

TRIPS, TECHNOLOGICAL DEVELOPMENTS, AND THE RIGHTS OF BROADCASTING ORGANIZATIONS: POLITICAL STALEMATE OR DELIBERATE IGNORANCE?

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ABSTRACT

Even though the TRIPS Agreement arrived at a turning point in the history of information technology and communication, its copyright and related rights provisions ignored the technological developments of the time. Scholarly analysis on the lack of foresight on the part of TRIPS negotiators with respect to the pace of technological developments has primarily revolved around the challenges posed by internet and digital technologies ignoring other technological developments of the time, such as those in broadcasting. In this vein, this paper posits that even though cable was a prevalent form of broadcast technology during the Uruguay Round negotiations, Article 14.3 of the TRIPS Agreement deliberately failed to grant cable rebroadcast rights to broadcasting organizations in accordance with the “minimum standards treaty” principle of the TRIPS Agreement.

I. INTRODUCTION

[1] The Trade Related Aspects of Intellectual Property Rights (TRIPS),¹ the most ambitious intellectual property (IP) rights treaty of the twentieth

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century, arrived at a turning point in the history of information technology and communication.² It was signed at a time when the world witnessed an unprecedented phenomenon known as the Internet. Even though Internet and digital technologies were a prevalent form of technology during the Uruguay Round negotiations, the copyright and related rights provisions of TRIPS failed to take into account the technological developments of the time.³ Based on a literature review, three plausible reasons for its myopic outlook emerge. First, negotiators paid no heed to these new technologies due to ignorance.⁴ Second, the issue was deliberated during the Uruguay Round negotiations, but did not make its way to TRIPS due to lack of political willingness.⁵ Third, the spate of technological developments was

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¹ Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299 [hereinafter “TRIPS Agreement”].

² See J. H. Reichman, *Compliance with the TRIPS Agreement: Introduction to a Scholarly Debate*, 29 VAND. J. TRANSNAT’L. L. 363, 366, 386 (1996).

³ See Haochen Sun, *Overcoming the Achilles Heel of Copyright Law* 5 N.W. J. TECH. & INTELL. PROP. 265, 276 (2007).

⁴ See *id.*

⁵ See Reichman, *supra* note 2, at 386.

realized after the Dunkel Text was finalized and it was impossible to reopen the negotiations.⁶

[2] This scholarly analysis on the lack of foresight by TRIPS negotiators has primarily revolved around the challenges posed by Internet and digital technologies ignoring other technological developments of the time, such as those in broadcasting. Even though cable was a prevalent form of broadcasting technology in the 1990's, Article 14.3 of the TRIPS Agreement protects broadcasting organizations only against broadcast piracy by wireless means.⁷ However, in most of the countries, satellite broadcasting is no longer the prevalent form of broadcast technology.⁸ This means that broadcast piracy can take place through both wire (cable) and wireless (satellite and digital broadcasting) means. As a matter of fact, one of the primary modes of broadcast piracy, at least in the Asia-Pacific region, is the unauthorized reception and distribution of broadcast signal by cable operators.⁹

[3] The restrictive scope of Article 14.3 of TRIPS has become a ground for certain World Intellectual Property Organization (WIPO) member states, notably India, and the civil society to oppose the proposed treaty for

⁶ See Mihály Ficsor, *The WIPO 'Internet Treaties' The United States as the Driver: The United States as the Main Source of Obstruction - As Seen by an Anti-Revolutionary Central European*, 6 J. MARSHALL REV. INTELL. PROP. L. 17, 19 (2006).

⁷ See TRIPS Agreement, *supra* note 1, part 2, § 1, art. 14 (stating that broadcasting organizations shall have the right to prohibit...the rebroadcasting by wireless means of broadcasts).

⁸ See WIPO Standing Committee on Copyright & Related Rights, 30th Sess., *Current Market and Technological Trends in the Broadcasting Sector*, WIPO Doc. SCCR/19/15 (Jun. 2, 2015) (showing the lower concentration of satellite use as compared to other methods for broadcasting technology worldwide).

⁹ See Peter Galace, *Pay TV Piracy: A Global Challenge*, 3 SATELLITE EXECUTIVE BRIEFING 1 (Sept. 15, 2010), <http://www.satellitemarkets.com/pdf/sept15-10.pdf>, <https://perma.cc/36J6-D7AF>.

the protection of rights of broadcasting organizations (the Broadcasters Treaty).¹⁰ Their primary contention has been that since TRIPS failed to grant any special rights to broadcasting organizations vis-à-vis the International Convention for the Protection of Performers, Producers of Phonograms, and Broadcasters (Rome Convention), no clear need for a new international instrument on broadcasters rights was established.¹¹ In this vein, this paper attempts to dispel the concerns of these apprehensive countries and the civil society by arguing that cable retransmission (rebroadcast) rights were never discussed during the Uruguay Round negotiations, as it was clearly not its agenda, keeping in line with the “minimum standards treaty” principle of the TRIPS Agreement.¹²

¹⁰ At the 35th Standing Committee on Copyright and Related Rights (SCCR), another key WIPO member state also expressed some reservations over the proposed Broadcasters Treaty on grounds of TRIPS failure to grant any special rights to broadcasting organizations. For confidentiality reasons, the author cannot point out this delegation as this view was expressed during the informal session of the SCCR. Some of these civil society groups include the Center for Internet and Society (CIS) and Knowledge Ecology International (KEI). See *Infra* note 84 and accompanying text.

¹¹ See Intergovernmental Committee of the International Convention for the Protection of Performers, Producers of Phonograms, and Broadcasting Organizations, Final Rep. ¶ 48, OIT/UNESCO/OMPI/ICR.19/9 (June 28, 2005), <http://unesdoc.unesco.org/images/0014/001405/140583e.pdf>, <https://perma.cc/PD28-MPHZ> (the Indian delegate making a reference to TRIPS expressed that since TRIPS did not extend any special rights to broadcasters, there was no need for a separate international instrument protecting their rights); see also WIPO Standing Committee on Copyright & Related Rights, *Report on the Nineteenth Session* ¶ 194, WIPO Doc. SCCR/19/15 (June 28, 2010) (Centre for Internet and Society expressing that Article 14 of TRIPS was sufficient to protect the rights of broadcasting organizations). Similar sentiment was also expressed at the 22nd SCCR. See also WIPO Standing Committee on Copyright & Related Rights, *Report on the Twenty-Second Session*, WIPO Doc. SCCR/22/18, at ¶ 256 (Dec. 9, 2011).

¹² See Laurence R. Helfer, *Adjudicating Copyright Claims Under the TRIPS Agreement: The Case for a European Human Rights Analogy*, 39 HARV. INT’L L.J. 357, 360 (1998); see also Peter K. Yu, *The TRIPS Enforcement Dispute*, 89 NEB. L. REV. 1046, 1109 (2011) (stating that the WTO panel in U.S.-China dispute under the TRIPS Agreement

[4] Part II of the article traces the evolution of the Uruguay Round negotiations, in light of the technological developments of the time, specifically related to Internet, digital technologies and broadcast technology. Part III of the article elucidates the existing international framework for the rights of broadcasting organizations. Part IV of the paper articulates the need for the proposed treaty for the protection of rights of broadcasting organizations (the Broadcasters Treaty), specifically from the perspective of developing countries. Part V concludes the paper with a summary.

reminded everyone that TRIPS was a minimum standards agreement); Peter K. Yu, *TRIPS and Its Discontents*, 10 MARQ. INTELL. PROP. L. REV. 369, 388 (2006) (stating that the TRIPS Agreement was primarily focussed on laying out the minimum standards of intellectual property protection as opposed to describing the different possible IP systems); J.H. Reichman & David Lange, *Bargaining Around the TRIPS Agreement: The Case for Ongoing Public-Private Initiatives to Facilitate Worldwide Intellectual Property Transactions*, 9 DUKE J. COMP. & INT'L L. 11, 12 (1998) (stating that TRIPS recognized minimum standards for the enforcement of intellectual property rights within a single national system); Rochelle Cooper Dreyfuss & Andreas F. Lowenfeld, *Two Achievements of the Uruguay Round : Putting TRIPS and Dispute Settlement Together*, 37 VA. J. INT'L L. 275, 281 (1997) (stating that TRIPS negotiators introduced a concept of minimum standards into the TRIPS Agreement.); J. H. Reichman, *Universal Minimum Standards of Intellectual Property Protection under the TRIPS Component of the WTO Agreement* 29 INT'L LAW. 345, 351 (1995) (discussing generally how TRIPS established universal minimum standards in the area of intellectual property). As a matter of fact, certain scholars have advocated for the creation of maximum standards of international intellectual property protection. See Rochelle Cooper Dreyfuss, *TRIPS - Round II: Should Users Strike Back?*, 71 U. CHI. L. REV. 21, 27 (2004) (stating that the WTO system should start to recognize substantive maxima on the scope of available IP protection); see also Susan K. Sell, *TRIPS: Fifteen Years Later*, 18 J. INTELL. PROP. L. no. 2, 2011, at 2 (APSA 2011 Annual Meeting Paper) (stating that while many countries thought that they were negotiating a ceiling, they realized that they had negotiated only a floor); Laurence R. Helfer, *Human Rights and Intellectual Property: Conflict or Coexistence?*, 5 MINN. INTELL. PROP. REV. 47, 58 (2003) (stating the need to articulate "maximum standards" of intellectual property protection because treaties from Berne to Paris to TRIPS were all concerned with articulating minimum standards); Ruth Okediji, *Toward an International Fair Use Doctrine*, 39 COLUM. J. TRANSNAT'L L. 75, 168 (2000) (articulating the need for an international fair use doctrine as a "ceiling").

II. TRIPS AND TECHNOLOGICAL DEVELOPMENTS

A. Internet and Digital Technologies

[5] In 1986 when the Uruguay Round negotiations for the TRIPS Agreement commenced, the negotiators were unable to foresee the full potential of digital technologies, particularly Internet, on the content dissemination models in the copyright sector due to the Internet's formative nature.¹³ However, between the *de facto* finalization of the Dunkel Text of the TRIPS Agreement, and until its signing in 1994, the Internet became a truly spectacular phenomenon.¹⁴ Even then, the Dunkel Text failed to address the thorny issues raised by digital technologies, as it was impossible to reopen the TRIPS negotiations.¹⁵ WIPO was quick in taking the lead for filling this vacuum created by the advent of digital technologies.¹⁶ This promptness on the part of WIPO was partly to reinforce its own relevance, which was losing glory to the WTO in the aftermath of the TRIPS Agreement in addition to pressure from the United States (US) for revising the copyright rules for the digital environment.¹⁷ In the 1990's, WIPO was

¹³ See Antony Taubman, *Thematic Review: Negotiating "Trade-Related Aspects" of Intellectual Property Rights*, in *THE MAKING OF THE TRIPS AGREEMENT: PERSONAL INSIGHTS FROM THE URUGUAY ROUND NEGOTIATIONS* 20 (Jayashree Watal & Antony Taubman eds., 2015).

