

# The Broadcast Treaty and Its Implications for Signal Piracy in North America

Marlee Miller\*

## I. INTRODUCTION

Copyright laws grant authors the right to control specific uses of their work and the right to be compensated for those uses. However, not all creative works receive copyright protection. In the United States, to the extent that broadcasters create their own original programming, they receive copyright protection.<sup>1</sup> Nonetheless, the broadcasters do not have the right to control all uses of the content sent through their signals.<sup>2</sup> To remedy this problem, the U.S. established a compulsory licensing scheme, requiring cable and satellite operators who transmit a broadcaster's content through their cable systems to pay that broadcaster the statutory fee.<sup>3</sup>

The advent of digital technologies has increased the quantity and the variety of information available to the public, as well as the speed the public can access that information. Such increases in digital technology have made it possible for pirates to steal broadcasters' signals and to make the information encoded in those signals available on the Internet, either simultaneously to the broadcast of the signal (referred to as "simulcasting") or at anytime upon the user's request (referred to as "on-demand transmissions", "webcasting", or "netcasting").<sup>4</sup> Signal piracy is a problem for broadcasters because once the signal is transmitted to the public, it is difficult for broadcasters to control their signal and the content of that signal.<sup>5</sup>

Currently, the World Intellectual Property Organization ("WIPO")<sup>6</sup> is trying to update broadcasters' rights against signal pirates. The WIPO Standing Committee on Copyrights and Related Rights ("SCCR") recently held conventions in Geneva, Switzerland to discuss with its members the possibility of drafting and ratifying a treaty for broadcasters.<sup>7</sup> This article examines specific provisions of the proposed Broadcast Treaty, provides information about the current status of the Treaty, and discusses how the Broadcast Treaty could help U.S. broadcasters combat signal piracy.

## II. INTERNATIONAL BROADCAST TREATIES PRE-DATING THE WIPO

The proposed Broadcast Treaty is not the first treaty related to international broadcast issues. One of the first international treaties to deal with broadcast issues, in the form of obligations, was the Berne Convention for the Protection of Literary and Artistic Works (1948 Brussels Text).<sup>8</sup> It required that broadcast-

ers abide by copyright law and obtain authorization from and pay the authors of the copyrighted works they air.<sup>9</sup>

The first treaty to focus specifically on broadcasters' rights and other related rights was the Rome Convention for the Protection of Performers, Producers of Phonograms, and Broadcasting Organizations ("Rome Convention"), passed in 1961.<sup>10</sup> The Rome Convention established a regime for protecting "neighboring" or "related" rights, which are "rights neighboring on copyright."<sup>11</sup>

The Agreement on Trade-Related Aspects of Intellectual Property Rights ("*TRIPS*"), signed in 1994, provided a means for broadcasters to enforce their intellectual property rights without expanding broadcasters' rights.<sup>12</sup> In 1996, WIPO adopted the Performers and Phonograms Treaty ("*WPPT*"), which expanded the definition of broadcasting to include both satellite transmissions and encrypted signals.<sup>13</sup>

None of these treaties discuss matters relating to the theft of broadcasters' signals. In an effort to establish a more uniform signal theft regime, the General Assembly requested that the SCCR put together a treaty that would protect broadcast signals from signal theft.

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## III. WIPO BROADCAST TREATY

### A. Background of the Broadcast Treaty

There is much debate surrounding the Revised Basic Proposal of the Broadcast Treaty. Some argue that this proposed Treaty grants broadcasters too many rights, effectively creating a new arena of intellectual property solely for broadcasters.<sup>14</sup> Most members of WIPO favor a signal-based approach rather than a rights-based approach for the Broadcast Treaty.<sup>15</sup> The signal-based approach prohibits the *unauthorized* use of broadcast signals and grants broadcasters legal remedies if such an unauthorized use occurs. By comparison, proponents of the rights-based approach, who are mostly broadcasters, advocate the expansion of broadcasters' rights to include "the exclusive

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right of authorizing the direct or indirect reproduction, in any manner or form, of fixations of their broadcasts,” regardless of whether the original signal was received legally.<sup>16</sup> If the rights-based approach were adopted, then those wishing to use material they legally receive through a broadcast signal may be required to receive permission from both the broadcaster and the copyright owner before they can use the content.<sup>17</sup> Critics of the rights-based approach argue that it would make it more expensive and time consuming for educators to use broadcasted material and would likely “restrict the entry of information into the public domain.”<sup>18</sup>

Several countries, including the United States, have voiced their objections to the Revised Basic Proposal.<sup>19</sup> In response, the General Assembly decided to limit the scope of the Treaty to that which is necessary to protect broadcasters from signal theft.<sup>20</sup> In addition, the General Assembly mandated that the members clarify any outstanding issues, specifically the scope of the treaty, by the end of the second meeting, scheduled for June 2007.<sup>21</sup> At the January 2007 Meeting, Chairman of the SCCR, Jukka Liedes, surprised everyone by presenting a series of “non-papers,” titled such because they have no official authority, as an attempt to summarize areas of consensus on the Treaty.<sup>22</sup> By circulating these non-papers, the Chairman hoped that instead of arguing over each detail of the Revised Basic Proposal, members could reach consensus on the more general provisions of the Treaty.<sup>23</sup> However, when the non-papers were presented, the delegates were not prepared to discuss the non-papers and many had problems with the provisions.<sup>24</sup>

In late June, the members met again to discuss the Treaty under a strict mandate to reach consensus on the Treaty provisions.<sup>25</sup> In an attempt to achieve a consensus, the Chairman introduced another series of non-papers, which he said were based on his consultations with members about the Treaty.<sup>26</sup> These non-papers created much controversy and did not serve their intended purpose of encouraging consensus.<sup>27</sup> In fact, the June meeting was unsuccessful because no consensus was reached.<sup>28</sup> Members recommended that the General Assembly send the Treaty back to the SSCR’s regular session for more discussion.<sup>29</sup> The General Assembly is slated to make its decision on the members’ recommendation in late September/Early October of 2007.

