, by any of the means specified in the foregoing subparagraphs and by a broadcasting organization different from the original one, of the work broadcast by

¹⁵⁷ See Lois F. Wasoff, *Análisis de las repercusiones de la decisión de la causa Aereo*, *Revista de la OMPI*, World Intellectual Property Organization [WIPO] (2014), https://www.wipo.int/wipo_magazine/es/2014/05/article_0003.html [<https://perma.cc/V8UJ-GB6Q>]; see also Sam Méndez, *Aereo and Cablevision: How Courts are struggling to harmonize the public performance right with online retransmission of Broadcast Television*, 9 WASH. J.L. TECH. & ARTS 239 (2014). The previous text was written in preterite conjugation, given that Aereo went broke less than six months after the decision of the Supreme Court.

¹⁵⁸ *American Broad. Cos.*, 134 S. Ct. at 1–4, 7–9, 14.

radio or television.”¹⁵⁹ As we may see, public communication is protected by the retransmission of works but program-carrying signals are not. Then, in Article 39, in regards to exclusive rights of the broadcasting organizations it protects: “a) the retransmission of their broadcasts by any means or process.”¹⁶⁰ According to these rules, in the Andean Community it’s necessary to distinguish the communication to the public from the retransmission. This is not in itself a communication to the public, but the use of the signal by a broadcasting organization other than the originator. It follows that in the countries of the Andean Community broadcasting organizations are not protected by the unauthorized use of their signals through communication to the public of their broadcasts, unless the offender has fixed the broadcast. On the contrary, the other rightsholders are protected with respect to communication to the public. However, broadcasters will be protected if other broadcasters retransmit the signal without authorization.

What would be the situation of the broadcasting organizations with respect to certain acts, in the current state of the debate in WIPO? Since the fixation of their content-carrying signal and public communication are not protected, there are certain acts that could go unprotected. For example, if a user records a program and later uploads it to a platform, it would fall outside the reach of the texts in the project. The conduct would be left unprotected if this act was considered to make the content available, but with the burden of having to read the term “retransmission” in a much wider sense because it is understood as an act which may

¹⁵⁹ *Andean Community, Decisión 351, estableciendo un Régimen Común sobre Derecho de Autor y Derechos Conexos*, World Intellectual Property Organization [WIPO] (December 17, 1993), <https://wipolex.wipo.int/es/text/223497> [<https://perma.cc/W628-8J2X>] (last visited Jan. 2, 2019).

¹⁶⁰ *Id.* At art. 39.

only be carried out by another broadcasting organization. This case would not be a traditional retransmission, but a fixation and later public communication or “making available.” At this point, the key would be the eventually-reached definition of “deferred transmission.”

In this way, some acts carried out on the Internet are communication to the public, and while the holders of copyright and other related rights would be protected, they would not cover international broadcasting organizations, although they would be protected at the local level, as well as in the EU. The acts of communication to the public of the program-carrying signal should always require the authorization of the broadcasting organization, in addition to the corresponding one of the other rightsholders.¹⁶¹

In my view, a direct effect of a better and more updated protection for broadcasters is the indirect benefit for the rightsholders on the content included in the signal, such as copyright and other related rights, sponsors of sporting events or other shows. Thus, a stronger right of broadcasting organizations will allow other rightsholders to negotiate better or more broadly the license or assignment contracts they have with the broadcasting organization. In turn, the broadcasting organization may provide collaboration to other actors with respect to enforcement, when both rights are jointly infringed, or when the broadcasting organization receives authorization from the other holders to pursue offenders, without prejudice to the defense of their own interests. For example, in most of the transmissions of sport events, after the licensor receives the price or royalty for the license, loses interest to pursue infringements or unauthorized uses. The licensee (the broadcasting

¹⁶¹ See Guibault & Quintais, *supra* note 26, at 13–16 (commenting on the case *ITV Broadcasting* from the European Court of Justice; an operator captured a signal (Catch Up TV) and then he distributed it almost simultaneously by means of an Internet platform. This was considered an act of communication to the public.).

organization), does not have an action to prevent such acts internationally, unless the licensor transmits his action to him or has previously done so in the license contract.

Nevertheless, the protection held by the broadcasting organization over the broadcasted signal shall not imply any greater or lesser protection over the content nor generate any additional protection for such content.¹⁶² In fact, the same content may be broadcasted by very different signals. In my opinion, this is one of the effects of Article 1 proposed in the text under discussion. This is due to the fact that the protection granted “shall leave intact and shall in no way affect the protection of copyright or related rights in subject matter carried by broadcast signals,” so that “no provision . . . shall be interpreted as prejudicing such protection,” and shall not prejudice “any rights and obligations under any other treaties.”¹⁶³ This must be broadly interpreted: rights granted by other treaties, within its own terms, limitations and exceptions, shall not be modified by the fact that such contents are assembled and distributed by means of a content-carrying signal. Nor does it cause any effect over the contents, which are in the public domain and will remain there even though transported by a radio signal. Those contents would remain free to be broadcasted by others. The same applies to the exercise of limitations and exceptions over contents, whether they are protected by copyright or not.

