<u>**The WIPO Broadcasters' Treaty: A case of treaty analysis**</u>

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In 1996 the battle against unauthorized access to and use of creative works over the Internet or other digital networks was won through the adoption of two treaties at WIPO commonly called the Internet Treaties; namely The WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT). The WCT deals with protection for authors of literary and artistic works, such as writings and computer programs; original databases; musical works; audio-visual works; works of fine art and photographs; whereas the WPPT deals with protection for authors rights of performers and producers of phonograms.

However after the adoption of these treaties, broadcasters felt they were left orphaned of protection from the digital technology and started pressing for protection at WIPO. Their demands finally met with a positive response and WIPO finally set up the **Standing Committee on Copyright and Related Rights (SCCR)** which met for its first ever session in 1998 in the cold month of November.[i]

Between 1st and 5th May 2006, the **SCCR** established a *Basic Proposal* in order to develop protection rights for all broadcast organizations. Years have gone by and, much water have flown under the bridges since then, broadcasters are still battling it out in Geneva twice yearly at least, to get protection they need. Since 1998 it is important to note, like time and tide wait for no one, so does technology. Much progress has been made in the broadcasting or media industry. Most free-to-air broadcasts have gone from analogue to digital, Smart TV have made their appearance, 3D technology has been improved, tablet and smart phones are now alternative mediums for viewing T.V.

The use of binary code: 0 and 1 have meant that TV signals are now in this format. Good for technology and for making the optimum use of frequency spectrums; it has also been a haven for pirates – signals pirates. Hackers, profiteers and free-riders have grown up like mushrooms around the world. They are on the constant look-out on how to profit on the back of a less technologically-savvy broadcaster or an innocent one. At this point it is worth noting, it is not only the "*poor*" broadcasters which are the target as their signals are more easily captured, but it is also true that the '*rich*' broadcasters are heavily targeted as their signals carry more valuable content. The rule of piracy knows no bound and only one principle: "*What is worth protecting is worth copying*" say the pirates. (As opposed to Peterson J.'s comment in <u>University of London Press Ltd v University Tutorial[ii]</u> "*what is worth copying is worth protecting*")

What is signal piracy? Piracy can take three main forms:[iii]

i. Unauthorised copying. i.e. the copying of contents on storage mediums (physical copying);
ii. Illegal interception of free-to-air signals over the air and online (include also grey-market[iv]); and

iii. Illegal access into encrypted pay-TV signals with equipment designed to circumvent the security measures in set-top boxes (hardware-based).

International rules to protect television broadcasts from piracy have not been updated since the 1961 Rome treaty, drafted at a time when cable was in its infancy and the Internet not even invented. Now that perfect digital copies of television programmes can be made and transmitted with a few mouse clicks, signal theft has become a big commercial headache for broadcasting organizations around the world. It is estimated that broadcasters are losing billions in terms of revenue through the act of signal piracy, for e.g. in the pay-tv market empirical evidence shows that US$952 million in 2004 to some US$1.06 billion in 2005, reflecting a continuing trend, are being lost annually.[v]

Having set this background, the purpose of this article is not to explain further the ongoing WIPO Broadcasters' Treaty or what signal piracy is in details, subjects which themselves will be topics discussed further in other articles – watch this space. The purport of this article is to question why a treaty as an instrument of protection is necessary as opposed to individual country's national laws. Why so much arguments and discussions to adopt a treaty when each individual country which is interested to protect "*signal theft*" can easily do so in their national laws. [vi]

Each sovereign country can pass enabling laws to outlaw or ban the three acts which I have enumerated above. By adopting national laws the battle may be won, but the war on signal piracy will not. I explain.

Use of treaties

A treaty is an instrument whereby an independent member state has the intention to enter into an agreement on international laws which will become binding on itself vis-à-vis the international community. "Treaty" means *an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation*[vii]. A treaty is a source of law and is one of the main sources of international laws. Although treaties can be known by different names, protocols, covenants, conventions or exchange of letters, they all have a common purpose; states participating bind themselves legally to act in a particular relation between themselves.

The advantages of having a treaty are therefore manifold. It creates a rule of international law (*jus cogens*), the goals are put in writing, the jurisdiction of the International Court of Justice (ICJ) can be entertained under 36(1) & (2) of the Court's Statute[viii], diplomatic pressure can be exercised on defaulting state, more diplomatic avenues for talks, and above all, certainty of operations for stakeholders in the broadcasting fields.