¹⁴ See Fisor, *supra* note 6, at 19; see also MIHÁLY FICSOR, *THE LAW OF COPYRIGHT AND INTERNET: THE 1996 WIPO TREATIES, THEIR INTERPRETATION AND IMPLEMENTATION* 73 (2002) [hereinafter "FISCOR, THE LAW OF COPYRIGHT AND INTERNET"].

¹⁵ See Fisor, *supra* note 6, at 19.

¹⁶ See Timothy K. Armstrong, *Two Comparative Perspectives on Copyright's Past and Future in the Digital Age*, 15 J. MARSHALL REV. INTELL. PROP. L. 698, 740 (2016).

¹⁷ See *id.*; see also Pamela Samuelson, *The U.S. Digital Agenda at WIPO*, 37 VA. J. INT'L L. 369, 375–80 (1996) (for United States' role in copyright's digital agenda); See CATHERINE SEVILLE, *EU INTELLECTUAL PROPERTY LAW AND POLICY* 19 (2nd ed. 2016) for the historical context of WIPO's Digital Agenda.

dealing with the complexities raised by digital technologies in its committee of experts for copyright and related rights.¹⁸ However, the pace of work undertaken by these committees was slow, as to avoid any undue interference with the TRIPS negotiations.¹⁹

[6] Once the TRIPS Agreement was adopted as part of the larger World Trade Organization (WTO) package in 1994,²⁰ the work of the committees accelerated, and within a record time of one and a half years, the international community adopted two international instruments. In 1996, both the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty (collectively known as the “WIPO Internet Treaties”), which lay down international norms for preventing unauthorized access to, and use of, creative works on the internet and other digital platforms, were formed.²¹

B. Cable

[7] The origins of cable for radio broadcasting dates back to as far as 1924 when it was used in some European cities.²² However, it was not used

¹⁸ There were two committees of experts responsible for updating the legal regime pertaining to complexities arising due to digital technologies. One committee was responsible for copyright issues and the other was responsible for issues on the rights of performers and producers of phonograms. See FISCOR, *THE LAW OF COPYRIGHT AND INTERNET*, *supra* note 14, at 18–25 (2002).

¹⁹ See Fiscor, *supra* note 6, at 19–20.

²⁰ See *Frequently asked questions about TRIPS [trade-related aspects of intellectual property rights] in the WTO*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/trips_e/tripfq_e.htm#SingleUndertaking, <https://perma.cc/YNK5-AXZM> (last visited Feb. 28, 2018).

²¹ See *WIPO Internet Treaties*, WIPO, http://www.wipo.int/copyright/en/activities/internet_treaties.html, <https://perma.cc/ST8L-TJB9> (last visited Oct. 12, 2017).

²² See ANTHONY FRIEDMANN, *WRITING FOR VISUAL MEDIA* 244, n. 1 (4th ed. 2014).

for television broadcasting until 1948.²³ Now, cable is often used by broadcasting organizations to transmit their wireless television and radio signals to areas where a wireless broadcast signal is unable to reach, by connecting it to a transmitting tower via cable.²⁴

[8] Even though cable was a prevalent form of broadcast technology during the 1990's when TRIPS was negotiated, it did not make its way to the Dunkel Text, primarily for retaining the substantive provisions of the Rome Convention.²⁵ This shortsightedness of TRIPS was termed “unfortunate” by the representative of the European Broadcasting Union (EBU) at the WIPO World Symposium on Broadcasting, New Communication Technologies, and Intellectual Property held in Manila, Philippines in April, 1997 (the Manila Symposium).²⁶

[9] The Manila Symposium owes its genesis to the preparatory work that led to the adoption of the WIPO Internet Treaties, where several delegations expressed the need for harmonization of the rights of broadcasting organizations.²⁷ The Manila Symposium culminated in a consensus that the existing international regime was inadequate to combat

²³ See *History of Cable*, CALIFORNIA CABLE & TELECOMM'NS ASSN, <https://www.calcable.org/learn/history-of-cable/> (last visited Oct. 12, 2017).

²⁴ See Gholamreza Rafiei, *The Possibility of Granting New Legal Protection and IP Rights to Broadcasting Organizations Against the Unauthorized Exploitation of their Broadcasts* 31 (2015) (unpublished Ph.D. thesis, University of Neuchatel) (on file with author).

²⁵ See *infra* note 58 and accompanying text.

²⁶ See WIPO, *WIPO World Symposium on Broadcasting, New Communication Technologies and Intellectual Property* 20 (April 1997) [hereinafter “*WIPO World Symposium*”].

²⁷ WIPO Standing Committee on Copyright & Related Rights, *Existing International, Regional and National Legislation Concerning the Protection of Rights of Broadcasting Organizations*, WIPO Doc. SCCR/1/3, ¶ 1 (Sep. 7, 1998).

signal piracy due to technological developments in the broadcasting industry.²⁸ The revenues of traditional broadcasters²⁹ were dwindling, which severely impaired their public service function in the procurement and consequent dissemination of quality content.³⁰

[10] While the delegations conceded the need for revising the existing international regime for protecting the rights of broadcasting organizations, there was no consensus on the work plan.³¹ The Manila Symposium was followed by another symposium for the Latin American and Caribbean Countries in Cancun, Mexico in 1998.³² These two Symposia ultimately led to the establishment of the Standing Committee on Copyright and Related Rights (SCCR), a committee mandated to examine harmonization across copyright and related rights.³³ Since then, broadcasters have been battling it out, at least bi-annually in the WIPO headquarters in Geneva, for an international treaty that updates their rights under the International

²⁸ *See id.* at ¶ 15.

²⁹ It is commonly accepted that traditional broadcasters are those providing linear broadcast services via the conventional means of broadcasting, i.e cable, terrestrial, and satellite (basically everything except for pure webcasters).

³⁰ *See Existing International, Regional and National Legislation Concerning the Protection of Rights of Broadcasting Organizations, supra* note 27, at ¶ 4.

³¹ *See WIPO World Symposium, supra* note 26, at 114.

³² *See Existing International, Regional and National Legislation Concerning the Protection of Rights of Broadcasting Organizations, supra* note 27.

³³ *See Standing Committee on Copyright and Related Rights (SCCR)*, WIPO, <http://www.wipo.int/policy/en/sccr/>, <https://perma.cc/EH83-7CRF> (last visited Oct. 12, 2017).

Convention for the Protection of Performers, Producers of Phonograms, and Broadcasting Organizations of 1961 (the Rome Convention).³⁴

III. RIGHTS OF BROADCASTING ORGANIZATIONS UNDER INTERNATIONAL TREATIES

A. Rome Convention

[11] The Rome Convention, which dates back to 1961, is the principal international legal instrument on neighboring rights protecting the rights of performers, phonogram producers, and the broadcasting organizations.³⁵ Article 13 grants broadcasting organizations the right to authorize or prohibit - (a) the rebroadcasting of their broadcasts; (b) the fixation of their broadcasts; (c) the reproduction of their fixation unless permitted by Article 15; and (d) the communication to the public of their television broadcasts, provided such communication is made in places accessible to the public against the payment of an entrance fee.³⁶

[12] The Rome Convention is severely limited in protecting the rights of broadcasting organizations due to its antiquity. First, it provides mandatory protection only to simultaneous broadcasts of broadcasting organizations; leaving optional protection for deferred broadcasts to domestic law, as at that time, recording equipment did not exist.³⁷ However, in contemporary

³⁴ See *Protection of Broadcasting Organizations – Background Brief*, WIPO, <http://www.wipo.int/pressroom/en/briefs/broadcasting.html>, <https://perma.cc/TPA7-4HMY> (last visited Oct. 12, 2017) [hereinafter *Background Brief*].

³⁵ See International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, Oct. 26, 1961, art. 2, 49 U.N.T.S. 43 [hereinafter Rome Convention].

³⁶ See *id.* at art. 13.

³⁷ See Article 3(g) of the Rome Convention defines rebroadcasting as the simultaneous broadcasting by one broadcasting organization of the broadcast of another broadcasting organization. See *id.* at art. 3; see also WIPO, GUIDE TO THE ROME CONVENTION AND TO

times, the making available right (a form of deferred transmission) is a core right of the broadcasting organizations, just like that of the phonogram producers and performers.³⁸ Its importance for performers and phonogram producers was recognized way back in 1996 during the time of the WIPO Performances and Phonograms Treaty (WPPT) and was recently reiterated at the Beijing Treaty for the Audiovisual Performances (BTAP).³⁹

[13] The majority of broadcast piracy takes place online, and without this right, broadcasting organizations cannot sue the pirate independently from the copyright owner in the event of a piracy.⁴⁰ This right becomes all the more important for preventing sports broadcast piracy, which due to the high stakes involved, requires urgent action. It is for this reason that broadcasting organizations have been ardently demanding for this right to be included in the Broadcasters Treaty.⁴¹

[14] Second, the Rome Convention fails to protect unauthorized cable rebroadcasts of other broadcasting organizations, primarily because cable

THE PHONOGRAMS CONVENTION 53 (1981),
http://www.wipo.int/edocs/pubdocs/en/copyright/617/wipo_pub_617.pdf,
<https://perma.cc/S3A5-YGGX> [hereinafter “GUIDE TO THE ROME CONVENTION”].

³⁸ See Catherine Saez, *WIPO Broadcasting Treaty: What Broadcasters Really Want to Protect Their Business From Piracy*, INTELL. PROP. WATCH, Sept. 2, 2017, <https://www.ip-watch.org/2017/02/09/wipo-broadcasting-treaty-broadcasters-really-want-protect-business-piracy/>, <https://perma.cc/4GPT-6UTX>.

³⁹ The making available right for the digital era has been recognized under of Article 8 of the WIPO Copyright Treaty and Article 10 and Article 14 of the WIPO Performances and Phonograms Treaty. See WIPO Copyright Treaty art. 8, Dec. 20, 1996, 2186 U.N.T.S. 121; see also WIPO Performances and Phonograms Treaty art. 10, 14, Dec. 20, 1996, 2186 U.N.T.S. 203.

⁴⁰ See Shyamkrishna Balganes, *The Social Costs of Property Rights in Broadcast (and Cable) Signals*, 22 BERKELEY TECH. L.J. 1303, 1319 (2007).

⁴¹ See *infra* Part IV, A.

was at its infancy during the 1960's.⁴² However, in present times, in many countries, satellite broadcasting is no longer the prevalent form of broadcast technology.⁴³ This means that broadcast piracy can take place through both wire (cable) and wireless (satellite and digital broadcasting) means.⁴⁴ Therefore, to reflect this technological development, protection of broadcasters from piracy is one of the primary rights sought to be granted to broadcasting organizations under the proposed Broadcasters Treaty.⁴⁵

[15] Last, from a legal perspective, the Rome Convention is somewhat redundant, as only signatories to the Berne Convention for the Protection of Literary and Artistic Works (the Berne Convention) or the Universal Copyright Convention (UCC) can become signatories to it.⁴⁶ It is for this

⁴² Article 3(f) of the Rome Convention defines broadcasting as transmission by wireless means for public reception of sounds or of images and sounds. *See also* GUIDE TO THE ROME CONVENTION, *supra* note 37, at 54 (stating that an important omission from Article 13 was the right to control retransmission of the broadcast program by wire.); *Background Brief*, *supra* note 34 (stating that the Rome treaty was drafted at a time when cable was at its infancy and the Internet not even invented.).