For example, we can observe this indirect benefit over other rightsholders by means of the radio aggregators’ phenomenon on the Internet. The Internet allows radio to be

¹⁶² See Jeremy Malcolm, *The Danger of New Post-Fixation Rights in the WIPO Broadcasting Treaty*, ELECTRONIC FRONTIER FOUNDATION (December 9, 2014), <https://www.eff.org/es/node/83478> [<https://perma.cc/K9Q5-F294>]. Hence, the declamations from some international organizations are incorrect as they affirm that new rights might be generating on contents by the so-called *post fixation rights*.

¹⁶³ WIPO SCCR/27/2, *supra* note 68.

available for free by means of different platforms, including radios designed exclusively to be transmitted by the Internet. For example, entrepreneurs (and maybe organizations too) that only play music or prepare their own content, create a way to communicate with their clients or their community.

They are not broadcasters in the traditional sense of the term, since they do not operate in the spectrum, have many programs, or additional advertising. However, service providers who provide communication or hosting services may introduce advertising in that signal to finance facilities or the service. Owners of other rights should receive at least remuneration for this means of communication to the public.

A second case would be those broadcasters who develop their Internet channel to widen their audience or make access easier to users that might want to use their own computer or any other device besides the traditional radio device. Many times, the sound quality is better, the platform usually brings in additional information, and users can find chat rooms to participate in the shows or to find previous editions they might want to hear again.¹⁶⁴ In such a situation, it is the broadcaster who, by himself or by means of a provider, broadcasts on a new channel to reach a higher or distant audience, like another region or country. In these cases, if the broadcaster had additional advertising digital incomes or a premium service with a differentiated subscription, he should pay the other rights-owners whose works or performances were included in their signals broadcasted by the Internet.

The third case is about the platforms that act as aggregators in which any user can find stations from all over

¹⁶⁴ See Agustín Espada, *Ecosistema radiofónico online en Argentina: un análisis comparativo de los contenidos de los sitios webs de agregadores, podcasters, radios online y offline*, 4 REVISTA DE LA ASOCIACIÓN ESPAÑOLA DE INVESTIGACIÓN DE LA COMUNICACIÓN 54–62 (2017) (regarding the phenomenon of content aggregators).

the world, classified in music genres, styles and regions.¹⁶⁵ Here we can identify two groups. The first group presents the work in a synchronic or continuous flow (streaming) with a little delay for technical reasons, such as Tune In, iTunes Radio by Apple, or RadioArg.com.¹⁶⁶ Many of them do not have authorization from the broadcaster. These are typical situations of communication to the public, both in broadcast and in content.

The second group allows an additional time-shifting or access to the recording of previous shows (such as podcasts). These would be examples of “making available.” Among the best-known service, we can find is RadioCut, which, because of its high capacity of storage, additionally constitutes a historical archive.¹⁶⁷ It is also possible to find radios on YouTube. Audiences prefer to listen to radio on these platforms because they are more robust and bring a higher audio quality. Moreover, they offer all stations in a single location without the need to open multiple sites to change the radio station. What seems certain is that both situations are illegal without the previous authorization of the broadcaster or the other rightsholders. Neither could be an example of the exceptions of aggregators provided by some regulations, like the Spanish one.¹⁶⁸ Broadcasters

¹⁶⁵ Agustín Espada, *La radio agregada - Cuando la radio ya no se escucha sólo en la radio*, FIBRA TECNOLOGÍAS DE LA COMUNICACIÓN (Apr. 4, 2017), <http://papel.revistafibra.info/la-radio-agregada/> [<https://perma.cc/QPN5-PZLW>].

¹⁶⁶ TUNE IN, <https://tunein.com/> [<https://perma.cc/YV3A-U26V>] (last visited Jan. 2, 2019); RADIOARG, <http://www.radioarg.com/> [<https://perma.cc/JVS4-SAUN>] (last visited Jan. 2, 2019).

¹⁶⁷ RADIOCUT, https://us.radiocut.fm/?redir_url [<https://perma.cc/KFS2-T2QV>] (last visited Jan. 2, 2018).

¹⁶⁸ Royal Legislative Decree 1/1996, Approving the Revised Text of the Law on Intellectual Property Law, regulating, clarifying and harmonizing the legal provisions art. 32.2 (B.O.E. 1996) (Spain) (“Making available to the public by electronic service providers to aggregate of non-significant fragments of contents disseminated in

should at least authorize the inclusion of their signals to these platforms. At the same time, such authorization shall not imply the consent of the other right-owners.

Briefly, considering the texts under discussion in the SCCR, the lack of inclusion of communication to the public, among the rights to be granted, affects both broadcasters and other rightsholders.

C. Making Available Right

As I have already mentioned, the available technology allows time-shifting, that is to say, the displacement in time for the viewing of a TV show or the listening to a radio station. This is possible by means of the disposition of a website by the broadcaster, or by TV systems that allow user programming or access to previous programs, generally within a time limit.¹⁶⁹ It is also possible that the deferred transmission is done by a third party under authorization of the broadcaster, but most of the time it is a third party who fixes the temporary signal without the issuer's authorization, making it available almost simultaneously. Moreover, those contents might be rebroadcasted in the same way or with alterations, such as deleting advertising.

periodical publications or websites of periodical update with informative, public opinion creation or entertainment purposes, shall not need authorization, notwithstanding de right of the editor or, as the case might be, of other right owners to receive equitable compensation. It shall be an inalienable right which shall be effective by collecting societies for intellectual and property rights. In any case, the making available to the public of any image, photographic work or mere photograph disseminated in periodical publications or websites of periodical update shall require authorization.”).