One other main advantages of international treaty as opposed to national laws is the Treaty of Treaties commonly called the Vienna Convention on Treaties 1969 (in force since 1980). Although the Vienna Convention is restricted only to treaties between states, it reflects general consensus among states about the customary rules it reflects. Even non-signatories accept its effect and its importance although they have chosen not to ratify or sign the same for diplomatic reasons.

Commentators on the treaty accept that this treaty is based on the principle of *pacta sunt servanda* which is described in Article 26. It is believed that this principle comes from the Roman and Canon law. What it means? In simple English it means that "*every treaty in force is binding upon the parties to it and must be performed by them in good faith*".

It has been recognised that apart from the legal obligations of treaties, their moral perspective is often wider for nation of states. Once a state has agreed to be bound by a treaty or if a treaty is in existence, which creates a norm of international law (*jus cogens*), even non-party states find a moral obligation to adopt its rule. The moral obligation is far greater in some cases as a state does not want to be considered the odd-one out.

There are other two main reasons why states choose to adopt and ratify a treaty. *The influential theoretical approaches offer contrasting explanations. Rational institutionalist theory expects states to use institutions … to improve or consolidate their preferred standards while reducing the risk of suffering competitive disadvantages in world markets. In this view … conventions are devices for the prevention and mitigation of regulatory "races to the bottom" among trade rivals. By contrast, sociological institutionalism expect states to ratify … conventions if doing so conforms to a norm of appropriate behaviour that is prevalent in the states' respective peer groups.*[ix]

Writing in a research paper in 2003, Professor Onuma Yasuaki, University of Tokyo, Japan, found there are positive and negative factors which influence a state to comply with an international order. The positive factors can be listed as to maintain diplomatic, commercial, and financial and transportation relations and policy makers have generally believed that the advantages of international law generally outweigh its disadvantages. On the negative side, deprivation of interests and sanctions against the violators explain why states comply with international orders. An important and interesting fact mentioned by Prof. Yasuaki for states to comply with an international order was the fear to be deprived of the use of international communications and networks.[x] Interestingly signals are considered network and communication mediums. The International Telecommunications Union (ITU) which is an organ of the United Nations sets and publishes regulations and standards relevant to electronic communication and broadcasting technologies of all kinds including radio, television, satellite, telephone and the Internet. Can a state go against the ITU? Is this not a case for treaty adoption on its own?

A treaty has a normative cognate value which cannot be undermined and cannot be underestimated. Since the first treaty signed in 2100 B.C, the Lagash and Umma of Mesopotamia[xi], border agreement between Lagash and Umma in Mesopotamia, setting the boundary limitation between the two states, modern nations have continued to adopt treaty as a rule for diplomatic and international relations. There are it is estimated by the World Treaty Library around or more than 180,000 treaties in existence since 1648. Treaty will always and has always therefore been the solution when a social, economic, legal or financial issue has multi-jurisdictional dimension.

Why a Treaty for Signal Piracy

In the case of signal piracy why is therefore a treaty more relevant than a domestic legislation? Modern broadcasters operate in a world which knows no boundary. The proliferation of signals and the technology of same have improved so much over the past years, that a signal can be sent from one corner of the world to a remote area through satellite, cable, IP protocol and free to air. A domestic legislation will only be limited in geography and space.[xii] A sovereign parliament in any free country can only legislate within the boundary of its territory. Signals on the other hand know no such restriction. It travels freely from one point to the other without any legal limitations. Of course state can restrict signals by adopting measures such as geo-blocking etc. however how can a state prevent digital signal through the IP protocol. Such restrictions will not only take time and effort, it will completely drain the resources of the nation. The cost-benefit will not be worth it.

There is more to this: the commercial reason. Once there is a treaty, broadcasters will feel more secure[xiii] and more widespread commercial transactions which can but benefit the states. The macro-economic effects of protection cannot be valued in monetary terms at this stage but its positive effects on the GDP of the nation cannot be underestimated.[xiv]

The other reason why a treaty is the only way forward is the principle of reciprocity and mutual recognition. For instance international copyright works on the principle that a foreign author is given protection in a member state as if the author is a citizen of this member state and the work has been created in this member state. Let us take the example of a broadcast signal. If it was only under national law protection, once it leaves the jurisdiction the other states are not bound by any international norms to protect it. Critics often cite the example of ICrave TV[xv] in Canada as proposition that a treaty is not necessary as ICrave TV quickly pay out once broadcasters in the US entered a claim for copyright infringement. ICrave TV was broadcasting via the Internet US-based channels on the grounds that local laws allowed it to transmit wireless broadcast cable signals without paying and was also exempt from paying royalties. However the Canadian courts had no opportunity to consider the matter, as under pressure (financially?) ICrave TV decided to settle the matter. So the matter has never been decided in this cross-border jurisdictional conundrum and there is no *ratio-decidendi* for future reference.