⁴³ *See* MICHAEL L. RUSTAD, *U.S. Laws Applicable to International Trade*, in 3-14 COMPUTER CONTRACTS § 14.05 (2017).

⁴⁴ *See id.*

⁴⁵ Clause III(1)(i) of the revised consolidated text grants broadcasting organizations the exclusive right of authorizing the retransmission of their signal to the public by any means. The expression “by any means” is contentious so as to include online signals within its scope or not. Irrespective, there is unanimity amongst the delegates that the proposed treaty should protect unauthorized rebroadcasts, whether by wire (cable) or wireless means. *See* WIPO Standing Committee on Copyright & Rights, *Revised Consolidated Text on Definitions, Object of Protection, Rights to be Grants and Other Issues*, WIPO Doc. SCCR/34/4, ¶ 5 (May 5, 2017).

⁴⁶ *See Summary of the Rome Convention for the Protection of Performers, Producers, of Phonograms and Broadcasting Organizations (1961)*, WIPO, http://www.wipo.int/treaties/en/ip/rome/summary_rome.html, <https://perma.cc/FY3C-F6JV> (last visited Mar. 1, 2018).

reason that it has characteristically less international appeal, with only 93 out of the total 191 WIPO member states as signatories.⁴⁷ There are many WIPO member states such as Afghanistan, the Islamic Republic of Iran, Papua New Guinea, Samoa, and Timor Leste, which are not signatories to either the Berne Convention or the UCC.⁴⁸

[16] Therefore, unless these countries sign up to the Berne Convention or the UCC, they cannot join the Rome Convention.⁴⁹ As a consequence, broadcasting organizations have no legal recourse available to them if their signals are pirated in these countries. Thus, there is an urgent need for a standalone international legal instrument protecting the rights of broadcasting organizations; especially at a time when broadcasters operate in an increasingly borderless world.

B. Brussels Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellites

[17] Chronologically, Brussels Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellites (the Brussels Convention) is the second-in-line international instrument protecting the rights of broadcasting organizations.⁵⁰ It was enacted in 1974. Only satellite broadcasters are the intended beneficiaries under it, making it a limited legal

⁴⁷ See *WIPO-Administered Treaties*, WIPO, http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=17, <https://perma.cc/7524-7T47> (last visited Jan. 6, 2018) (listing contracting parties to the Rome Convention).

⁴⁸ See *id.*

⁴⁹ See Rome Convention, *supra* note 35, at art. 24.

⁵⁰ See Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite, May 21, 1974, 1144 U.N.T.S. 3 [hereinafter Brussels Convention].

instrument for protecting broadcasting organizations against signal piracy.⁵¹ As a matter of fact, signals emitted for the direct reception by the public are not granted any protection whatsoever.⁵² Further, it does not provide any enforcement mechanisms for broadcasting organizations.⁵³ Therefore, it is not surprising that its international appeal is even lesser than that of the Rome Convention; with only 38 out of the total 191 WIPO member states as parties to it.⁵⁴ The most recent instrument protecting the rights of broadcasters is TRIPS.⁵⁵

C. Trade Related Aspects of Intellectual Property Rights

[18] Article 14.3 of the TRIPS Agreement grants broadcasting organizations the right to prohibit the unauthorized - (a) fixation; (b) the reproduction of fixations; (c) the rebroadcasting by wireless means of broadcasts; and (d) the communication to the public of television broadcasts of the same.⁵⁶ However, the WTO member states are not obligated to grant

⁵¹ *See id.* (stating in the Preamble that the Contracting Parties were convinced that there was a need for an international system under which measures for preventing distributors from distributing programme carrying signals transmitted by satellite which were not intended for those distributors).

⁵² *See id.* at art. 3.

⁵³ *See* Judith S. Weinstein, *International Satellite Piracy: The Unauthorized Interception and Retransmission of United States Program-Carrying Satellite Signals in the Caribbean, and Legal Protection for United States Program Owners*, 15 GA. J. INT'L & COMP. L. 1, 16 (1985) (noting that the choice of enforcement mechanisms (either under public or private law) has been left to the discretion of the Contracting States); *see also* David Ladd et. al., *Footprints over the Caribbean: Bringing Program Protection in Step with Satellite Technology*, 1 ENT. & SPORTS L.J. 1, 13 (1984).

⁵⁴ *See* Brussels Convention, *supra* note 50.

⁵⁵ *See* TRIPS Agreement, *supra* note 1, at art. 14.

⁵⁶ *See id.*

these rights to broadcasting organizations provided it protects the underlying content by copyright.⁵⁷ Therefore, in a way, TRIPS grants even less rights to broadcasting organizations as compared to the Rome Convention, which provides for mandatory rights to broadcasting organizations, irrespective of whether the underlying content is protected by copyright law or not.⁵⁸

[19] The non-mandatory nature of this provision has been fiercely criticised by commentators, as it leaves absolutely no scope of protection where the content is not protected by copyright law,⁵⁹ such as sports events or news. Because of this, Article 14.3 is confusing in the sense that it first grants rights to broadcasting organizations, but subsequently nullifies it by making it optional for the WTO member states to grant such rights.⁶⁰ Apart from this gap, Article 14.3 is also severely restricted as it allows broadcasting organizations to prevent unauthorized rebroadcasts only if it takes place by wireless means.⁶¹ This means that WTO member states are not obligated to protect broadcasting organizations against broadcast piracy which takes place via cable. This shortsightedness of TRIPS is a bit odd considering that broadcast piracy via cable was a huge menace, even back in 1990's (when TRIPS was negotiated), as cable was a prevalent form of

⁵⁷ *See id.*

⁵⁸ *Compare id.* (detailing rights granted to broadcasting organizations under TRIPS Agreement), *with* Rome Convention, *supra* note 35, at art. 13 (detailing rights granted to broadcasting organizations under the Rome Convention).

⁵⁹ *See* Wend Wendland, *Broadcasting in the Information Age: The Copyright of Broadcasters in Their Broadcasts*, 114 S. AFRICAN L.J. 304, 315 (1997).

⁶⁰ *See* MEGUMI OGAWA, PROTECTION OF BROADCASTERS' RIGHTS 52 ¶ 3.2.2 (2005).

⁶¹ *See* Wendland, *supra* note 59.

broadcast technology by that time.⁶² This shortsightedness of TRIPS was well conceded by the delegates present at the Manila Symposium.⁶³

[20] The plausible reason for this shortsightedness is that TRIPS was envisioned to be a “minimum standards” treaty which was never meant to update any existing international IP treaty.⁶⁴ TRIPS’s primary focus was on

⁶² See PETER-TOBIAS STOLL ET. AL., WTO - TRADE RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS 298 (Peter-Tobias Stoll et al. eds., 2009); JUSTIN MALBON ET. AL., THE WTO AGREEMENT ON TRADE-RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS 272 ¶ 14.19 (2014); see also J.A.L. STERLING, WORLD COPYRIGHT LAW 863 (3d ed. 2008); Wendland, *supra* note 59; see also David L. Morton, *Broadcast Technology History: 1945-Present*, IEEE BROAD. TECH. SOC’Y, <https://bts.ieee.org/about-bts/broadcast-technology-history-1945-present.html>, <https://perma.cc/5HG6-4WFW> (last visited Mar. 29, 2018) (stating that cable distribution started in the U.S. in 1960’s and 1970’s.); Trent Crawford, *The History and Pioneers of Cable Television*, SEWELL DIRECT, <https://sewelldirect.com/learning-center/pioneers-of-tv>, <https://perma.cc/7T8X-3PPV> (last visited Mar. 29, 2018) (stating that because of the difficulty of some people receiving regular broadcast signals because of geography, cable television first came on the scene during the late 1940’s in a very limited area.).

⁶³ See, e.g., *WIPO World Symposium*, *supra* note 26, at 13–14 (referencing how TRIPS provisions have not been updated to international norms).

⁶⁴ See Helfer, *Adjudicating Copyright Claims Under the TRIPS Agreement* *supra* note 12, at 360 (comparing the larger scope of WTO treaties to TRIPS narrower intentions); see also Dreyfuss & Lowenfeld, *supra* note 12, at 281 (stating that TRIPS negotiators introduced a concept of minimum standards into the TRIPS Agreement); Reichman, *supra* note 12 (discussing generally how TRIPS established universal minimum standards in the area of intellectual property); Reichman & Lange, *supra* note 12, at 12 (stating that TRIPS recognized minimum standards for the enforcement of intellectual property rights within a single national system); Yu, *TRIPS Enforcement Dispute*, *supra* note 12, at 1109 (stating that the WTO panel in U.S.-China dispute under the TRIPS Agreement reminded everyone that TRIPS was a minimum standards agreement); Yu, *TRIPS Discontents*, *supra* note 12, at 388 (stating that the TRIPS Agreement was primarily focused on laying out the minimum standards of intellectual property protection as opposed to describing the different possible IP systems). Cf. Dreyfuss, *supra* note 12, at 27 (stating that the WTO system should start recognizing substantive maxima on the scope of available IP protections); see also Helfer, *Human Rights and Intellectual Property*, *supra* note 12, at 58 (stating the need to articulate “maximum standards” of IP protection

IP enforcement and procedural issues, such as injunctive relief and damages.⁶⁵ Anyway, it would have been very difficult to take up each and every provision of the major international IP treaties.⁶⁶ It is for this reason that during the Uruguay Round negotiations, the delegation of the European Community (EC) expressed that the TRIPS Agreement should not attempt to elaborate rules which would substitute for existing IP treaties, and should not aim for harmonization at national level.⁶⁷ In line with this thought, even though it extensively advocated for the rights of broadcasting organizations, it never proposed the inclusion of cable retransmission rights in the TRIPS Agreement. As a matter of fact, the cable retransmission (rebroadcast) rights of broadcasting organizations was not discussed at all during the Uruguay

because treaties from Berne, Paris, and TRIPS were concerned with articulating “minimum standards”); Okediji, *supra* note 12, at 168 (articulating the need for an international fair use doctrine as a “ceiling”); Sell, *supra* note 12, at 2 (stating that while many countries thought that they were negotiating a ceiling, they realized that they had negotiated only a floor).

⁶⁵ See GATT Secretariat, *Guidelines and Objectives Proposed by the European Community for the Negotiations on Trade Related Aspects of Substantive Standards of Intellectual Property Rights*, GATT Doc. MTN.GNG/NG11/W/26, at ¶ I (July 7, 1989), <https://docs.wto.org/gattdocs/q/UR/GNGNG11/W26.PDF>, <https://perma.cc/XPU4-NHXW> [hereinafter *GATT EC Guidelines and Objectives*]; see also Helfer, *Copyright Claims under the TRIPS Agreement*, *supra* note 12, at 376–77 (stating that as a result of widespread failure to enforce IP in certain countries, industrialized nations sought to bring IP protection with the framework of GATT.); Andreas Rahmatian, *Indirect Sovereignty through Property Rights*, 7 NOTRE DAME J. INT’L COMP. L. 58, 63 (2017) (stating that TRIPS started as an enforcement treaty for ensuring the enforcement of western intellectual property standards on rest of the world especially developing countries.).

