

A NOTE COMPARING
THE DEFINITIONS IN THE PROPOSED TREATY FOR THE PROTECTION OF BROADCASTING ORGANIZATIONS
WITH THOSE IN EXISTING INTERNATIONAL CONVENTIONS

BY

NEHAA CHAUDHARI

AMULYA PURUSHOTHAMA

THE CENTRE FOR INTERNET AND SOCIETY, INDIA

INTRODUCTION

This note analyses the differences in definitional clauses across six documents, the proposed Treaty on the Protection of Broadcasting Organisations¹ (“**Broadcast Treaty**”), the Proposal on the Draft Treaty on the Protection of Broadcasting Organization- The Proposal by the Delegation of South Africa² (“**Proposal by South Africa**”), The WIPO Copyright Treaty, 1996, the WIPO Performances and Phonograms Treaty, 1996 (“**WPPT**”), the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations, 1961 (“**The Rome Convention**”), and the Beijing Treaty on Audiovisual Performances, 2012 (“**The Beijing Treaty**”)

The definitions for signal, broadcasting, broadcasting organization, retransmission, fixation, communication to the public and rights management information will be studied in detail as the definitions for these concepts has varied somewhat through the years. The rest of the definitions can be found in a detailed table that follows.

1. SIGNAL

¹ See Working Document for a Treaty on the Protection of Broadcasting Organisations, Prepared by the Secretariat, Standing Committee on Copyright and Related Rights, 27th Session, Geneva, April 28- May 2, 2014, SCCR/27/2/REV. (Hereafter The Broadcast Treaty.)

² The Proposal on the Draft Treaty on the Protection of Broadcasting Organisations, Proposal by the Delegation of South Africa, Informal Consultation Meeting on the Protection of Broadcasting Organisations, Geneva, April 14 and 15, 2011, WIPO/CR/Consult/Ge/11/2/2. (Hereafter, The South African Proposal)

The proposed Broadcast Treaty defines a signal as an “electronically generated carrier consisting of sounds or images or sounds and images or representations thereof whether encrypted or not”³, the alternative to this provision defines a signal as an “electronically generated carrier capable of transmitting a broadcast cablecast”⁴. The proposal by South Africa, on the other hand, defines a signal as an electric current or electromagnetic field used to convey data. Clearly the former definition could be extended to cover the content underlying the signal and is not as technologically neutral as the latter definition.

2. BROADCASTING

The proposed Broadcast Treaty defines broadcast as the “transmission of a signal by a broadcasting organization for reception by the public”⁵, an alternative to this excludes signals sent over computer networks from the definition of a broadcast,⁶ another alternative defines broadcasting as “the transmission by wireless means for the reception by the public of sounds or of images or of images and sounds or of the representations thereof”. This definition includes satellite transmission, wireless transmission of encrypted signals where the means for decrypting are provided to the public by the broadcasting organization or with its consent. Transmission over computer networks is excluded from this definition as well.⁷ This mirrors definitions of broadcasting set out in the WPPT⁸, the Rome Convention⁹ and the Beijing Treaty¹⁰. The proposal by South Africa defines “broadcasting” as the process whereby the output signal of a broadcasting organization is taken from the point of origin, being the point where such signal is made available in its final content format and is conveyed to any broadcast target area by means of electronic communications and “broadcast” is construed accordingly.

³ Article 5, Alternative A, 5(a), The Broadcast Treaty.

⁴ Article 5, Alternative A, Alternative to (a), The Broadcast Treaty.

⁵ Article 5, Alternative A, Article 5 (b), The Broadcast Treaty.

⁶ Article 5, Alternative A, Alternative to (b), The Broadcast Treaty.

⁷ Alternative B for Article 5, Article 5 (a) The Broadcast Treaty.

⁸ See Article 2(f) of the WIPO Performances and Phonograms Treaty, 1996.(Hereinafter, WPPT) that reads as: “broadcasting” means the transmission by wireless means for public reception of sounds or of images and sounds or of the representations thereof; such transmission by satellite is also “broadcasting”; transmission of encrypted signals is “broadcasting” where the means for decrypting are provided to the public by the broadcasting organization or with its consent”

⁹ See Article 3 (f) of the Rome Convention, 1961 (Hereafter The Rome Convention), that reads as: “broadcasting” means the transmission by wireless means for public reception of sounds or of images and sounds.’