¹⁶⁹ See WIPO SCCR/30/5, *supra* note 116, at 14. A distinction must be made between linear and non-linear consumption, where the former means that content is enjoyed upon broadcast of the signal without any changes, whereas the latter implies that content is enjoyed on demand, outside the broadcast.

All this wide range of technical possibilities is the video on demand (VOD), whether by open access or by subscription video on demand (SVOD), including the near video on demand (nVOD). Those systems do not have a double channel, and therefore only permit downloading one content at a time.¹⁷⁰ The legality of the broadcast shall be given by the terms of the contract between the broadcaster and the platforms used to make it available. Even then, the other right-owners shall be free to claim against those platforms in accordance with the extension of the authorization given to the broadcaster, since this last one could not grant a larger right than the one received.

In this context, in the case of Warner Bros. and Universal v. Zattoo, the broadcasters ARD and ZDF authorized Zattoo to distribute the signal on the Internet. Film producers alleged that the license of their movies for broadcasters was for open television and cable distribution, but not for the Internet. The court decided that such authorization could not be construed as including the Internet, which is reasonable since the audiences they reach, as well as their collection systems are different.¹⁷¹

The immediate description above is different from those platforms that only index the contents available by third parties on the Internet, but do not host nor communicate to the public by themselves. In this sense, the situation is different since the portal only provides references of location

¹⁷⁰ VOD services are usually more expensive because of the technical requirements involved, thus it is sometimes used for the release of movies or premium channels. See WIPO SCCR/30/5, *supra* note 116, at 18. There is a useful technical glossary available at Techopedia and SearchTelecom. *Technology Dictionary*, TECHOPEDIA, <https://www.techopedia.com/dictionary> [<https://perma.cc/L4LC-S3NN>] (last visited Oct. 20, 2018); *SearchTelecom.com*, TECHTARGET, <https://searchtelecom.techtarget.com/> [<https://perma.cc/NV3Z-RVH2>] (last visited Oct. 20, 2018).

¹⁷¹ See Yliniva-Hoffmann & Matzneller, *supra* note 6, at 10.

in the universal web of those contents fixed and made available by third parties.

One of these cases was the one discussed at the *Tribunal de Grande Instance* de Paris between M6 and W9 against SBDS Active, who managed the service tv-replay.fr, by which users were given a list of available programming by the original owners.¹⁷² The claimants were television channels that in turn had their own websites where they gave users the possibility of viewing the contents already emitted at a later time, through the services called catch-up. For its part, SBDS Active published, operated and maintained the site Totalvod (www.totalvod.com) in which it made available to the public the links and other information referring to the programs set and hosted in countless video on demand sites (VOD). This allowed users to access the previous programming without going through the sites of their owners. It was considered that SBDS active did not communicate to the public because it did not reproduce any content, but only indicated where they were available or redirected users to those places.¹⁷³

The second case, Twentieth Century Fox v. Newzbin, was brought to the England and Wales High Court (Chancery Division).¹⁷⁴ Newzbin gave its users not only a linking service, but also a hosting service for programming in databases, content obtained in their owners' site property and others found within the deep-web. And, in the own terms of Mr. Justice Kitchin, "The defendant is liable to the

¹⁷² Tribunal de Grande Instance [TGI] Paris 3ème chambre, 1ère section Jugement, June 18, 2010.

¹⁷³ See Guibault & Quintais, *supra* note 28, at 18 (concurring with the unanimous legal opinion of ALAI); see also *Iniciativas de reforma de la Ley de Propiedad Intelectual*, ASSOC. LITTERAIRE ET ARTISTIQUE INTERNATIONALE [ALAI] (Sept. 16, 2013), <http://www.alai.org/assets/files/resolutions/making-available-right-report-opinion.pdf> [<https://perma.cc/SR8R-BB5F>].

¹⁷⁴ Twentieth Century Fox Film Corporation & Anor. v. Newzbin Ltd [2010] EWHC 608 (Ch) (Eng.).

claimants for infringement of their copyrights because it has authorized the copying of the claimants' films; has procured and engaged with its premium members in a common design to copy the claimants' films; and has communicated the claimants' films to the public."¹⁷⁵ Additionally,

[t]he claimants contend that the defendant is a relevant service provider and that it has actual knowledge that its premium members are infringing the claimants' copyrights and, indeed, the copyrights of other rights holders in the content made available on Newzbin. Accordingly, they invite me to grant an injunction to restrain the defendant from including in its indices or databases entries identifying any material posted to or distributed through any Usenet group in infringement of copyright.¹⁷⁶

Conclusively, in this case, the site was condemned to intellectual property infringement based on unlawful downloads.¹⁷⁷

Consequently, protection shall be extended when retransmission of the content is made by circumventing technological means, infringing contractual limitations, having current access to contents previously only temporarily available, or any situation unauthorized by the rightsowner.