⁶⁶ See Thu-Lang Tran Wasescha, *Negotiating for Switzerland*, in THE MAKING OF THE TRIPS AGREEMENT: PERSONAL INSIGHTS FROM THE URUGUAY ROUND NEGOTIATIONS, *supra* note 12, at 168 (stating that it would have been impossible to take up the substantive provisions of the Paris and Berne Convention again.), https://www.wto.org/english/res_e/booksp_e/trips_agree_e/history_of_trips_nego_e.pdf, <https://perma.cc/VB3S-NGRL>.

⁶⁷ See *GATT EC Guidelines and Objectives*, *supra* note 65, at II.

Round negotiations, as it would have meant adopting a Rome-plus approach, which was clearly not on the GATT table.⁶⁸ Even the Australia, Japan, and Hong Kong delegations were of the opinion that Rome Convention standards should be retained for neighboring rights protection.⁶⁹ Therefore, in consonance with this, Mr. Lars Anell, the

⁶⁸ See E-mail from Jagdish Sagar, Intellectual Prop. Practitioner, to author (Nov. 2, 2017, 19:06 IST) (Mr. Jagdish Sagar, the Chief negotiator of India for copyright provisions of TRIPS confirmed that there was no discussion at all on the cable rebroadcast rights of broadcasting organizations during the Uruguay Round negotiations as it was implied that TRIPS should incorporate the Rome Convention standards for the protection of broadcasting organizations); E-mail from Heijo Ruijsenaars, Head of Intellectual Prop., European Broad. Union, to author (June 8, 2017, 17:27 CET) (Heijo Ruijsenaars has been involved in harmonization on the rights of broadcasting organizations at the European Union level. According to him, the cable retransmission rights of broadcasting organizations was never discussed during the Uruguay Round negotiations, as it would have implied a debate on the substance of the Rome Convention which was clearly not on the GATT-TRIPS table); see also Wasescha, *supra* note 66, at 169 (stating that “the TRIPS Agreement did not require a full Rome Convention adherence.”); TRIPS Agreement, *supra* note 1, at arts. 10, 11 (There seems to be an inconsistency in the approach of TRIPS negotiators towards copyright and related rights provisions. On one hand, they were reluctant to adopt a Rome-plus approach for neighboring rights protection while on the other hand, TRIPS does incorporate many Berne-plus and Paris-plus provisions in its copyright and related rights section. Examples of some of these provisions are art. 10, § 1 (mandatory protection for computer programs), art. 10, § 2 (requiring protection for creative selections or arrangements of data), and art. 11 (according rental rights for computer programs, cinematographic works, and sound recordings)). See generally Ralph Oman & Lewis Flacks, *Berne Revision: The Continuing Drama*, 4 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 139, 142 (1993) (describing “Berne Plus” package); Reichman, *supra* note 12, at 370 (describing further “Berne Plus”); Jane C. Ginsburg, *With Untired Spirits and Formal Constancy: Berne Compatibility of Formal Declaratory Measures to Enhance Copyright Title-Searching*, 28 BERKELEY TECH. L.J. 1583, 1600 (2013) (outlining additional Berne-plus approaches).

⁶⁹ See GATT Secretariat, *Standards and Norms for Negotiations on Trade-Related Aspects of Intellectual Property Rights*, GATT Doc. MTN.GNG/NG 11/W/35, at 2 (July 10, 1989), <https://docs.wto.org/gattdocs/q/UR/GNGNG11/W35.PDF>, <https://perma.cc/S6LF-S27D> (outlining the Australian proposal during negotiations); GATT Secretariat, *Meeting of Negotiating Group of 11, 12 and 14 December 1989*, GATT Doc. MTN.GNG/NG11/17, at ¶ 37 (Jan. 23, 1990),

Chairman of the Uruguay Round negotiations on the TRIPS Agreement, advised the WTO member states to provide for neighboring rights protection consistent with the substantive provisions of the Rome Convention, an approach described as Rome-neutral by Professor Sam Ricketson.⁷⁰

[21] It is worthwhile to mention that the Swiss, the Nordic, and the Japanese were plausibly in favor of protecting the unauthorized rebroadcasts of broadcasting organizations by wire, as in their proposals they never qualified the form of technology in which the unauthorized retransmissions (or rebroadcasts) should be made; i.e. whether by wire or wireless means.⁷¹ All they state is that the broadcasting organization shall

<https://docs.wto.org/gattdocs/q/UR/GNGNG11/17.PDF>, <https://perma.cc/SCE2-TXBP> (outlining the proposal from Hong Kong during negotiations); GATT Secretariat, *Synoptic Tables Setting Out Existing International Standards and Proposed Standards and Principles*, MTN.GNG/NG11/W/32/Rev.2, at 25 (Feb. 2, 1990), <https://docs.wto.org/gattdocs/q/UR/GNGNG11/W32R2.PDF>, <https://perma.cc/A896-9CAN> (outlining the Japanese proposal during negotiations).

⁷⁰ See Sam Ricketson, *The Draft Broadcasters' Treaty: Latecomers to International Protection - Or Perhaps None at All* in NEW DEVELOPMENTS IN EU AND INTERNATIONAL COPYRIGHT LAW 87 (Irina A. Stamatoudi ed., 2016); STOLL ET AL., *supra* note 62, at 287; SILKE VON LEWINSKI, INT'L COPYRIGHT L. & POLICY, 298 (2008); see also GATT Secretariat, *Status of Work in the Negotiating Group: Chairman's Report to the GNG*, GATT Doc. MTN.GNG/NG11/W/76, at 15 (July 23, 1990), https://www.wto.org/gatt_docs/English/sulpdf/92110034.pdf, <https://perma.cc/QVQ2-DCRQ>.

⁷¹ See GATT Secretariat, *Draft Amendment to the General Agreement on Tariffs and Trade on the Protection of Trade-Related Intellectual Property Rights: Communication from Switzerland*, GATT Doc. MTN.GNG/NG11/W/73, at 8 (May 14, 1990), <https://docs.wto.org/gattdocs/q/UR/GNGNG11/W73.PDF>, <https://perma.cc/PZ5S-XP3C> [hereinafter *GATT Communication from Switzerland*]; GATT Secretariat, *Proposal by the Nordic Countries for the Negotiations on Standards and Principles for Trade-Related Aspects of Intellectual Property Rights*, GATT Doc. MTN.GNG/NG11/W/36, at 6 (July 10, 1989), <https://docs.wto.org/gattdocs/q/UR/GNGNG11/W36.PDF>, <https://perma.cc/X8XE-YHF4> [hereinafter *Proposal by the Nordic Countries*]; GATT Secretariat, *Submission by Japan: Addendum*, GATT Doc.

have the right to prevent all third parties from rebroadcasting (retransmitting) their broadcast without their consent.⁷² However, their proposals never made their way to the final text, in line with the “minimum standards” treaty principle of the TRIPS Agreement.⁷³ Additionally, it was unlikely that without US leadership, as the primary proponent of the TRIPS Agreement, cable retransmission rights could have been granted to broadcasting organizations at all.

[22] The United States’s disinterest in neighboring rights protection, specifically for sound performers and broadcasting organizations, is hardly unknown.⁷⁴ The United States’s position was that due to the Rome

MTN.GNG/NG11/W/17/Add.1, at 7 (Sept. 23, 1988), <https://docs.wto.org/gattdocs/q/UR/GNGNG11/W17A1.PDF>, <https://perma.cc/62ZP-MRPH> [hereinafter *Submission by Japan*].

⁷² See, *GATT Communication from Switzerland*, *supra* note 71; *Proposal by the Nordic Countries*, *supra* note 71; *Submission by Japan*, *supra* note 71.

⁷³ See Helfer, *Adjudicating Copyright Claims under the TRIPS Agreement*, *supra* note 12, at 360 (discussing the TRIPS minimum standards framework); see also Reichman, *supra* note 12, at 351 (discussing generally how TRIPS established universal minimum standards in the area of intellectual property); Sell, *supra* note 12, at 2 (discussing negotiation by various countries of a “floor” for intellectual property rules).

⁷⁴ The United States’s disinterest in neighboring rights is primarily due to a constitutional impediment which permits Congress only to legislate to protect “writings,” which means that it can only protect the interests of authors. See Malla Pollack, *What is Congress Supposed to Promote?: Defining “Progress” in Article I, Section 8, Clause 8 of the United States Constitution, or Introducing the Progress Clause*, 80 NEB. L. REV. 754, 762–63 (2001) (noting that the Progress clause was aimed at only protecting writings and discoveries); see also Eugen Ulmer, *The Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations*, 10 BULL. COPYRIGHT SOC’Y. U.S.A. 90, 99 (1962) (noting the difficulties existing in the US for signing any agreement on neighboring rights); Laura A. Pitta, *Economic and Moral Rights Under U.S. Copyright Law - Protecting Authors and Producers in the Motion Picture Industry*, 12 ENT. & SPORTS L. 3, 7 (1995) (arguing that the US did not have a need for a neighboring rights doctrine *per se*).

Convention's characteristically less international appeal, there was no need for including neighboring rights in the TRIPS Agreement.⁷⁵ However, the Nordics, the Swiss, and the EC had keen interest in neighboring rights particularly the rights of performers.⁷⁶ Therefore, perhaps with a view to reach a consensus, and due to its keen interest in securing strong protection for sound recordings (phonogram producers), the US subsequently became amenable to neighboring rights protection in the TRIPS Agreement.⁷⁷

[23] It is no secret that the TRIPS negotiations were primarily driven by the US corporate IP interests.⁷⁸ Therefore, it is not far-fetched to say that

⁷⁵ See Julie Chasen Ross & Jessican A. Wasserman, *Trade-Related Aspects of Intellectual Property Rights*, in *THE GATT URUGUAY ROUND: A NEGOTIATING HISTORY (1986-1992)* 2289–90 (Terence P. Stewart ed., 1993).

⁷⁶ *Id.* at 2290.

⁷⁷ See Hannu Wager, *Copyright: A Nordic Perspective*, in *THE MAKING OF THE TRIPS AGREEMENT: PERSONAL INSIGHTS FROM THE URUGUAY ROUND NEGOTIATIONS*, *supra* note 12, at 329 (stating that from early on, the United States sought strong protection for sound recordings), https://www.wto.org/english/res_e/booksp_e/trips_agree_e/history_of_trips_nego_e.pdf, <https://perma.cc/CQF9-AX39>.