¹⁰ See Article 2(c) of the Beijing Treaty on Audiovisual Performances, 2012(Hereafter The Beijing Treaty), that reads as “broadcasting” means the transmission by wireless means for public reception of sounds or of images and sounds or of the representations thereof; such transmission by satellite is also “broadcasting”, transmission of encrypted signals is “broadcasting where the means for decrypting are provided to the public by the broadcasting organization or with its consent.’

Clearly the proposal by South Africa is more technologically neutral and limits the protection granted by the treaty to the signal and ensures that it doesn't cover the underlying content being transmitted by the signal.

3. BROADCASTING ORGANISATIONS

The proposed Broadcast Treaty defines broadcasting organisations as “the legal entity that takes the initiative for packaging assembling and scheduling program content for which it has, where necessary, been authorized by rights holders and takes the legal and editorial responsibility for the communication to the public of everything which is included in its broadcast signal.” Or alternatively¹¹, considers broadcasting organisations and cablecasting organisations as one and the same and defines them as the legal entity that takes the initiative and has the responsibility for the transmission to the public of sounds or of images or of images and sounds or of the representation thereof and the assembly and scheduling of the content of the transmission. The proposal by South Africa defines broadcasting organization as the “legal entity that has the responsibility for packaging, assembly and/or scheduling of program content for which it has legitimate license. Or rights of use for the transmission to the public, sections of the public or subscribers in the form of an unencrypted or encrypted output signal containing sounds, visual images or other visible signals whether with or without accompanying sounds”. The proposal by South Africa ensures that cablecasting organisations aren't included within the definition of broadcasting organisations, this definition is also by far the most technologically neutral and ensures adequate protection for broadcasting organisations on all broadcasting platforms.

4. RETRANSMISSION

The proposed Broadcast Treaty defines “retransmission” as “the transmission by any means by any person other than the original broadcasting organization for reception by the public whether simultaneous or delayed”;¹² or alternatively defines rebroadcast as “the simultaneous transmission for the reception by the public of a broadcast or a cablecast by any other person than the original broadcasting organization”; even simultaneous transmission of a rebroadcast is understood to be a rebroadcast under this definition.¹³

¹¹ Alternative B for Article 5, Article 5 (c) The Broadcast Treaty.

¹² Article 5, Alternative A to Article 5(d) The Broadcast Treaty.

¹³ Alternative to Article 5(d), The Broadcast Treaty.

Under a further alternative¹⁴ retransmission is defined as “the simultaneous transmission for the reception by the public by any means of a transmission ... by any other person than the original broadcasting or cablecasting organization” this definition of retransmission also includes simultaneous transmission of a retransmission.

To contrast to this, the Rome convention defines rebroadcasting as the simultaneous broadcasting by one broadcasting organization of the broadcast of another broadcasting organization.¹⁵ Clearly a higher level of protection is granted to broadcasting organisations under the proposed Broadcast Treaty.

5. FIXATION

The proposed Broadcast Treaty defines fixation as “the embodiment of sounds or images or sounds and images or representations thereof from which they can be perceived , reproduced or communicated through a device”¹⁶¹⁷,the WPPT defines fixation as means “the embodiment of sounds, or of the representations thereof, from which they can be perceived, reproduced or communicated through a device”;¹⁸ and the Beijing Treaty defines audiovisual fixation as “the embodiment of moving images, whether or not accompanied by sounds or by the representations thereof, from which they can be perceived reproduced or communicated through a device”.¹⁹ In this capacity, the definitions proposed in the Broadcast Treaty seem to be in line with the earlier international treaties.

6. COMMUNICATION TO THE PUBLIC

The proposed Broadcast Treaty defines communication to the public as “any transmission or retransmission to the public of a broadcast signal or a fixation thereof by any medium or platform”.²⁰or alternatively as “making the transmissions ... audible or visible or audible and visible in places accessible to the public.”²¹ Whereas the WPPT defined communication to the public as “the transmission to the public by any medium, otherwise than by broadcasting, of sounds of a performance or the sounds or the representations of sounds fixed in a phonogram... including making the sounds or representations of sounds fixed in a phonogram

¹⁴ Alternative B for Article 5, Article 5 (d), The Broadcast Treaty.