The right to make available also grants protection in cases where uploads are made by users of public platforms. Platforms argue that they do not control content, though they may identify the content or receive notifications of the owners about the removal or blocking of particular content. It is true that the signal can be stored permanently or

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ See Yliniva-Hoffmann & Matzneller, *supra* note 6, at 11–12 (commenting on Twentieth Century Fox Film Corporation & Anor v Newzbin Ltd [2010] EWHC 608 (Ch) (Eng.)).

temporarily, and then made available in a variety of platforms by a new host, this time in the platform servers.¹⁷⁸

But this situation is changing dramatically. The long legal battles have led to negotiated solutions, like in the case *Mediaset v. YouTube*, where after many years, an agreement was reached so that programming could be available in a special open channel managed for the broadcaster for the purpose of catch-up services, within the platform.¹⁷⁹ This result is the recognition of the broadcaster rights (and other rightsowners), and the evolution of the answer of the intermediaries. Technologies allow right-owners to use robots that send millions of new notices of infringements automatically, which allow them to negotiate monetization strategies when they used to demand only the removal or blocking of content.¹⁸⁰

¹⁷⁸ In this sense, see Court of Justice of the European Union [CJEU] doctrine in Case C-466/12, *Svensson and Others v. Retriever Sverige AB*, 2014 EUR-Lex OJ C 379 (Mar. 29, 2014), which could also be applied here. The foresaid doctrine considers that the linking that redirects users to sites authorized by the owner or sites where the owner put his contents are legal and do not imply public communication nor making contents available. The act would be unlawful only upon one of the following facts: 1) if content is initially made available without the owner's consent, 2) if protective technological measures were avoided, 3) if it was made available against the explicit or clearly implicit intention of the owner.

¹⁷⁹ See Eduardo Fernández, *Mediaset firma la paz con YouTube*, DIARIO EL MUNDO, (Oct. 21, 2015), <http://www.elmundo.es/television/2015/10/21/562773b546163fac218b4625.html> [<https://perma.cc/G74W-F5CT>].

¹⁸⁰ A new stage in the practice created by the Safe Harbor doctrine and its instrument, the notice and take down, derived from § 512 of the Digital Millennium Copyright Act (DMCA). Digital Millennium Copyright Act, 17 U.S.C. §512 (1998); see Jennifer M. Urban et al., *Notice and Takedown in Everyday Practice*, at 28 et seq. (Mar. 30, 2018) (Berkeley Law Sch. Pub. Law Working Paper No. 2755628, 2017) (on file with University of California, Berkeley School of Law); Martin Husovec, *Accountable, Not Liable: Injunctions Against Intermediaries*, at 70 et seq. (Tilburg University, *TILEC Discussion Paper* No. 012,

Currently, many of the broadcasters have their own official channels on YouTube and other platforms, which are used to gain audience loyalty and promote shows or new releases. They may consist of short one-minute summaries or show episodes. Generally, they are not series or films, but news, realities, sports, and special moments that deserve to be recaptured. It is also a way to give users easier access to short excerpts to share and comment on social media.¹⁸¹

Protection of the broadcast signal permits the owner to negotiate those conditions with the platforms, which is a much healthier ecosystem. Moreover, many agreements state that platforms must redirect users to the official channel of the broadcaster by a preset link, where current programming in real time should also be found. Platforms take benefit of the traffic or the advertising, which are shared with broadcasters. These kinds of distribution, added to the traditional ways, are also useful to the user to view contents from mobile devices.¹⁸² Hence, it is not surprising that the main obstacle that remains to achieve a minimum consensus in the SCCR is the level of protection to be achieved for deferred transmissions. The possibility for the broadcaster to have exclusive rights over those broadcasts made at different times and by different means allows him to access an audience that wants to enjoy programming in different places and times. Additionally, the exclusive rights over

2016) (on file with Tilburg University) (commenting on the European evolution of intermediaries).

¹⁸¹ Christian Grece, *The presence of broadcasters on video sharing platforms - Typology and qualitative analysis*, EUROPEAN AUDIOVISUAL OBSERVATORY (2016), <https://rm.coe.int/16807835ba> [<https://perma.cc/43CT-ETT3>]. There, very relevant data is shown, about number of subscribers of official channels, uploaded videos, period of time that users spent in line, etc.

¹⁸² *See id.* at 10.

deferred transmissions would allow him to avoid parasitic behaviors by third parties.¹⁸³

The new uses and kinds of access add value to the proposal of the broadcaster. Though the programming does not get any larger, there will be a bigger audience when considering the number of television viewers that could not enjoy the content at its original broadcast time. Obviously, the one benefitting from this new audience and the new use of the signal is the broadcaster or person he has authorized.¹⁸⁴ It is useful to consider that, if this use allows access to a new public, the payment should also be increased to the holders of the content, whether they are authors, performers, or any other rightsholder.¹⁸⁵

¹⁸³ Deferred transmissions have been the main topic of discussion of the last two sessions of the SCCR. See World Intellectual Property Organization [WIPO], *Standing Committee on Copyright and Related Rights*, SCCR/37/8 (Nov. 30, 2018), https://www.wipo.int/edocs/mdocs/copyright/en/sccr_37/sccr_37_8.pdf [<https://perma.cc/4HPH-RN3Y>] [hereinafter WIPO SCCR/37/8] (the conclusive document of the last session); see also the proposal presented by Argentina, World Intellectual Property Organization [WIPO], *Standing Committee on Copyright and Related Rights*, SCCR/37/2, (September 19, 2018), https://www.wipo.int/edocs/mdocs/copyright/en/sccr_37/sccr_37_2.pdf [<https://perma.cc/LAE2-F4FN>].