⁷⁸ See PETER DRAHOS & JOHN BRAITHWAITE, *INFORMATION FEUDALISM* 64 (2002) (describing the United States's role in the TRIPS Agreement); see also SUSAN K. SELL, *PRIVATE POWER, PUBLIC LAW: THE GLOBALIZATION OF INTELLECTUAL PROPERTY RIGHTS* 96 (2003) (stating in the context of TRIPS that twelve corporations made public law for the world); Catherine Field, *Negotiating for the United States*, in *THE MAKING OF THE TRIPS AGREEMENT: PERSONAL INSIGHTS FROM THE URUGUAY ROUND NEGOTIATIONS*, *supra* note 12, at 129–30 (stating that Congress and private sector groups were key drivers in the US negotiating process for the TRIPS Agreement); Paul J. Heald, *American Corporate Copyright: A Brilliant, Uncoordinated Plan*, 12 *J. INTELL. PROP. L.* 489, 491 (2005) (stating that corporate copyright owners have been driving US foreign policy for years); Ruth L. Okediji, *Public Welfare and the Role of the WTO: Reconsidering the TRIPS Agreement*, 17 *EMORY INT'L L. REV.* 819, 846 (2003) (noting that the negotiation of the TRIPS Agreement was a combination of sub-sets of coalitions of private industry and their respective states); Anne Kalvi, *The Impact of Copyright*

the US would have anyway not pressed for cable retransmission rights unless there would have been an expression of interest in this right from its domestic broadcasting industry. From the available accounts of the Manila Symposium, which time-wise closely followed the TRIPS Agreement, it seems that until 1997, the American broadcasters had not indicated the need for updating the rights of broadcasting organizations at an international level to reflect the technological developments of the time.⁷⁹ It is therefore not surprising that the U.S. delegation was not forthcoming about the inclusion of cable retransmission rights in Article 14.3 of the TRIPS Agreement during the Uruguay Round negotiations.⁸⁰ Had American broadcasters asserted the need for updating their rights at an international level, it is likely that the US would have at least proposed to have a substantive discussion on the merits of this right.

[24] This historical context is important for understanding that the cable retransmission rights of broadcasting organizations were not deliberated at all during the Uruguay Round negotiations as it was clearly not on its agenda. Therefore, any opposition to cable retransmission rights of broadcasting organizations on grounds of its non-inclusion in Article 14.3 is totally misplaced as the international IP community never got an opportunity to discuss about its importance until the 5th SCCR which was held in 2001.⁸¹ At the 5th SCCR, Switzerland and the EC proposed for the

Industries on Copyright Law, 10 JURIDICA INT'L 95, 101 (2005) (stating that the US foreign policy related to copyright industries influenced the TRIPS Agreement).

⁷⁹ *WIPO World Symposium*, *supra* note 26, at 105.

⁸⁰ See generally World Trade Organization (WTO), *Overview: The TRIPS Agreement* (describing the terms included in the TRIPS Agreement, none of which include Cable Remissions), https://www.wto.org/english/tratop_e/trips_e/intel2_e.htm, <https://perma.cc/U62X-7RCQ> (last visited: Mar. 30, 2018).

⁸¹ See WIPO Standing Committee on Copyright & Related Rights, *Report on the Work of its Fifth Session*, WIPO Doc. SCCR/5/6, at ¶ 29 (May 28, 2001), http://www.wipo.int/edocs/mdocs/copyright/en/sccr_5/sccr_5_6-main1.pdf, <https://perma.cc/T34Q-U9TL>.

inclusion of this right in the Broadcasters Treaty and since then, other countries have also reiterated about its importance, to the extent that it is now a non-contentious issue of the revised consolidated text of the Broadcasters Treaty.⁸²

[25] Further, even though Article 14.3 of the TRIPS Agreement failed to take into account cable as a form of broadcast technology, the recent spate of multilateral IP treaties such as the WIPO Internet Treaties and the BTAP

⁸² See WIPO Standing Committee on Copyright & Related Rights, *Protection of the Rights of Broadcasting Organizations: Proposal by the Eastern Republic of Uruguay*, WIPO Doc. SCCR/7/7, at 3 (Apr. 17, 2002), http://www.wipo.int/edocs/mdocs/copyright/en/sccr_7/sccr_7_7.pdf, <https://perma.cc/LGW8-ZDB5>; see also WIPO Standing Committee on Copyright & Related Rights, *Protection of the Rights of Broadcasting Organizations, Protections on the Rights of Broadcasting Organizations: Proposal submitted by the United States of America*, WIPO Doc. SCCR/8/7, at 7 (Oct. 21, 2002), http://www.wipo.int/edocs/mdocs/copyright/en/sccr_8/sccr_8_7.pdf, <https://perma.cc/6NT9-CUNE>; see also WIPO Standing Committee on Copyright & Related Rights, *Proposal on the Legal Protection of Broadcasting Organizations: Proposal submitted by Kenya*, WIPO Doc. SCCR/9/3, at 3–4 (May 1, 2003), http://www.wipo.int/edocs/mdocs/copyright/en/sccr_9/sccr_9_3_rev.pdf, <https://perma.cc/J6DJ-YETD>; see also WIPO Standing Committee on Copyright & Related Rights, *Protection of the Rights of Broadcasting Organizations: Proposal submitted by Canada*, WIPO Doc. SCCR/9/10 (June 20, 2003), http://www.wipo.int/edocs/mdocs/copyright/en/sccr_9/sccr_9_10.pdf, <https://perma.cc/56HU-E653>; see also WIPO Standing Committee on Copyright & Related Rights, *Treaty on the Protection of Broadcasting Organizations and Cablecasting Organizations: Document submitted by Singapore*, WIPO Doc. SCCR/11/12, at 4 (Dec. 26, 2003), http://www.wipo.int/edocs/mdocs/copyright/en/sccr_11/sccr_11_2.pdf, <https://perma.cc/3UVK-R973>; see also WIPO Standing Committee on Copyright & Related Rights, *Revised Consolidated Text on Definitions, Object of Protection and Rights to be Granted*, WIPO Doc. SCCR/33/3, at 4 (Sept. 19, 2016) (providing the latest revised consolidated text), http://www.wipo.int/edocs/mdocs/copyright/en/sccr_33/sccr_33_3.pdf, <https://perma.cc/6LRB-BCY5>.

indicates that TRIPS was the beginning and not an endpoint.⁸³ Therefore, this lack of foresight on the part of TRIPS negotiators should not be a reason for the WIPO member states and the civil society to oppose TRIPS-plus provisions in the proposed Broadcasters Treaty.⁸⁴ Of course, had Article

⁸³ See Susan K. Sell, *TRIPs Was Never Enough: Vertical Forum Shifting, FTAs, ACTA, and TPP*, 18 J. INTEL. PROP. L. 447, 448 (2011).

⁸⁴ Examples of some of these countries include India and Sudan. At the Intergovernmental Committee of the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasters, the Indian delegation, while making a reference to Article 14 of the TRIPS Agreement, expressed that there was no need for updating the rights of broadcasting organizations. See Int'l Convention for the Protection of Performers, Producers of Phonograms, and Broadcasting Organizations (Rome Convention, 1961), *Final Report of the Intergovernmental Comm.*, U.N. Doc. OIT/UNESCA/OMPI/ICR.19/9, at 9–11 (June 28, 2005), <http://unesdoc.unesco.org/images/0014/001405/140583e.pdf>, <https://perma.cc/YX7Q-8YXD>; see also WIPO Standing Committee on Copyright & Related Rights, *Report on the Seventeenth Session*, WIPO Doc. SCCR/17/5, at 26–27 (Mar. 25, 2009), http://www.wipo.int/edocs/mdocs/copyright/en/sccr_17/sccr_17_5.pdf, <https://perma.cc/WC45-Q5S9>; WIPO Standing Committee on Copyright & Related Rights, *Report on the Thirteenth Session*, WIPO Doc. SCCR/14/7, at 10–11 (May 1, 2007) (Indian delegation stating that there was no need to go beyond Article 14.3 of the TRIPS Agreement), http://www.wipo.int/edocs/mdocs/copyright/en/sccr_14/sccr_14_7.pdf, <https://perma.cc/NSF9-5DGW>; WIPO Standing Committee on Copyright & Related Rights, *Draft Report on the Thirty-First Session*, WIPO Doc. SCCR/31/6 PROV., at 33–34 (Feb. 19, 2015), http://www.wipo.int/edocs/mdocs/copyright/en/sccr_31/sccr_31_6.pdf, <https://perma.cc/B7JN-KFL3>. Center for Internet and Society (CIS) is one such civil society which has opposed the Broadcasters Treaty on grounds of sufficiency of Article 14.3 of TRIPS. For CIS's statements, see WIPO Standing Committee on Copyright & Related Rights, *Draft Report on the Twenty-Eighth Session*, WIPO Doc. SCCR/28/3, at 15 (Nov. 8, 2014), http://www.wipo.int/edocs/mdocs/copyright/en/sccr_28/sccr_28_3.pdf, <https://perma.cc/LZ56-FNLR>; WIPO Standing Committee on Copyright & Related Rights, *Report on the Twenty-Second Session*, WIPO Doc. SCCR/22/18, at 45 (Dec. 9, 2011), http://www.wipo.int/edocs/mdocs/copyright/en/sccr_22/sccr_22_18.pdf, <https://perma.cc/66G8-YX5U>; WIPO Standing Committee on Copyright & Related Rights, *Report on the Nineteenth Session*, WIPO Doc. SCCR/19/15, at 40 (June 28,

14.3 of the TRIPS Agreement been futuristic, it would have partially obliterated the need for the Broadcasters Treaty.

IV. THE PROPOSED TREATY FOR THE PROTECTION OF RIGHTS OF BROADCASTING ORGANIZATIONS

[26] Due to the lacuna of the existing international regime for broadcasters rights, broadcasters in both under-developed and developing countries have been facing the brunt of signal piracy. As a matter of fact, broadcasters in under-developed and developing countries suffer the most as they often do not have the economies of scale of their counterparts in more developed countries.⁸⁵ This is corroborated by a 2011 study conducted by the Cable & Satellite Association of Asia (CASBAA), according to which India, a developing country was the biggest loser in the Asia-Pacific region due to signal piracy.⁸⁶ The Government of Philippines (another developing country) recognised this threat way back in 1997 and took the lead in organizing the Manila Symposium for updating the rights of broadcasting organizations under the Rome Convention.⁸⁷ It is since then

2010), http://www.wipo.int/edocs/mdocs/copyright/en/sccr_19/sccr_19_15.pdf, <https://perma.cc/6T7D-DR9W> (stating that Article 14 of the TRIPS Agreement was sufficient to safeguard the interests of broadcasters).

⁸⁵ See Aynon Doyle, Head of Policy Analysis & Research: Regulatory Affairs Department, *Toward a Broadcasting Treaty Dealing with Signal Piracy*, Presentation at African Ministerial Conference 2015: Intellectual Property for an Emerging Africa, at 11 (Nov. 2015), http://www.wipo.int/edocs/mdocs/africa/en/ompi_pi_dak_15/ompi_pi_dak_15_cluster_ii_9.pdf, <https://perma.cc/7JR7-MCF7>.

⁸⁶ See WIPO Standing Committee on Copyright & Related Rights, *Report adopted by the Committee*, WIPO Doc. SCCR/23/10, at 98 (July 20, 2012), http://www.wipo.int/edocs/mdocs/copyright/en/sccr_23/sccr_23_10.pdf, <https://perma.cc/5RLU-635K>.

⁸⁷ See *supra* text accompanying Part II (B).

that the Broadcasters Treaty has been on the agenda of the SCCR.⁸⁸ Within the precincts of WIPO, no other IP treaty has witnessed such protracted negotiations as the Broadcasters Treaty. Until recently, the primary reason for these protracted negotiations has been an ambiguity over the beneficiaries of the treaty and an absence of consensus on key provisions of the definitions, the object of protection and the rights to be granted.⁸⁹ At the 35th session of the SCCR, most of the key issues were resolved.⁹⁰ The primary outstanding issues which require further work of the committee are post-fixation rights in the form of deferred transmissions and on limitations

⁸⁸ See *Broadcasting Organizations*, WIPO (last visited Mar. 30, 2018), <http://www.wipo.int/copyright/en/activities/broadcast.html>.

