

WIPO Broadcast Treaty and webcasting

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On Friday, 8 May 2009, at Shastri Bhavan, New Delhi, the Ministry of Information and Broadcasting held a stakeholders' briefing meeting on the Broadcast Treaty that has been on the table at the World Intellectual Property Organisation (WIPO). The purpose of that meeting was to inform the relevant stakeholders of the developments in Geneva, as well as to garner input from them regarding the stance to be adopted by India at the WIPO.

First, we wish to applaud the Ministry of Information and Broadcasting for holding this stakeholders' meeting, which is a definite step towards greater transparency, and are grateful for having been invited to provide our input. The meeting was attended by representatives from various government offices and ministries, including the Ministry of Human Resource Development (which administers the Indian Copyright Act), broadcasters, broadcast associations, law firms, and civil society organisations. The Secretary of the Ministry of Information and Broadcasting inaugurated the session by talking of how the Broadcast Treaty involved the assessment and balancing of various interests while keeping 'public interest' foremost. This was followed by Mr. N. P. Nawani, Secretary General of the Indian Broadcasting Foundation (IBF), presenting on the concerns of the broadcasting industry. After this Prof. N. S. Gopalakrishnan, head of the School of Law, Cochin University of Science and Technology, spoke.

Prof. Gopalakrishnan covered many areas of relevance: the concept of broadcasting and the legal rights involved; the scheme of legal protection over broadcast signals and over the content of the signals, and the difference between the two; gaps in the international law covering broadcasting; details of the proposed broadcast treaty; the implications of the broadcast treaty and concerns of the Indian government; and unresolved issues.

Amongst the unresolved issues mentioned by Prof. Gopalakrishnan was that of webcasting and the problems related to that. The discussion below aims to shed some light on some of the problems created by the inclusion of webcasting in the broadcast treaty.

Legal regimes for broadcasting

At the national level, the law governing broadcasting is the Indian Copyright Act, 1957. Broadcasting is covered by many sections of the Indian Copyright Act, including: ss. 2(dd) (definition of "broadcast"), 2(ff) (definition of "communication to the public"), 37 (the section granting a special "broadcast reproduction right"), and 39A (containing exceptions to s.37). At the international level, broadcasting is covered by the Rome Convention, 1960 (which India has signed, but hasn't ratified); the Brussels Convention, 1974 (only pre-broadcast satellite signals); the TRIPS Agreement, 1994 per Article 14 (which doesn't mandate that broadcasting rights be granted directly to the broadcasters); the WIPO Performances and Phonograms Treaty, 1996 (WPPT) in Articles 2(f) and 15; and the proposed WIPO Treaty on the Protection of Broadcasting Organizations ("Broadcast Treaty"). In May 2006, provisions for webcasting were brought back into the Broadcast Treaty as part of the non-mandatory Appendix after having been excised in 2004 owing to protests by many countries on their inclusion. The current draft (SCCR/15/2 rev.) was prepared in September 2006 as an attempt to put together an all-inclusive document (with alternative versions of proposed provisions present in the document), and a diplomatic conference was planned to push the treaty through. In August 2007, WIPO released a 'non-paper' (SCCR/S2/Paper1) and dropped plans for the diplomatic conference, as there was still significant disagreement about the treaty. In November 2008, the WIPO chair released an informal paper (SCCR/17/INF/1), which advocated technological neutrality, and hence, presumably, that webcasting to be covered by the treaty.