¹⁸⁴ See Bates & Wells, *supra* note 15, at 25. In that sense, I do not share the opinion that there is no social value added. A new possibility for consumers is valuable for them, and for that reason third parties' intent to appropriate such value. Though there is no added value as regards the making available or any kind of rebroadcast it does not generate new contents or programs, there is a reallocation of incomes towards those who have generated value.

¹⁸⁵ To consider the principle of independence of rights, see Ricardo Antequera Parilli, Comment, *Transmisión digital. Comunicación pública. Transmisión por radiodifusión y por Internet. Independencia de los derechos*, CERLALC (Aug. 11, 2011), <http://aplicaciones.cerlalc.org/derechoenlinea/dar/index.php?mode=arhivo&id=2515> [<https://perma.cc/G57Y-RBU7>]. This decision established that principle of independence of rights must be observed and that if Internet implies a different means of communication, for a different audience, different payments are due for the use of the same

D. Pre-broadcasting

Within the objects intended to be protected, it is the signal prior to broadcast. In the terms of Document SCCR/34/4, “pre-broadcast signal” means a program-carrying signal transmitted to a broadcasting (“cablecasting”) organization, or to an entity acting on its behalf, for the purpose of subsequent transmission to the public.”¹⁸⁶

A situation arises from the interception of the signal and the use of material that originated in the broadcast, which for different reasons, is not yet ready to be transmitted to the public. The case arises when a producer or broadcaster sends content to a satellite, an antenna, a commercial broadcasting organization, or a distributor. The signal could be the same as the one that will be transmitted later, but it could also be subject to the inclusion of advertising, sponsor information or adaptations required in different territories or time zones. In some cases, the signal is final and in others it is not, but what seems certain is that the signal is not meant to be transmitted to the public, but available to be captured by unauthorized carriers.

The situation is similar to the one I commented when I referred to the purpose of the Brussels Convention, but this convention only refers to the signal sent to a satellite, whereas all other cases are excluded from its scope of protection. Thus, the update of this point is even more necessary, given that the lack of control of the signal by the broadcasting organization might cause larger damage, which

works. In the case cited, it was a collective management organization that wanted an additional payment if the radio, in addition to being on the air (off line), was transmitted over the Internet (on line). The Court understood that because it was a different medium that allowed access to a new public, the rightsholder could authorize the transfer, and if it did, could require a new payment.

¹⁸⁶ WIPO SCCR/34/4, *supra* note 106.

would be clearly transferred to the other right holders by causing a drop in the demand and consequently in the audience.¹⁸⁷

Among the rights to be granted, Document SCCR/34/4 states that “[b]roadcasting [and cablecasting] organizations shall also enjoy the right to prohibit the unauthorized retransmission of their own pre-broadcast signal by any means.”¹⁸⁸ Briefly, the signal must be under protection since its creation.¹⁸⁹

In the 35 SCCR sessions (November 2017) a text was added upon the proposal of Switzerland, which was well received by all delegations: “a Contracting Party may fulfill [the preceding paragraph] by providing other adequate and effective pre-broadcast signal protection.”¹⁹⁰ This addition aims to facilitate the states’ implementation of alternative methods of protection of the pre-signal, in addition to the classic civil or criminal penalties, like unfair competition, trade secrets, unlawful enrichment, or fulfillment of contracts.

¹⁸⁷ See Bates & Wells, *supra* note 15, at 33.

¹⁸⁸ WIPO SCCR/43/4, *supra* note 106.

¹⁸⁹ As Ingrid Deltenre states, “In order to be able to protect and build on their sizeable investment, broadcasters must have the proper means to authorize or prohibit use of signals, both in upstream and downstream markets. This means that the broadcast signal must be protected from the moment it is created (as a pre-broadcast signal) through to its primary use to broadcast, or retransmit, programs and against any unlawful secondary exploitation.” *Protecting Broadcasters in the Digital Era*, WIPO MAG. (Apr. 2013), http://www.wipo.int/wipo_magazine/en/2013/02/article_0001.html [<https://perma.cc/Z6W2-C4AB>] (containing an interview with Ingrid Deltenre).

¹⁹⁰ See WIPO SCCR/37/8, *supra* note 183. The proposed text says: “(3) Broadcasting organizations shall also enjoy the right to prohibit the unauthorized retransmission of their pre-broadcast signal by any means. (4) A Contracting Party may fulfil Article III (2) by providing other adequate and effective prebroadcast signal protection for broadcasting organizations.”