¹⁵ Article 3(g), The Rome Convention, 1961.

¹⁶ Article 5, Alternative A to Article 5 (e), The Broadcast Treaty.

¹⁷ Alternative B for Article 5, Article 5 (f), The Broadcast Treaty.

¹⁸ Article 2(c), WPPT.

¹⁹ Article 2(b), The Beijing Treaty

²⁰ Article 5, Alternative A to Article 5 (f), The Broadcast Treaty.

²¹ Alternative B for Article 5, Article 5 (e), The Broadcast Treaty.

audible to the public.”²² The Beijing Treaty defined communication to the public as “the transmission to the public by any medium otherwise than by broadcasting, of an unfixed performance or of a performance fixed in an audio visual fixation... “communication to the public” includes making a performance fixed in an audiovisual fixation audible or visible or audible and visible to the public.”²³ Clearly the definition has been broadened under the proposed treaty, which makes it plausible for the protection granted to broadcasters to cover the content underlying the signal as well.

7. RIGHTS MANAGEMENT INFORMATION

The proposed Broadcast Treaty defines rights management information as “information that identifies the broadcasting organization, the broadcast, the owner of any right in the broadcast, or information about the terms and conditions of use of the broadcast and any numbers or codes that represent such information when any of these items of information is attached to or associated with the broadcast or the pre broadcast signal or its use in accordance with Article 6.”²⁴ The WIPO Copyright Treaty, 1996, defines it as means information which identifies the work, the author of the work, the owner of any right in the work, or information about the terms and conditions of use of the work, and any numbers or codes that represent such information, when any of these items of information is attached to a copy of a work or appears in connection with the communication of a work to the public.”²⁵

The WPPT extends the same definition to performances and performers as it defines rights management information as “information which identifies the performer, the performance of the performer, the producer of the phonogram, the phonogram, the owner of any right in the performance or phonogram, or information about the terms and conditions of use of the performance or phonogram, and any numbers or codes that represent such information, when any of these items of information is attached to a copy of a fixed performance or a phonogram or appears in connection with the communication or making available of a fixed performance or a phonogram to the public.”²⁶ And the Beijing Treaty defines rights management information as “information which identifies the performer, the performance of the performer or the owner of any right in the performance or information about the terms and

²² Article 2(g), WPPT.

²³ Article 2(d), The Beijing Treaty.

²⁴ Article 5 (h), The Broadcast Treaty.

²⁵ Article 12(2), The WIPO Copyright Treaty, 1996.

²⁶ Article 19(2), WPPT.

conditions of use of the performance, and any numbers or codes that represent such information, when any of these items of information is attached to a performance fixed in an audiovisual fixation.”²⁷

Clearly the current treaty extends the protection offered to rights management information to pre-broadcasting signals in addition to broadcast signals, this represents a higher level of protection granted to broadcasters under the proposed Broadcast Treaty.

DETAILED TABLE ON DEFINITIONS IN INTERNATIONAL TREATIES

DEFINITION	BROADCAST TREATY 27/2 REV	BROADCAST TREATY PROPOSAL BY SOUTH AFRICA WIPO/CR/CONSULT/GE/11/2/2	WIPO COPYRIGHT TREATY, 1996	WIPO PERFORMANCES AND PHONOGRAMS TREATY, 1996	ROME CONVENTION, 1961	BEIJING TREATY ON AUDIOVISUAL PERFORMANCES, 2012
SIGNAL	Article 5, Alternative A, 5(a): “signal” is an electronically generated carrier consisting of sounds or images or sounds and images or representations thereof, whether encrypted or not; Alternative to (a), “signal” means an electronically generated carrier capable of transmitting a broadcast or cablecast	“signal is an electric current or electromagnetic field used to convey data”;				
BROADCAST	Article 5, Alternative A : Article 5 (b): “broadcast” means the transmission of a signal by or on behalf of a broadcasting organization for reception by the public; Alternative to (b): “broadcast” means the transmission of a set of electronically generated signals by	“broadcasting” means the process whereby the output signal of a broadcasting organization is taken from the point of origin, being the point where such signal is made available in its final		Article 2(f): “broadcasting” means the transmission by wireless means for public reception of sounds or of images and sounds or of the representations	Article 3 (f): “broadcasting” means the transmission by wireless means for public reception of sounds or of images and sounds;	Article 2(c): “broadcasting” means the transmission by wireless means for public reception of sounds or of images and sounds or of the representations thereof; such

²⁷ Article 16(2), The Beijing Treaty.