Practising lawyers at international laws know too well how difficult it is to convince a court of law to accept the proprietary rights in goods and services which are cross-jurisdictional unless there is a clear proprietary claim. Unless the overseas proprietor of the signal can claim under the national law of another state, i.e. there is a specific provision which enables it to do so; its claims will be doomed for failure.

In signal theft or misappropriation, especially in the case of pre-broadcast signals (scenario 2 above), it is often the case that a broadcaster has no logo or no visible trademark or watermark which can clearly identify the ownership thereof. In these situations, one can see a treaty being more relevant than a national law which is restricted on many principles of laws which diverged from one country to the next.

The other difficulty for a national law in this context is the scattered texts for broadcasters in certain legislations. In the US for instance broadcaster has to be careful how the claim for redress is drafted. Failing to cite the proper legislations can be fatal to a claim. For instance there are the regulatory acts, trademark acts, copyright acts, competition acts etc. that have to be considered. A single body of rule protecting the broadcasters' signal is more cost – effective. Japan is another example where a broadcaster will have to navigate through several texts of laws before it can come to a conclusive answer or will it?

Conclusion

The treaty remains in signal piracy the main and only way forward. It is the panacea for broadcasters and the only way that broadcasters can continue to invest in the acquisition of content which serve as public interest, such as sports (Olympic and World Cup) and entertainment and cultural programmes for nation-building and existence of humans as a species.[xvi]

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[i] http://www.wipo.int/meetings/en/details.jsp?meeting_id=3598

[ii] [1916] 2 Ch. 601

[iii] SCCR/20/2 REV

[iv] This type of access is mainly limited to satellite TV, and in some cases, terrestrial signals, due to the inability to place specific restrictions on where the signals are transmitted. Grey market access has been less common in the past, but with national borders becoming more and more porous and the free movement of people and goods, it has started to become increasingly prevalent. Vide the UK and EU case of Karen Murphy v MPS Limited Full ECJ judgment at http://curia.europa.eu

[v] CASBAA (Cable and Satellite Broadcasting Association of Asia), in its 2008 report on piracy, estimated that losses to the industry and the TV value chain (including government bodies) from illegal distributors was in the range of $365m – making unauthorized re-broadcasting one of the most significant forms of unauthorized access and piracy in the Asia Pacific region; See also: http://www.alianza.tv/files/LatAmTVSignalPiracy.pdf; http://articles.economictimes.indiatimes.com/2011-11-01/news/30345720_1_piracy-channel-tv-ad-revenues;

[vi] It is interesting to note in a recent report of the ITU: Interactive multimedia services in Asia Pacific, Technical Report Oct 2015, at p. 54: "*…in most jurisdictions, there is not yet an effective anti-piracy regime which provides countermeasures against illegal content providers.*"

[vii] Article 2(1) (a) of the Vienna Convention on the law of treaties

[viii] Article 36(1) Statute of ICJ: *The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force.*
Article 36 (2): *The states parties to the present Statute may at any time declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:*
a. the interpretation of a treaty;
b. any question of international law;
c. the existence of any fact which, if established, would constitute a breach of an international obligation;
d. the nature or extent of the reparation to be made for the breach of an international obligation.

[ix] A research study by LSE Dept. of Govt.:
http://www.lse.ac.uk/government/research/resgroups/PSPE/pdf/PSPE_WP1_11.pdf

[x] EJIL (2003), Vol.14 No.1, 105-139 @ 116-118

[xi] Nussbaum, Arthur (1954). A concise history of the law of nations pp. 1–2

[xii] Despite Chinese laws prohibiting reception of satellite TV, southern China is said to have close to 10m homes receiving signals from neighbouring Hong Kong and Taiwan – either via the grey market route or through CA circumvention (Source SCCR/20/2 REV)

[xiii] An Organization for Economic Co-Operation and Development (OECD) study indicates that “the lack of intellectual property protection will be considered as a negative factor in investment decisions by nationals or foreigners.” Organization for Economic Co-Operation and Development (OECD), Economic Arguments for Protecting Intellectual Property Rights Effectively, 1989

[xiv] Report by the Office for Harmonization in the Internal Market (OHIM) and the European Patent Office (EPO) stated that industries relying on IPRs contribute to €4, 7 trillion to EU GDP. (Sept 2013)

[xv] *Twentieth Century Fox Film Corp v. iCraveTV* (2000 WL 255989 W.D.Pa.)

[xvi] European Commission 2014; SportsEconAustria et al 2012