E. Limitations and Exceptions

The limitations and exceptions are the way to consider the different elements of general welfare in a system that allows the use without an economic impact in the rightsholder's business, but with a positive impact on other unmeasurable factors, like freedom of speech, education, and culture dissemination.¹⁹¹ This is the answer to give to those who affirm that exclusive rights might have a negative social impact. Additionally, from the point of view of legal theory, those limitations and exceptions work as actual rights under certain circumstances.¹⁹²

Two different texts have been proposed about broadcasters' rights in the current state of negotiations at the SCCR. The first text is the Document SCCR/34/4, which follows a wording similar to the Beijing Treaty and the WIPO Treaties (WCT and WPPT). It is a general text that recognizes the three-step test and sets the countries free to establish the necessary limitations and exceptions, according to their own needs.¹⁹³

The second proposal has been submitted by Argentina, Brazil, and Chile in Document SCCR/35/10. It is closer to the Rome Convention with terms that give equal

¹⁹¹ See Bates & Wells, *supra* note 15, at 11. This would be the adequate answer to the critical proposals to economism, which leaves aside the other market failures.

¹⁹² See JUAN FERNANDO CÓRDOBA MARENTES, *EL DERECHO DE AUTOR Y SUS LÍMITES* 103 (Temis ed. 2015).

¹⁹³ See WIPO SCCR/34/4, *supra* note 106 (“Contracting Parties may, in their national legislation, provide for the same kinds of limitations or exceptions with regard to the protection of broadcasting [or cablecasting] 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 [or cablecasting] organization.”).

freedom to each state to establish their own set of limitations and exceptions.¹⁹⁴

Of all of the approaches, the first one may bring more reassurance to some delegations that prefer not to be attached to an enumerated list, since they may anyway establish the same amount of cases at the domestic level. Nevertheless, as the list of the second text is merely illustrative and non-binding (each party “may establish”),

¹⁹⁴ See World Intellectual Property Organization [WIPO], *Standing Committee on Copyright and Related Rights*, at 2, SCCR/35/10 (Nov. 15, 2017), https://www.wipo.int/edocs/mdocs/copyright/en/sccr_35/sccr_35_10.pdf [<https://perma.cc/GRT3-YS4F>] [hereinafter WIPO SCCR/35/10].

Contracting Parties may, in their national legislation, provide for the same kinds of limitations or exceptions with regard to the protection of broadcasting [or cablecasting] 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) Any Contracting Party may, in its domestic laws and regulations, provide for exceptions to the protection guaranteed by this Treaty as regards:

- (a) private use (subject to clarification on scope);
- (b) use of short excerpts in connection with the reporting of current events;
- (c) ephemeral fixation by a broadcasting organization by means of its own facilities and for its own broadcasts;
- (d) use solely for the purposes of teaching or scientific research;
- (e) the use to specifically allow access by persons with impaired sight or hearing, learning disabilities, or other special needs;
- (f) the use by libraries, archives or educational institutions, to make publicly accessible broadcast protected by any exclusive rights of the broadcasting organization, for purposes of preservation, education and/or research;

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

the differences are not significant. In all the cases, each country shall have the power to regulate the cases according to the three-step rule.¹⁹⁵

An observation should be made to the second proposal, in regards to the “private use.”¹⁹⁶ Though written in similar terms as the Rome Convention, the circumstances and technology status call for cautious statements. Private use should be limited to family or home environment. It should never include public communication or making available, which are not private. Fixation, reproduction, or retransmission outside the home environment should not be permitted since that would imply the loss of control of right-owners over their works or broadcasts. The situation gets worse upon a clearly abusive exercise of the safe harbor doctrine.

In my opinion, it is more relevant to establish the interaction between the limitations and exceptions over the related rights and those limitations and exceptions affecting authors’ right and other related rights on the broadcast contents by a program-carrying signal. In that sense, the corresponding lists of exceptions and limitations should be coordinated to avoid doubts and confusion to the users. For example, if there was an exception established for educational purposes for the use of works in classrooms, like audiovisual works, it should not be impossible to use such works only because there fails to be a similar exception about broadcasters’ rights.¹⁹⁷ Thus, each state could regulate

¹⁹⁵ See World Intellectual Property Organization [WIPO], *Standing Committee on Copyright and Related Rights*, at 9, SCCR/17/INF/1 (Nov. 3, 2008), https://www.wipo.int/edocs/mdocs/copyright/en/wipo_cr_abu_10/wipo_cr_abu_10_sccr_17_inf_1.pdf [<https://perma.cc/X899-K5CH>] [hereinafter WIPO SCCR/17/INF/1]. Both approaches have been under discussion for some time.

¹⁹⁶ See WIPO SCCR/35/10, *supra* note 194.

¹⁹⁷ Raquel Xalabarder, *Copyright Exceptions for Teaching Purposes in Europe* (July 2004) (Working paper, Universitat Oberta de Catalunya)

their own limitations and exceptions, but establish a coordination rule by which authors' rights and related rights could work harmoniously to deter conflicts in regards to the circulation and enjoyment of contents.

In the current international context and with the Internet, the exercise of those limitations and exceptions presents significant operative problems, due to the inherent connection with the principle of territoriality.¹⁹⁸ The difficulty arises when the legal use of a broadcasted work or signal, within the territory of a party, turns illicit in the territory of another party, due to the different local implementation of a limitation or exception admitted by an international treaty. For example, the use of a piece of information transmitted by a TV news show in Country A by a social media user or by another broadcaster in a different TV channel from Country B. Such use could be illegal in Country B, though legal in Country A.