	<p>wireless and carrying a specific program for reception by the general public, broadcast shall not be understood as including transmission of such a set of signals over computer networks. Alternative B for Article 5, Article 5 (a) “broadcasting” means the transmission by wireless means for the reception by the public of sounds or of images or of images and sounds or of the representations thereof; such transmission by satellite is also “broadcasting”. Wireless transmission of encrypted signals is “broadcasting” where the means for decrypting are provided to the public by the broadcasting organization or with its consent. “broadcasting” shall not be understood as including transmissions over computer networks</p>	<p>content format and is conveyed to any broadcast target area by means of electronic communications and “broadcast” is construed accordingly”</p>		<p>thereof; such transmission by satellite is also “broadcasting”; transmission of encrypted signals is “broadcasting” where the means for decrypting are provided to the public by the broadcasting organization or with its consent;</p>		<p>transmission by satellite is also “broadcasting”, transmission of encrypted signals is “broadcasting where the means for decrypting are provided to the public by the broadcasting organization or with its consent.</p>
<p>BROADCASTING ORGANIZATION</p>	<p>Article 5, Alternative A to Article 5 (c): “broadcasting organization” means the legal entity that takes the initiative for packaging assembling and scheduling program content for which it has, where necessary, been authorized by rights holders and takes the legal and editorial responsibility for the communication to the public of everything which is</p>	<p>“broadcasting organization” means the legal entity that has the responsibility for packaging, assembly and/or scheduling of program content for which it has legitimate license. Or rights of use for the transmission to the public, sections of</p>				

	<p>included in its broadcast signal. Alternative B for Article 5, Article 5 (c): “broadcasting organization” and “cablecasting organization” mean the legal entity that takes the initiative and has the responsibility for the transmission to the public of sounds or of images or of images and sounds or of the representation thereof and the assembly and scheduling of the content of the transmission.</p>	<p>the public or subscribers in the form of an unencrypted or encrypted output signal containing sounds, visual images or other visible signals whether with or without accompanying sounds.</p>				
RETRANSMISSION	<p>Article 5, Alternative A to Article 5(d): “retransmission” means the transmission by any means by any person other than the original broadcasting organization for reception by the public whether simultaneous or delayed; Alternative to (d) rebroadcast means the simultaneous transmission for the reception by the public of a broadcast or a cablecast by any other person than the original broadcasting organization; simultaneous transmission of a rebroadcast shall be understood as well to be a rebroadcast.</p> <p>Alternative B for Article 5, Article 5 (d): “retransmission” means the simultaneous transmission for the reception by the public by any means of a transmission referred to in provisions (a) or (b) of this</p>				<p>Article 3(g): “rebroadcasting” means the simultaneous broadcasting by one broadcasting organization of the broadcast of another broadcasting organization.</p>	

	article by any other person than the original broadcasting or cablecasting organization; simultaneous transmission of a retransmission shall be understood as well to mean a retransmission.					
FIXATION	Article 5, Alternative A to Article 5 (e) “fixation” means the embodiment of sounds or images or sounds and images or representations thereof from which they can be perceived , reproduced or communicated through a device Alternative B for Article 5, Article 5 (f) “fixation” means the embodiment of sounds or of images or of images and sounds or of the representations thereof from which they can be perceived, reproduced or communicated through a device.			Article 2(c): “fixation” means the embodiment of sounds, or of the representations thereof, from which they can be perceived, reproduced or communicated through a device;		Article 2(b): “audiovisual fixation” means the embodiment of moving images, whether or not accompanied by sounds or by the representations thereof, from which they can be perceived reproduced or communicated through a device.
COMMUNICATION TO THE PUBLIC	Article 5, Alternative A to Article 5 (f): “communication to the public” means any transmission or retransmission to the public of a broadcast signal or a fixation thereof by any medium or platform. Alternative B for Article 5, Article 5 (e): “communication to the public” means making the transmissions referred to in provisions (a), (b) or (d) of this article audible or visible or audible and visible in places accessible to			Article 2(g): “communication to the public” of a performance or a phonogram means the transmission to the public by any medium, otherwise than by broadcasting, of sounds of a performance or the sounds or the		Article 2(d): “Communication to the public of a performance means the transmission to the public by any medium otherwise than by broadcasting, of an unfixed performance or of a performance fixed in an audiovisual fixation. For the purposes of Article 11, “communication to the