⁸⁹ The Mandate of the 2007 WIPO General Assembly clarified that the scope of the Treaty was restricted to traditional broadcasting and cablecasting organizations which was meant to exclude entities transmitting content solely via computer networks or internet. For the mandate, see WIPO General Assembly, *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 Orgs.*, WIPO Doc. WO/GA/34/8 (July 23 2007), http://www.wipo.int/edocs/mdocs/govbody/en/wo_ga_34/wo_ga_34_8.pdf, <https://perma.cc/YFX8-ETM5>; see also WIPO Standing Committee on Copyright & Related Rights, *Draft Report on the Thirty-First Session*, WIPO Doc. SCCR/31/6 PROV., at 37 (Feb. 19, 2015) (US delegation stating that the exclusion of webcasters from the proposed treaty was widely accepted by all delegations), http://www.wipo.int/edocs/mdocs/copyright/en/sccr_31/sccr_31_6.pdf, <https://perma.cc/3XT7-ZP7A>. Prior to the 35th SCCR, there was no consensus on the definition of broadcasting and whether protection should be granted to deferred transmissions (including online signals) and the pre-broadcast signal of broadcasting organizations. See WIPO Standing Committee on Copyright and Related Rights, *Revised Consolidated Text on Definitions, Object of Protection, Rights to be Granted and Other Issues*, WIPO Doc. SCCR/34/4 (May 5, 2017), http://www.wipo.int/edocs/mdocs/copyright/en/sccr_34/sccr_34_4.pdf, <https://perma.cc/Z4GN-U5SD>.

⁹⁰ Since the majority of the substantive discussions took place in informals, the author is not in a position to comment on it. *But see* WIPO Standing Committee on Copyright & Related Rights, *Draft Report on the Thirty-Fifth Session*, WIPO Doc. SCCR/35/11 (Dec. 5, 2017).

and exceptions (L&E's) to the Broadcasters Treaty:

A. Post Fixation Rights

[27] Post-fixation rights are the rights to control the subsequent usage of the content after its initial broadcast by the broadcasting organizations.⁹¹ It is proposed to be granted in the form of deferred transmissions (including the making available right) in the latest version of the revised consolidated text, though there is still no consensus about its inclusion.⁹² Critics of the Broadcasters Treaty, notably civil society groups, have vehemently opposed the inclusion of post-fixation rights on grounds that it impeded access to public domain material or where a legitimate fair-use argument could be made.⁹³ Even some delegations such as India were, until recently, against post-fixation rights.⁹⁴

⁹¹ See WIPO Standing Committee on Copyright & Related Rights, *The WIPO Treaty on the Protection of Broadcasting Organizations* ¶¶ 23–25, WIPO Doc. 6 SCCR/17/INF/1 (Nov. 3, 2008).

⁹² See WIPO Standing Committee on Copyright & Related Rights, *Revised Consolidated Text on Definitions, Object of Protection, Rights to be Granted and Other Issues*, WIPO Doc. SCCR/34/4, at 5 (May 5, 2017) (Clause (1) (ii) of the Rights to be Granted Section provides that broadcasting and cablecasting organizations (subject to consensus of the SCCR) shall have the exclusive right of authorizing the retransmission of their programming-carrying signal to the public by any means (subject to consensus)).

⁹³ Jeremy Malcolm, *The Danger of New Post-Fixation Rights in the WIPO Broadcasting Treaty*, ELEC. FRONTIER FOUND. (Dec. 9, 2014), <https://www.eff.org/deeplinks/2014/12/danger-post-fixation-rights-wipo-broadcasting-treaty>, <https://perma.cc/A92C-K653>. See also WIPO Standing Committee on Copyright & Related Rights, *Report on the Thirty-First Session*, WIPO Doc. SCCR/31/6, at ¶ 213 (Feb. 19, 2015) (Representative of Knowledge Ecology International proposing that it was inappropriate to have a making available right in the Treaty as it was associated with content), and WIPO Standing Committee on Copyright & Related Rights, *Report on the Twenty-Second Session*, WIPO Doc. SCCR/22/18, at ¶ 266 (Dec. 9, 2011).

⁹⁴ See WIPO Standing Committee on Copyright & Related Rights, *Report on the Thirtieth Session*, WIPO Doc. SCCR/30/8, at ¶ 51 (Sept. 14, 2015) (Delegation of India expressing that no post-fixation rights should be provided under the Treaty and that the

[28] This concern of the civil society groups, though well-founded, is conceptually flawed as it confuses the use of the signal with the use of the content.⁹⁵ Anybody is free to take and use the public domain material from the same source as the broadcaster did.⁹⁶ For example, suppose that the copyright in the movie *The Little Mermaid* is held by Walt Disney and ABC has the broadcasting rights to it. After the expiration of the copyright term, the movie will fall into the public domain. Any third party will be able to freely use the movie once it has fallen into the public domain. However, for using only the broadcast of the movie such as that may be made available on a broadcaster's video on demand (VOD) or catch-up service, a user would have to gain legitimate access to the broadcast (perhaps by paying a fee). The Broadcasters Treaty cannot and will not restrict the access to the movie, once it falls into public domain.

[29] Further, in conformity with the mandate of the 2007 WIPO General Assembly, the SCCR is obligated to finalize a single draft text on “objectives, specific scope and object of protection” strictly on a “signal-based approach”.⁹⁷ This means that the Broadcasters Treaty cannot grant rights to broadcasting organizations in the underlying content as it belongs to the rightsholder. The rights in the underlying content is purely a contractual issue between the broadcaster and the content rightsholder,

scope of protection should cover only signal protection); *see also* WIPO Standing Committee on Copyright & Related Rights, *Report on the Twenty-Ninth Session*, WIPO Doc. SCCR/29/5, at ¶ 33 (June 11, 2015).

⁹⁵ *But see* Malcolm, *supra* note 93.

⁹⁶ *But see* WIPO Standing Committee on Copyright & Related Rights, *Report on the Twenty-Second Session*, WIPO Doc. SCCR/22/18, at ¶ 266 (Dec. 9, 2011).

⁹⁷ WIPO Gen. Assembly, *Report on the Special Session 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, ¶ 2(iv) (July 23, 2007).

which has nothing to do with the Broadcasters Treaty.⁹⁸ Content rightsholders may grant limited rights in the underlying content to broadcasters in the form of the making available right.⁹⁹ As a matter of fact, this is a standard industry practice.¹⁰⁰

[30] The making available right is a core right of broadcasters in this present day, fast-paced world where audiences demand that they should be able to watch their favorite programs at a time and at a place individually chosen by them rather than watching it on a certain day and at a certain time (also known as linear programming).¹⁰¹ To fulfill this demand, broadcasters worldwide are shifting from linear programming to non-linear services such as video on demand (VOD) and catch-up services.¹⁰² It is in recognition of

⁹⁸ See WIPO, *Report on the Twenty-Second Session*, *supra* note 96, at ¶ 493.

⁹⁹ *See id.*

¹⁰⁰ *Protecting Broadcasters in the Digital Age*, WIPO MAG. (April 2013), http://www.wipo.int/wipo_magazine/en/2013/02/article_0001.html, <https://perma.cc/2PLL-X9X3>.

¹⁰¹ *Id.*

¹⁰² *The Future of Broadcasting V: The Search for Fundamental Growth*, ACCENTURE 16 (2016), https://www.accenture.com/t20170411T172611Z_w_/us-en/_acnmedia/Accenture/next-gen/pulse-of-media/pdf/Accenture_Future_of_Broadcast_V_POV.pdf, <https://perma.cc/7RVQ-JVXW>. In the media industry, there is a difference between Video-on-demand (VOD) and catch-up TV even though the two are generally considered to be the same. VOD allows viewers to listen/watch audio and video content such as TV programs at a time and place convenient to them. While catch-up TV allows viewers to record shows which they may have missed, there may be a time element associated with a catch-up service. For example, a particular TV show may not be available on the catch-up TV after 15 days from its date of original broadcast. There is no consensus amongst the delegations on the form of deferred transmissions (which includes VOD, catch-up service, highlights, previews, and other forms of delayed transmissions) which should be protected under the Treaty. For a discussion of the difference between VOD and catch-up service, see Naomi Havergal, *The Difference Between on Demand and Catch-up TV*, DIGITAL T.V., Dec. 16,

its importance that copyright owners often grant the making available right to broadcasting organizations in the broadcast license agreements. As suggested by certain delegations, the Broadcasters Treaty will not and cannot grant the making available right to broadcasters as it is purely a contractual issue between the content rightsholders and the broadcaster.¹⁰³ The aim of including the making available right in the Broadcasters Treaty is only to reinforce that a broadcaster has an independent right to sue the pirate from the copyright owner just in case there is an unauthorized use of the broadcast. Broadcast piracy requires swift legal action much swifter than in other areas of copyright infringement.¹⁰⁴

[31] In reality, an immediate court action (within hours) is almost always necessary after the broadcast piracy is discovered, specifically in the case of sports events which have a very short shelf life or in the event when a threat of piracy is discovered (e.g. announcement that a certain broadcast will soon be made available).¹⁰⁵ In such cases, the broadcaster whose signal is pirated is the one most directly affected and waiting for the content rightsholder to take legal action may be impractical as they may be far away, in other time-zones of the world. Further, they may even be disinterested in taking legal action as in most cases they may have already received the license fee for the broadcast. Lastly, where multiple content right holders are involved, such as in the case of piracy of individual programmes, it would be unrealistic to expect all of them to be get involved and coordinate

2014, <http://www.digital-tv.co.uk/news-and-feature3s/the-difference-between-on-demand-and-catch-up-tv>, <https://perma.cc/97CX-C6NQ>.

¹⁰³ The author cannot pinpoint the name of the delegations, as this was discussed during the informal sessions of the 35th SCCR. See WIPO MAG., *supra* note 100.

¹⁰⁴ The author is extremely grateful to Heijo Ruijsenaars, Head of Intellectual Property, European Broadcasting Union for helping in writing this section of the paper.

¹⁰⁵ See Philip Hunter, *Operators Wake Up to Booming Live Sports Piracy*, BROAD. BRIDGE (Apr. 18, 2015 12:10 PM), <https://www.thebroadcastbridge.com/content/entry/2605/operators-wake-up-to-booming-live-sports-piracy>, <https://perma.cc/JQ95-RQC9>.

themselves in the court proceedings, which will anyway increase costs and slow down the proceedings. It is therefore extremely important that broadcasters have an independent right to sue the pirate. This becomes all the more important for sports and news events, where an urgent action is absolutely imperative since there is anyway no copyright protection in the underlying content.¹⁰⁶ Therefore, relying on content protection (and content rightsholders) is an unrealistic option.