In respect thereof, a coordination rule that could avoid those problems has been submitted by Argentina to the SCCR in the point regarding limitations and exceptions. The Document SCCR/33/4 suggests a text that is adaptable for program-carrying signals: "the reproduction or making available of a work shall be governed by the law of the country in which the reproduction or making available occur, without precluding the reproduced work from being delivered to or used by a person or institution benefitting from exceptions and limitations located in another Member

(on file with the University Oberta de Catalunya, Internet Interdisciplinary Institute).

¹⁹⁸ Regarding the problems presented by the principle of territoriality in the digital environment, it is generally recommended to read Paul Torremans, *Questioning the Principles of Territoriality: The Determination of Territorial Mechanisms of Commercialization*, in *COPYRIGHT LAW, A HANDBOOK OF CONTEMPORARY RESEARCH*, 460 (Paul Torremans ed. 2007).

State, provided that such delivery or use is consistent with the terms and conditions set forth in this agreement.”¹⁹⁹

F. Technological Protection Measures

Technological protection measures (TPM) and rights management information (RMI) are elements already incorporated to the recent international instruments, like Articles 11 and 12 from WCT, 18 and 19 from WPPT, 15 and 16 from Beijing and 7 from Marrakech.²⁰⁰ Nevertheless, this matter has presented additional challenges in the debate of the new treaty.²⁰¹

The first ones are electronic devices or records incorporated or used by right-owners in their works, phonograms, videograms, and any other kind of digital records or signals to avoid copies and other unlawful

¹⁹⁹ World Intellectual Property Organization [WIPO], *Standing Committee on Copyright and Related Rights: Proposal Concerning Limitations and Exceptions for Libraries and Archives and Limitations and Exceptions for Educational and Research Institutions and for Persons with Other Disabilities*, SCCR/33/4 (Nov. 1, 2016), https://www.wipo.int/edocs/mdocs/copyright/en/sccr_33/sccr_33_4.pdf [<https://perma.cc/WG3S-H9VQ>].

²⁰⁰ See LIPSYC, *supra* note 25, at 145; see also Sam Ricketson & Jane Ginsburg, *INTERNATIONAL COPYRIGHT AND NEIGHBOURING RIGHTS* 966 (Oxford Univ. Press 2d ed. 2010); *Guía sobre los Tratados de Derecho de Autor*, *supra* note 39 at 221. In the Marrakesh case, it establishes that TPMs shall not be an obstacle for the term of the benefits granted by the Treaty. See Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled, June 27, 2013, art. 7, available at https://www.wipo.int/treaties/en/text.jsp?file_id=301016 [<https://perma.cc/N5RN-E9SN>] (“Contracting Parties shall take appropriate measures, as necessary, to ensure that when they provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures, this legal protection does not prevent beneficiary persons from enjoying the limitations and exceptions provided for in this Treaty.”).

²⁰¹ WIPO SCCR/17/INF/1, *supra* note 195, at 9.

conduct with, or without, authorization. These measures are frequently used in the audiovisual, music, or television industries, such as encrypted transmission and the provision of decoders by broadcasters.²⁰²

Document SCCR 34/4 provides that

Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by broadcasting [or cablecasting] organizations in connection with the exercise of their rights under this Treaty and that restrict acts, in respect of their broadcasts, that are not authorized by the broadcasting [or cablecasting] organizations concerned or are not permitted by law.²⁰³

It is a traditional wording in the scope of authors' rights and related rights, and it has the purpose of preventing against the avoidance of such measures, in accordance with the internal regulations of each member state.

The second paragraph is much more specific for the protection of the program-carrying signal: “[w]ithout limiting the foregoing, Contracting Parties shall provide adequate and effective legal protection against the unauthorized decryption of an encrypted programme-carrying signal.”²⁰⁴ This justifies dispositions as the ones that prohibit the manufacture, sale, import, lease, or circulation of any device or appliance intended for the decoding of codified signals, or to evade any of the TMP or RMI used by the right owner.²⁰⁵ This is the case of decoders and other devices, which permit TPM circumvention. The purpose of this paragraph is to adapt these measures to

²⁰² See Yliniva-Hoffmann & Matzneller, *supra* note 6, at 18–19.

²⁰³ See WIPO SCCR/34/4, *supra* note 106.

²⁰⁴ See *id.*

²⁰⁵ See RICARDO ANTEQUERA PARILLI, ESTUDIOS DE DERECHO DE AUTOR Y DERECHOS AFINES, 422–23 (2007).

program-carrying signals because TMP and RMI, as originally conceived by the WCT and WPPT, were intended for fixations in any media format, and in negotiations there are no references to the right of fixation.