Meaning of broadcasting and netcasting

Broadcasting is generally taken to be a point-to-multipoint transmission of audio-visual content. Hence, cable transmissions and Internet/Web transmissions (which are point-to-point) are usually not included when one uses the term "broadcasting". But there is no one common definition of "broadcasting". As things stand in the WIPO Broadcast Treaty, the definition of broadcasting (Art. 5(a)) does not cover cablecasting, which is separately defined in Art. 5(b), neither does it cover webcasting. However, the definition of "retransmission" as provided in the draft treaty is broad enough to cover Internet-based transmission, and hence could provide a backdoor via which webcasting is included. The rights covered by the all-inclusive draft WIPO Broadcast Treaty include the rights of and over: retransmission; communication to the public; fixation; reproduction; distribution; transmission following fixation; making available of fixed broadcasts; and pre-broadcast signals. The treaty also mandates legislative protection to systems of digital rights management (DRM) and technological protection measures (TPMs). This, coupled with post-fixation rights, grants broadcasters the rights to dictate what one can and cannot do with a broadcast, thus negating all fair dealing rights and possibly restricting the public domain as well. It may be noted that even content creators are not provided such

rights in the vast majority of the world, and that fair dealing rights are much better safeguarded by copyright law. The latest proposal by the U.S. on the term "netcasting" is to be found in an informal paper presented at SCCR 15 [MS Word document], and has been criticised as overly expansive by civil society organisations such as Consumer Project on Technology (now Knowledge Ecology International).

Non-justifications for webcasting's inclusion

Webcasting is sought to be included within the Broadcast Treaty for a number of reasons, all of which are problematic. Firstly, there is the argument of technology neutrality, which advocates say is to ensure that the treaty is relevant into the future as well. However, adopting technology neutrality as the basis for doing so amounts to wilful blindness to technological advancements, and the benefits that such advancement provides, including lowered costs of infrastructure. Secondly, advocates argue that thanks to media convergence, the same content (which is usually digital) can be delivered through various communication networks. This disregards the need to establish the requirement for a new right to be created, and simply assumes that just because the function that the two (broadcasters and webcasters) perform are similar means that they operate in similar economic and social environments. In fact, webcasters work in a very different environment from broadcasters.

This is an environment where intense innovation and competition already exist, and don't need to be artificially created by means of a new property right in an international treaty. Furthermore, the United States, a country with extremely large and hugely profitable broadcasting networks, does not have a specific statute to protect broadcasters' rights. Even it only has laws protecting the conditional-access regime. Second, much less investment is required to reach a set number of people through webcasting than through broadcasting – and these people can be spread throughout the globe. Typically, a computer with a fast internet connection is all that is required. Given this, anyone can become a 'broadcasting organisation'. Additionally, IP addresses (in IPv6) are not limited, unless one considers 340 undecillion addresses to be 'limited'. This is a big difference from terrestrial broadcasting, where Hertzian frequencies are limited, and hence one has to pay a premium for them. Lastly, signal appropriation does not happen for sake of the signal, but for the content. Protection, thus has to be given to the content (and already is given, in the form of copyright law). Copyright owners who object to such appropriation, and who are often large multinational corporations, have proven more than willing to pursue those who appropriate their works – broadcasters are not necessarily in a better position to do so. This situation is aggravated with webcasting. Indeed, on the Web, something akin signal appropriation is not only not frowned upon, but often encouraged: embedding of audio and video from other servers on your own website is prevalent.

Problems if webcasting is included

Apart from the lack of justifications for going ahead with the treaty, especially when it seeks to create a separate property right over signals instead of merely providing for signal protection and includes webcasting (at least upon 'retransmission'), there are many problems that the treaty creates. Firstly, transaction costs will increase vastly, leading to a tragedy of the anticommons where no one ends up using the content because clearing all the surrounding rights is too difficult. On top of clearing and making payment for rights from the copyright holders, a person wishing to use parts of any content that has been broadcast/webcast would have to get the rights cleared from the first broadcaster/webcaster as well. This is inevitable if property-like rights are bestowed upon the act of distributing signal in the form of a broadcast or hosting audio and visual content for webcasting.