[32] Most unauthorized use of broadcasts takes place online.¹⁰⁷ The online broadcast piracy threat was recognized way back in 1997 at the Manila Symposium and has ever since increased, with the growing ease of copying and new redistribution technologies.¹⁰⁸ Therefore, it is extremely important that this right is recognized in the Broadcasters Treaty as it would send a strong message to the outside world that broadcast piracy cannot be condoned. If this legitimate right of broadcasters is denied, they will have no intrinsic incentive for the production of these broadcasts. This would first hit sports events, as these programs (events) are most badly affected by online piracy followed by other broadcasts.¹⁰⁹ This will have a deleterious effect as the public will no longer respect neighboring rights protection in broadcast production, which will lead to a devaluation of copyright in general which is overall not a positive sign for the entire copyright community.

¹⁰⁶ See Benjamin Beck & Konstantin von Werder, *Live-Streaming Apps and Sporting Events – Copyright Law Concerns*, MAYER BROWN: ALL ABOUT IP, Aug. 26, 2015, <https://www.allaboutipblog.com/2015/08/live-streaming-apps-and-sporting-events-copyright-law-concerns/>, <https://perma.cc/5D62-PBH6>.

¹⁰⁷ See, e.g., Hunter, *supra* note 105.

¹⁰⁸ See *WIPO World Symposium*, *supra* note 26, at 93.

¹⁰⁹ See Mark Zeigler, *Piracy: Sports leagues' biggest problem?*, SAN DIEGO UNION-TRIBUNE (Dec. 20, 2013, 6:00 AM), <http://www.sandiegouniontribune.com/sports/chargers/sdut-nfl-mlb-world-cup-chargers-congress-ncaa-nhl-2013dec30-story.html>, <https://perma.cc/4PVQ-LWUL>.

[33] The Broadcasters Treaty is politically and legally redundant without the “making-available right,” as it is a core right of the other WIPO treaties such as the WCT, WPPT and the BTAP.¹¹⁰ Performers were granted this right under Article 10 of the WPPT and the BTAP while phonogram producers were granted this right under Article 14 of the WPPT.¹¹¹ The international copyright community has no valid reason to justify a different treatment for broadcasters considering that its importance was recognized way back in 1996 in the WIPO Internet Treaties.¹¹² If the other neighboring rights holders, such as performers and phonogram producers, were granted this right, why should broadcasters be left out? This would lead to an anomaly, which would be impossible to explain to future generations dealing with international copyright law. Therefore, to maintain a parity between all the categories of the neighboring rightholders (i.e performers, phonogram producers and broadcasting organizations), it is important that broadcasters are granted the making available right in the Broadcasters Treaty.

B. Limitations and Exceptions to the Broadcasters Treaty

[34] Many under-developed and developing countries, notably India, Indonesia, and Iran, and civil society groups have emphasised upon the need for robust limitations and exceptions to the Broadcasters Treaty.¹¹³ At the

¹¹⁰ See WIPO Copyright Treaty, *supra* note 39, at arts. 6, 8; see also WIPO Performances and Phonograms Treaty arts. 8, 10, 14, 19, Dec. 20, 1996, S. TREATY DOC. No. 105-17, 36 I.L.M. 78 (1997) [hereinafter WPPT]; Beijing Treaty on Audiovisual Performances, arts. 8, 10, June 24, 2012, 51 I.L.M. 1214 [hereinafter BTAP].

¹¹¹ See WPPT, *supra* note 110, at art. 10, art. 14; see also BTAP, *supra* note 110.

¹¹² See WPPT, *supra* note 110, at art. 19.

¹¹³ See WIPO Standing Committee on Copyright and Related Rights, *Report on the Thirty-Third Session*, WIPO Doc. SCCR/33/7, ¶ 29 (February 1, 2017) (expressing on behalf of the Asia-Pacific Group that it was committed to working to achieve a balanced text, cognizant of interests and priorities of all stakeholders.); see also WIPO Standing Committee on Copyright & Related Rights, *Report on the Thirty-First Session*, WIPO Doc. SCCR/31/6 PROV, at ¶ 39 (Feb. 19, 2015) (expressing that the Treaty should

35th SCCR, the delegations of Argentina, Brazil, and Chile also proposed to

provide exceptions for the protection in case of private use, use of short excerpts in connection with the reporting of current events, use solely for education and scientific research, and ephemeral fixation by a broadcasting organization, using its facilities and for its own broadcasts); *see also* WIPO Standing Committee on Copyright & Related Rights, *Report on the Thirtieth Session*, WIPO Doc. SCCR/30/6, at ¶ 51 (Sept. 14, 2015) (proposing that the Treaty should provide for exceptions for private use, use of short excerpts in connection with the reporting of current events, use solely for education and scientific research, and the fixation of broadcasting by means of its own facilities and for its own broadcasts); *see also* WIPO Standing Committee on Copyright & Related Rights, *Report on the Thirtieth Session*, WIPO Doc. SCCR/30/6, at ¶ 67 (Sept. 14, 2015) (proposing that there should be exceptions for public purposes); *see also* WIPO Standing Committee on Copyright & Related Rights, *Report on the Twenty-Ninth Session*, WIPO Doc. SCCR/29/5, at ¶ 33 (June 11, 2015) (proposing that the Treaty should provide for exceptions and limitations in the case of private use, use of short excerpts in connection with the reporting of current events and use for purposes of education and scientific research); *see also* WIPO Standing Committee on Copyright & Related Rights, *Report on the Thirty-Third Session*, WIPO Doc. SCCR/33/7, at ¶ 40 (Feb 1, 2017) (expressing that intellectual property rights of broadcast was a developmental issue that required careful balancing); *see also* WIPO Standing Committee on Copyright & Related Rights, *Report on the Thirty-Third Session*, WIPO Doc. SCCR/33/7, at ¶ 42 (Feb 1, 2017) (Delegation of Argentina expressing that the Committee should make progress on exceptions and limitations towards a future treaty as it will offer a solution to concerns expressed by Delegations such as Indonesia and Iran over access to education and information); *see also* WIPO Standing Committee on Copyright & Related Rights, *Report on the Thirty-First Session*, WIPO Doc. SCCR/31/6 PROV., at ¶ 156 (Feb. 19, 2015) (Delegation of Sudan expressing that it was important for the Treaty to accommodate exceptions and limitations in national legislation); *see also* WIPO Standing Committee on Copyright & Related Rights, *Report on the Thirtieth Session*, WIPO Doc. SCCR/30/6, at ¶ 58 (Sept. 14, 2015) (Delegation of South Africa expressing that the Treaty should provide for some exceptions such as for the use of short excerpts for the reporting of current events and for the purpose of education or scientific research and so forth); *see also* WIPO Standing Committee on Copyright & Related Rights, *Report on the Thirty-Third Session*, WIPO Doc. SCCR/33/7, at ¶ 65 (Feb 1, 2017) (International Federation of Library Associations and Institutions expressing that the Committee should discuss limitations and exceptions which should be full, robust and ideally mandatory); *see also* WIPO Standing Committee on Copyright & Related Rights, *Report on the Twenty-Fifth Session*, WIPO Doc. SCCR/25/3 PROV., at ¶ 91 (Jan. 23, 2013) (Center for Internet and Society expressing that limitations and exceptions to the Treaty were of great importance in light of the WIPO Development Agenda).

advance discussions on limitations and exceptions to the Broadcasters Treaty.¹¹⁴ The first sub-clause of this proposal closely follows Article 13 (1) of the BTAP, as it provides flexibility to contracting parties to provide for the same limitations and exceptions to the Broadcasters Treaty as they provide, in their national legislation, in connection with the protection of copyright in literary and artistic works in accordance with the internationally recognized Berne three-step test.¹¹⁵ The second sub-clause differs from the limitation and exception provisions of the other WIPO copyright treaties such as the WIPO Internet Treaties and the BTAP as it enumerates specific uses of the protected broadcast which may be permitted.¹¹⁶ Some of these permitted uses include : (a) private use (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) 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.¹¹⁷

[35] It is here where a legal impediment crops up, as limitations and exceptions for broadcasting organizations are entirely dependent upon the limitations and exceptions for the use of the broadcast content. For example, if the Broadcasters Treaty makes an exception for certain uses by libraries but a member state's copyright legislation does not provide for this exception, the library will not be able to use the broadcast because the use

¹¹⁴ See WIPO Standing Committee on Copyright & Related Rights, *Broadcasting Limitations and Exceptions: Proposal to Advance Discussions*, WIPO Doc. SCCR/35/10 (Nov. 15, 2017).

¹¹⁵ See *id.*

¹¹⁶ See *id.*

¹¹⁷ *Id.*

of the underlying content can still be prohibited by the copyright owner, which would render the said exception for the broadcast useless. This is also true for the exception for allowing access to the broadcast signal to impaired persons.¹¹⁸ If the national copyright law does not have an identical exception for allowing access to the underlying content for impaired persons, the exception to the broadcast signal would be ineffectual. To avoid this anomaly, the limitations and exceptions for the broadcast signal should be contemporaneous with the limitations and exceptions for the underlying content. Therefore, the language of the WIPO Internet Treaties and the BTAP on the limitations and exceptions would be ideal as it is an established international precedent which provides flexibility to countries to provide for limitations and exceptions in accordance with the Berne three-step test.¹¹⁹ This will ensure that the rights of all the stakeholders viz. users, libraries and archives, educational institutes and copyright owners etc. are taken into account.

[36] In under-developed and developing countries, traditional broadcasting (especially public service broadcasting) is the primary means of mass communication specifically for reaching out to remote areas due to low-internet penetration rate.¹²⁰ Their very survival is at threat due to

¹¹⁸ See *Broadcasting Limitations and Exceptions*, *supra* note 114.

¹¹⁹ See WPPT, *supra* note 110, at art. 16; WIPO Copyright Treaty, *supra* note 39, at art. 10; BTAP, *supra* note 110, at art. 13. This is also in sync with South Africa's proposal providing that countries should be flexible to provide L & E's in their national legislation, See Standing Comm. on Copyright and Related Rights, Rep. on Its Twenty-Second Session, WIPO SCCR/22/18, at ¶ 252 (Dec. 8, 2011), http://www.wipo.int/edocs/mdocs/copyright/en/sccr_22/sccr_22_18.pdf, <https://perma.cc/BA4L-7UQ8>; See also WIPO Standing Committee on Copyright & Related Rights, *Report on the Twenty-Second Session*, WIPO Doc. SCCR/22/18, at ¶ 249 (Jun. 15-24, 2011) (Delegation of Canada recalling its 2007 proposal, proposing that the limitations and exceptions to the Treaty should be in accordance with the TRIPS Agreement which provided countries flexibility to provide for limitations and exceptions in their national legislation after fulfilling the Berne three-step test.).