As can be seen, it is not a regulation of direct application, since it requires “adequate” implementation and “effective” means.²⁰⁶ This is reasonable because in the wide international diversity, it will depend on the level of maturity and degree of sophistication of each community, by which such adequacy and efficiency are determined. All the elements of the national system of enforcement of intellectual property come into play, like procedural rules and the investigative capacity of prosecutors and security forces. Depending on the circumstances of each society, the persecution costs might be higher than the results achieved.²⁰⁷

I believe the current wording, like the one in international treaties on other rights, shall not present difficulties. Though, it shall be significant to describe how the TPM and RMI work regarding limitations and exceptions, in order to avoid situations of “legal schizophrenia.”

²⁰⁶ Nevertheless, some authors consider that it would have immediate application. See GUILLERMO CABANELLAS, PROPIEDAD INTELECTUAL SOBRE PROGRAMAS DE COMPUTACIÓN 191 (2012) (“If a technological measure should exist, used to restrict unlawful acts or non-authorized acts by the authors, its avoidance shall be illicit under Article 11.”). Other authors consider the need to implement the regulation of the TMP and RMI at the local level. Among others, see Horacio Fernández Delpech, Technological Measures for the Protection of Intellectual Property on the Internet – The Elusive Acts – The Legal Protection Against the Elusion (Aug. 2006) (unpublished manuscript) (on file with Congreso MERCOSUR de Derecho Informático); Federico P. Vibes, *Iniciativas de reforma de la Ley de Propiedad Intelectual*, REVISTA JURÍDICA ARGENTINA LA LEY, Oct. 2017, at 187–207.

²⁰⁷ See Bates & Wells, *supra* note 15, at 12–13.

V. CONCLUSIONS

At the end of this path, we can confirm the need for an update of the international standards for the related rights of broadcasting organizations, as well as the update of domestic regulations. It can also be confirmed that given the increased relevance acquired by the media as disseminators of works and fixations of artists' performances, they are the main source of income for authors and performers, and in many cases, for cinematographic and phonographic producers too.

In this sense, the rights of creators shall be coordinated with the rights of users and of those who communicate the works to the public. It must be clear that signal protection does not cover content. Finally, to strengthen related rights does not mean to make them equal to author's rights. Thus, logically, regulation of related rights of broadcasting organizations shall be effective in parallel with the rights of authors of broadcasted works, that is to say, that such regulation should cover wired, wireless, and any other kind of transmissions.

Accordingly, in my opinion, the definition of broadcasting of the future treaty should not depend on the means of transmission, but on the objective activity where the initiative, editorial responsibility, and programming organization are the relevant acts. The treaty should impartially consider all the means by which the program-carrying signal reaches the public. The relevant issue is not the technical element, but the way in which contents are distributed.

Protection should not depend on government approval, which might exist or not, according to the public legal system of each country about licenses or authorizations for the use of the radio spectrum. Undoubtedly, licenses imply obligations with their corresponding rights, but it is the investment of the broadcaster that justifies his control

over the use of the signal so that he can capture the cash flows derived from those uses. An imperfect system, with evident “market failures,” undoubtedly discourages industry investments. The principal concern of the broadcaster is not the prohibition, which reduces his audience, but the fact that the uses are authorized and that those who are benefiting from new ways and places of access compensate the service received.

Among the rights to be granted to broadcasting organizations, we should not leave aside the exclusive right to the fixation of their program-carrying signal, without affecting in any way the rights of other right owners. The same can be said about acts of public communication and the making available of program-carrying signals, which should always require authorization from broadcasting organizations, separately from the pertinent authorization from other right-owners. Regarding signal protection prior to transmission, it is intended to protect the signal since the moment of its assembling and before any transmission or public communication.

An immediate effect of the updated protection of broadcasting organizations is the indirect extension to the owner of broadcast contents, as the owners of the author’s rights and other related rights, sponsors of sports events or of other kinds. Thus, a more reasonable regulation would grant right-owners better and wider negotiations of the license or assignment agreements they might have with broadcasting organizations. At the same time, broadcasting organizations shall be able to collaborate with other right-owners in regard to compliance, whenever both rights are jointly infringed, or whenever broadcasting organizations receive authorization from other right-owners to prosecute infringers, apart from independently ensuring their own rights. The safeguard of these rights shall enable broadcasting organizations to improve their negotiating

position towards hosting and content distribution platforms, and indirectly towards other right owners.

Nevertheless, the protection held by broadcasting organizations over their broadcast signals does not imply any higher or lesser protection over the content or any other additional protection for that content. It neither has any effect over the public domain contents, which as they are carried by a broadcast signal, those contents are not privatized when they are included in a broadcast and are free to be broadcasted by others. The same applies to the exercise of limitations, and exceptions over contents, whether protected by authors' rights or not. It is a question of coordination, and articulations should be provided for, some of which are already clear in other international instruments once the points in common or the overlapping zones are identified. Those rights are not a problem to education, culture, and other social objectives. Broadcasters wish to enlarge the audience, not restrict it. The limitations and exceptions system, including all the safeguards I submitted, seems appropriate to increase the dynamic efficiency of the welfare of society.

Finally, I would like to thank all those at SCCR in WIPO who have been struggling for 19 years to move forward in this dense jungle of expectations, interests, and rights. Those are not synonyms, and the challenge is to determine which expectations the international community might consider as legitimate interests to be later acknowledged as rights. This community has its own common good, which must lead the work of negotiators.