	the public.			representations of sounds fixed in a phonogram. For the purposes of Article 15, “communication to the public” includes making the sounds or representations of sounds fixed in a phonogram audible to the public.		public” includes making a performance fixed in an audiovisual fixation audible or visible or audible and visible to the public.
PRE-BROADCAST SIGNAL	Article 5, Alternative A to Article 5 (g): “pre broadcast signal” means a transmission prior to broadcast that a broadcasting organization intends to include in its program schedule, which is not intended for direct reception by the public					
RIGHTS MANAGEMENT INFORMATION	Article 5, Alternative A to Article 5 (h) “rights management information” means information that identifies the broadcasting organization, the broadcast, the owner of any right in the broadcast, or information about the terms and conditions of use of the broadcast and any numbers or codes that represent such information when any of these items of information is attached to or associated with the broadcast or the pre broadcast signal or its use in accordance with Article 6.		Article 12(2): “rights management information” means information which identifies the work, the author of the work, the owner of any right in the work, or information about the terms and conditions of use of the work, and any numbers	Article 19(2): “rights management information” means information which identifies the performer, the performance of the performer, the producer of the phonogram, the phonogram, the owner of any right in the performance or phonogram, or information about the terms and		Article 16(2): “rights management information” which identifies the performer, the performance of the performer or the owner of any right in the performance or information about the terms and conditions of use of the performance, and any numbers or codes that represent such information, when any

			or codes that represent such information, when any of these items of information is attached to a copy of a work or appears in connection with the communication of a work to the public	conditions of use of the performance or phonogram, and any numbers or codes that represent such information, when any of these items of information is attached to a copy of a fixed performance or a phonogram or appears in connection with the communication or making available of a fixed performance or a phonogram to the public.		of these items of information is attached to a performance fixed in an audiovisual fixation.
TRANSMISSION	Article 5, Alternative A to Article 5 (i), “transmission” means the sending for reception by the public of visual images sounds or representations thereof by the way of an electronic carrier	“electronic communications” means the emission, transmission or reception of sounds , visual images or other visible signals whether with or without accompanying sounds by means of magnetism, radio or other electromagnetic waves, optical electromagnetic systems or any agency of a like nature, whether with or without the aid of tangible conduct.				

PROGRAM	Article 5, Alternative A to Article 5 , alternative to (j), “program” means a discreet package of one or more works protected by copyright or related rights in the form of live or recorded material consisting of images, sounds or both.					
CABLECAST	Article 5, Alternative A to Article 5 (k) “cablecast” means the same as “broadcast” when the transmission is by wire and excluding transmission by satellite or over computer networks. Alternative B for Article 5, Article 5 (b): “cablecasting” means the transmission by wire for the reception by the public of sounds or of images or of images and sounds or of the representations thereof. Transmission by wire of encrypted signals is “cablecasting” where the means for decrypting are provided to the public by the cablecasting organization or with its consent. “cablecasting” shall not be understood as including transmissions over computer networks.					
PERFORMERS				Article 2(a) :“performers” are actors, singers, musicians, dancers, and other persons who act, sing, deliver,	Article 3(a): “performers” means actors, singers, musicians, dancers, and other persons who act, sing, deliver,	Article 2(a): “performers” are actors, singers, musicians, dancers, and other persons, who act, sing, deliver, declaim, play in,

				declaim, play in, interpret, or otherwise perform literary or artistic works or expressions of folklore	declaim, play in, or otherwise perform literary or artistic works;	interpret or otherwise perform literary or artistic works or expressions of folklore.
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On behalf of the Centre for Internet and Society,

Nehaa Chaudhari

Amulya Purushothama

Email: nehaa@cis-india.org

Phone: +91-11-40503285