¹²⁰ See WIPO Standing Committee on Copyright & Related Rights, *Report on the Twenty-Third Session*, WIPO Doc. SCCR/33/7, at ¶ 40 (Feb. 1, 2017) (Delegation of

rampant signal piracy.¹²¹ “Revenue generated by traditional broadcasters is directly proportionate to their ability to invest in the development and procurement of quality content,” a harbinger of every informed society.¹²² If the legitimate and justified rights of these broadcasters are derogated from, it will severely impede their ability to provide quality programming. Even though broadcasters can use anti-piracy techniques such as geo-blocking to prevent signal piracy, these techniques are expensive and potentially out of reach of public service broadcasters (PSB) while the cost

Indonesia stating that traditional broadcasting remained a central mechanism for access to information, knowledge, and culture in developing countries such as Indonesia which had lot of remote islands and areas, heavily reliant on traditional broadcasting for access to information.); *see also* WIPO Standing Committee on Copyright & Related Rights, *Report on the Twenty-Second Session*, WIPO Doc. SCCR/22/18, at ¶ 263 (Dec. 9, 2011) (Delegation of Cameroon noting that radio broadcasts were very widely used including in remote parts of the country). For the importance of public service broadcasting in developing countries, *see* Pieter J. Fourie, *The Future of Public Service Broadcasting in South Africa: The Need to Return to Basic Principles*, 29 COMMUNICATIO 148, 149 (2003) (emphasizing upon the need for a strong public service broadcaster in South Africa for fulfilling its developmental needs); *see also* Carter Eltzroth, *Broadcasting in Developing Countries: Elements of a Conceptual Framework for Reform*, 3 MASS. INST. TECH. INFO. TECH. & INT’L DEV. 19 (2006) (outlining the broadcasting’s potential in alleviating poverty and advancing development throughout the world). For a developing country such as India, the internet penetration rate in 2016 stood at 34.8%. *See India Internet Users*, INTERNET LIVE STATS, <http://www.internetlivestats.com/internet-users/india/>, <https://perma.cc/QN2F-QZ6T> (last visited Feb. 28, 2018).

¹²¹ *See* WIPO Standing Committee on Copyright & Related Rights, *Report on the Twenty-Second Session*, WIPO Doc. SCCR/22/18, at ¶ 263 (Dec. 9, 2011), http://www.wipo.int/edocs/mdocs/copyright/en/sccr_22/sccr_22_18.pdf, <https://perma.cc/TUT9-P35C> (Delegation of Cameroon noting that signal piracy was a very serious problem which in the long term could compromise the very existence of broadcasting organizations).

¹²² Seemantani Sharma, *India and the Proposed Treaty for the Protection of Broadcasting Organisations*, 52 ECON. & POL. WKLY. 65, 71 (Nov. 11, 2017).

of piracy in some developing countries remains as low as USD 20.¹²³ At a time when PSBs in developing countries are facing a financial crunch, a better utilization of funds would be on producing quality content rather than spending scarce resources on anti-piracy techniques.¹²⁴ Therefore, the civil society and developing countries should not oppose the Broadcasters Treaty (or for that matter any other international copyright treaty) merely due to its TRIPS-plus nature.¹²⁵ This is especially when a small but a growing body of literature supports heightened copyright protection for boosting local

¹²³ This is an estimated cost of assembling a dish, a receiver and a decoder by pirates in India. See Rajesh S. Kurup, *Satellite Piracy Sends Strong Signals to India*, BUS. STANDARD, http://www.business-standard.com/article/technology/satellite-piracy-sends-strong-signals-to-india-109060900070_1.html, <https://perma.cc/9QGD-FWCS> (last updated Jan. 20, 2013, 21: 33 IST).

¹²⁴ Prasar Bharati, India's public service broadcaster, has recently faced budget cuts. See Harveen Ahluwalia, *Govt Cuts Grants for Prasar Bharati*, LIVE MINT (Apr. 13, 2016 08: 29 PM IST), <http://www.livemint.com/Politics/l63iik8Nq1qnEAsdbupUJI/Govt-cuts-grants-for-Prasar-Bharati.html>, <https://perma.cc/4HNNH-XH69>. As a matter of fact, even in developed countries such as US and Denmark, public broadcasters may face budget cuts. See Brian Naylor, *Trump's Budget Plan Cuts Funding for Arts, Humanities and Public Media*, NATIONAL PUBLIC RADIO (Mar. 16, 2017, 3:02 PM ET), <https://www.npr.org/2017/03/16/520401246/trumps-budget-plan-cuts-funding-for-arts-humanities-and-public-media>, <https://perma.cc/86C3-RD4V> (last visited Feb. 27, 2018); see also *Public Service Broadcasting Under Threat*, MY NEWS DESK (Jan. 10, 2018, 12:44 CET), http://www.mynewsdesk.com/se/utbildningsradio/pressreleases/public-service-broadcasting-under-threat-2367768?utm_source=rss&utm_medium=rss&utm_campaign=Alert&utm_content=press-release, <https://perma.cc/7FW5-L9S6> (last visited Feb. 27, 2018) (stating that Denmark's public service broadcaster Danish Broadcasting Corporation was under threat of budget cuts by at least 25%).

¹²⁵ For the importance of the Broadcasters Treaty for a developing country such as India, See Seemantani Sharma, *India Needs to Urgently Endorse a Strong Broadcasters Treaty*, THE WIRE, Dec. 11, 2016, <https://thewire.in/86022/india-broadcasters-treaty/>, <https://perma.cc/QNY2-FEYN> (last visited Feb. 27, 2018).

creativity in developing countries.¹²⁶ Of course, one may argue that since broadcasters are related rights owners and not copyright owners, these studies have limited applicability to broadcasters' rights.¹²⁷

[37] However, this ignores the fact that broadcasting (which includes radio and television) is one of the core copyright industries where its total economic contribution to copyright industries in certain developing countries, such as Jamaica, has been as high as 12.3% of the total copyright industry.¹²⁸ Therefore, developing countries should not shun the Broadcasters Treaty without undertaking a realistic assessment of its

¹²⁶ For a glimpse into these studies, *see generally* Keith E. Maskus, *Strengthening Intellectual Property Rights in Lebanon*, in *CATCHING UP WITH THE COMPETITION: TRADE OPPORTUNITIES AND CHALLENGES FOR ARAB COUNTRIES* 251–81 (Bernard M. Hoekman & Jamel Zarrouk eds., 2000) (arguing that copyright protection was beneficial to local creative industries in Lebanon); *see also* Mark Schultz & Alec van Gelder, *Creative Development: Helping Poor Countries by Building Creative Industries*, 97 *KY. L.J.* 79, 81 (2008) (elucidating the role of a robust copyright regime for boosting Africa's commercial music industry); TARJA KOSKINEN-OLSSON, WIPO, *Study on Collective Negotiation of Rights and Collective Management of Rights in the Audiovisual Sector*, WIPO Doc. CDIP/14/INF/2, at 35 (2014), http://www.wipo.int/edocs/mdocs/mdocs/en/cdip_14/cdip_14_inf_2.pdf, <https://perma.cc/24E5-DZD6> (arguing that in Kenya, the granting of digital rights as provided under the WIPO Internet treaties had the potential to benefit stakeholders in the audiovisual industries and enable effective use of IP rights in the network environment).

¹²⁷ Either way, related rights are similar to copyright except that their scope is limited. *See* WIPO, *GUIDE ON SURVEYING THE ECONOMIC COPYRIGHT OF THE COPYRIGHT INDUSTRIES* 26 (2015), http://www.wipo.int/edocs/pubdocs/en/copyright/893/wipo_pub_893.pdf, <https://perma.cc/JE4M-NKM3> (last visited 28 Feb., 2018).

¹²⁸ According to WIPO, core copyright industries are those “which are wholly engaged in the creation, production and manufacture, performance, broadcasting, communication and exhibition, or distribution and sale of works and other protected subject matter.” *Id.* at 51. Television and radio broadcasting contributed US \$57.3 million or 12.3% of the total copyright sector to Jamaica's economy. *See WIPO Commissioned Study on the Contribution of the Copyright-Based Industries to the Economy of Jamaica*, JAMAICAN INT'L PROP. OFF. (June 6, 2010, 16:33), <http://www.jipo.gov.jm/node/116>, <https://perma.cc/V3W7-QEAG>.

perceived benefits for its local broadcasting industry, which is closely tied to other copyright based industries such as the audio-visual sector.¹²⁹

V. CONCLUSION

[38] The Broadcasters Treaty is the only international IP treaty till date which is devoid of the classical North-South divergences.¹³⁰ Broadcasters worldwide employ the same technology though their scale may vary and by that virtue, they meet the same fate at the hands of pirates. Just like time and tide waits for no one, so does technology. In coming times, countries which do not have a robust traditional broadcasting system will have no option but to rely on internet enabled means of mass communication such as over-the-top (OTT) services.¹³¹ Due to the existing digital divide, the knowledge gap will deepen as countries with limited or slow internet access will remain bereft of these alternative forms of mass communication. Therefore, opposition to the Broadcasters Treaty on its unsuitability for developing countries considering its TRIPS-plus nature is meritless and especially so when Rome-plus provisions related to broadcasters rights were never discussed during the Uruguay round negotiations. The international IP community has already spent twenty years discussing in-depth the key provisions of the Broadcasters Treaty.¹³² Any further delay by excessively

¹²⁹ See Robert M. Sherwood, *Some Things Cannot Be Legislated*, 10 CARDOZO J. INT'L. & COMP. L. 37, 39 (2002) (stating that academics and policy makers in developing countries often tend to condemn higher levels of IP protection without considering the benefits to local industry and commerce).

¹³⁰ See Seemantani Sharma, *India and the WIPO Broadcasters Treaty: Past Position & Future*, INNOVATION, IP, TECH. & L. BLOG (May 4, 2016), <https://seemantanisharma.com>, <https://perma.cc/2UKW-7G4B>.

¹³¹ See Christopher A. H. Vollmer, *2016 Entertainment & Media Industry Trends*, STRATEGY&, <https://www.strategyand.pwc.com>, <https://perma.cc/7YJQ-TKB3> (last visited Feb. 28, 2016).

¹³² See Catherine Saez, *Potential Treaty to Protect Broadcaster's IP Rights: Technicalities Explained*, INTELL. PROP. WATCH, Aug. 2, 2017, <https://www.ip->

mulling over TRIPS (a minimum standards treaty) will impede the *raison d'etre* of the Broadcasters Treaty as traditional broadcasters; the key beneficiaries of the treaty are already dying a slow death. Therefore, in the interest of time, WIPO member states should urgently and widely endorse the Broadcasters Treaty, especially when multilateralism in international IP law making is at threat.¹³³

watch.org/2017/02/08/potential-treaty-protect-broadcasters-ip-rights-technicalities-explained/, <https://perma.cc/3Y39-ETUR>.

¹³³ See Francis Curry, Director Gen., WIPO, Opening Remarks at the WIPO Int'l Conference on Intellectual Property and Genetic Resources and Traditional Knowledge: Traditional Knowledge and Genetic Resources: Considerations from an Intellectual Property Perspective (Nov. 13, 2017), http://www.wipo.int/edocs/mdocs/tk/en/wipo_ipk_ank_16/wipo_ipk_ank_16_1wipo_dg_speech.pdf, <https://perma.cc/QKK2-JVAN> (encouraging the committee to reach a decision quickly); see also Francis Gurry, *Francis Gurry on the Challenges for Multilateralism in the Field of Intellectual Property*, WIPO MAG. (Oct. 2017), http://www.wipo.int/wipo_magazine/en/2016/05/article_0001.html, <https://perma.cc/DR8L-5CTV>.