Secondly, materials in the public domain and openly-licensed content will become more difficult to gain access to, and the exercise of fair dealings with copyrighted content will be hampered. Since rights over signal are independent of rights over content, a copy of the public-domain work will have to be procured from an archive, which negates the very purpose of broadcasting and webcasting, which is to make content more easily accessible to a large number of people located over great distances. Additionally, limitations and exceptions are extremely difficult to negotiate and are of the 'ceiling' kind, limiting the limitations and exceptions that national legislatures can prescribe. Thus, the fair dealing rights over the signal will probably end up being more limited than the fair dealing rights over content. This makes the situation akin to anti-circumvention measures, which (in countries where they are legally recognised) have fewer limitations and exceptions than the content they protect.

Thirdly, public benefit and access will seriously be harmed. It is conceivable that this treaty might hamper the Indian legislature's ability to pass statutes such as the Sports Broadcasting Signals (Mandatory Sharing with Prasar Bharati) Act, 2007, which mandate sharing of certain kinds of signals. Lawyers will claim that such statutes go against India's international obligations.

Differences between webcasting and broadcasting

To sum up, there are a large number of differences between broadcasting and webcasting. **Infrastructure:** The expenditure required to establish the infrastructure for a webcasting unit is much less than that required for an equivalent (in terms of reach in terms of listeners). Even traditional broadcasting is not that expensive: fixed-frequency radio transmission kits have been known to cost as little as Rs. 50 (<http://news.bbc.co.uk/2/hi/south_asia/4735642.stm>). Thus, one of the biggest arguments for protection ('to recover investment') is taken away. The content producers' 'investment' is protected by copyright law. **Competition:** Providing incentives to increase competition and hence public benefit is often a reason cited as a reason for introduction of a new property-like

right. However, such incentives seem utterly redundant in the online market where becoming a webcasting organisation is trivial, and immense competition already exists. **Broadcasting vs. Uni- and Multicasting:** The notion of 'broadcasting' does not exist in IPv6. The closest that a webcaster can come to broadcasting is 'multicasting' to a specific range of IP addresses. What one sees on the Web today is "unicasting", which is initiated by a request from the recipient and not by the webcaster. **Temporal limitations:** Unlike traditional broadcasting (which does not include cable), content on demand is possible over the Web. By this, the temporal limitations faced by traditional broadcasting, which is ephemeral, are overcome. This opens up many possibilities that should not be hampered by creating an excessive legal regime (and that too a property regime) over webcasting. **Geographic limitations:** While terrestrial broadcasting is limited in geographic scope (which satellite and cable-casting are less susceptible to), webcasting knows no geographic limitations. As long as an Internet connection is present, the content can be viewed anywhere. Additionally, granting a separate webcasting right will open up a jurisdictional can of worms. **Marginal costs of subscribers:** While in terrestrial broadcasting, adding an additional receiver does not cost the broadcaster anything, in satellite television (direct-to-home), cable television and webcasting, each additional receiver means either additional infrastructure (cables and set-top boxes) or additional server load. In the case of webcasting, this marginal cost is small enough to ignore, especially given all the other reasons mentioned previously.

Conclusion

There are still a number of uncertainties surrounding the inclusion of webcasting in the Broadcast Treaty. Michael Nelson of the Internet Society points out that questions such as who the broadcaster is in a download grid, in distributed gaming, for webcasts of surveillance videos, etc., are unanswered. As the example of the download grid (a situation where the 'casting' is multipoint-to-point) shows, many Internet-specific scenarios have not been contemplated by the treaty negotiators. Situations which might soon be reality, such as peer-to-peer relaying of webcasts are also not contemplated, and the treaty would become a policy document preventing such technological innovations. Whether IPTV would be included within webcasting is also unclear. The WIPO chair in his informal paper noted, 'Finally, if after consideration of the options above (A/B) and possible other options, it will not in the present situation be possible to decide on the establishment of a new treaty, the SCCR should end these discussions through an express decision in order to avoid further spending of time, energy and resources to no avail. Such a decision could include a timetable for later revisiting and reconsidering the matter.' (SCCR/15/2 rev) SCCR should end these discussions which have gone on for more than a decade without any progress.