## B. Provisions and Details of the Broadcast Treaty

The Revised Basic Proposal is over one-hundred pages in length and contains a long list of alternative options for each of the proposal’s sections.<sup>30</sup> The Revised Basic Proposal recognizes piracy across and within borders as a problem and addresses it as one of its primary concerns.<sup>31</sup>

Article 6 of the Revised Basic Proposal explicitly states that the Treaty is to be signal-based rather than rights-based, providing that “[t]he protection granted under this Treaty extends only to signals used for the transmissions by the beneficiaries of the protection of this Treaty and not to works and other protected subject matter carried by such signals.”<sup>32</sup> It also excludes from protection a “rebroadcasting, retransmission by wire or cable, and retransmission over computer networks,” or webcasting, by anyone other than the initial broadcaster.<sup>33</sup>

Article 3 of the Chairman’s most recent non-paper states explicitly that the Treaty protects “broadcasting organizations in respect to their broadcasts” and does “not give rise to any rights in the programs that are transmitted by broadcasting organizations.”<sup>34</sup> Article 6 of the Revised Basic Proposal, *Scope of Protection*, is written in terms of what the Treaty does not protect, specifically, it does not protect “mere retransmissions, [or] any transmissions where the time of the transmission and the place of its reception may be individually chosen by members of the public (on-demand transmissions), or any transmissions over computer networks (transmissions using the Internet Protocol, ‘webcasting’, or ‘netcasting’).”<sup>35</sup>

The Revised Basic Proposal also grants broadcasters certain exclusive rights: the right of retransmission (Article 9),<sup>36</sup> the right of public communication of their broadcast (if such communication is made accessible upon payment of an entrance fee) (Article 10),<sup>37</sup> the right of fixation (Article 11),<sup>38</sup> the right of reproduction (Article 12),<sup>39</sup> the right of distribution (Article 13),<sup>40</sup> the right to authorize transmission of their broadcast (Article 14),<sup>41</sup> and the right to authorize the making available to the public the fixation of their broadcast (Article 15).<sup>42</sup>

The last provision relevant to our discussion is Article 24, *Provisions on Enforcement of Rights*.<sup>43</sup> This Article requires that members “ensure that enforcement procedures are available under their law so as to permit action against any act of infringement or violation of any prohibition covered by this Treaty...”<sup>44</sup> This provision is important because it mandates that all members of the Treaty pass laws to allow entities protected under the Treaty to seek legal action against any person or entity that



infringes their rights. If this provision is combined with Article 11 of the Chairman's March 2007 Non-paper,<sup>45</sup> it would alleviate many of the problems associated with seeking legal action in an international infringement case. It would do so by ensuring that all members provide mechanisms for broadcasting organizations and other protected entities to seek recourse if their rights granted under the Treaty are infringed.

#### IV. POSSIBLE EFFECTS OF THE BROADCAST TREATY ON BROADCAST RELATIONS IN NORTH AMERICA

Most broadcast signal piracy conflicts occur at the regional level, among bordering states. The problem is prevalent in Europe because it is a continent of many small bordering countries. Although the United States has far fewer bordering countries, it has still incurred broadcast piracy issues with Canada, Mexico, and the Caribbean.

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##### A. Signal Piracy in North America

There are no specific laws applicable to the United States, Canada, and Mexico that protect broadcasters from pirates and give broadcasters a right to seek legal action. Although these three countries joined together in a regional trade agreement, the North American Free Trade Agreement (“*NAFTA*”), the Agreement leaves much unsaid about broadcast signals and signal piracy. However, the Canada-U.S. Free Trade Agreement (“*FTA*”), which was passed by the U.S and Canada in 1987, addresses the issue of signal piracy.<sup>46</sup> Section 2006 (2)(b) of the FTA explicitly proscribes signal theft, providing that:<sup>47</sup>

[W]here the original transmission of the program is carried in signals intended for free, over-the-air reception by the general public, willful retransmission in altered form or non-simultaneous retransmission of signals carrying a copyright holder's program shall be permitted only with the authorization of the holder of copyright in the program.<sup>48</sup>

In drafting the FTA, the United States was particularly concerned about protecting its broadcasters from signal theft, because at that time America “was the largest producer of television programs...[and] Canadian cable companies...prior to the FTA, were picking up the American signals and rebroadcasting them within Canada absent the payment of any royalty fee.”<sup>49</sup> The FTA set in place a compulsory licensing regime, which at



least ensured that American broadcasters would be paid for the rebroadcasting of their signals into Canada.

Soon after signing the FTA, the United States, Mexico, and Canada entered into a multilateral trade agreement, *NAFTA*.<sup>50</sup> Article 103 of *NAFTA* states that in the event of inconsistencies with other treaties, *NAFTA* prevails, which indicates that *NAFTA* rules over the FTA.<sup>51</sup> However, because *NAFTA* does not directly touch on broadcast signal theft, this clause did not affect the FTA's provision on broadcast signal piracy and the compulsory license. In fact, the United States and Canada still abide by the compulsory licensing system established by the FTA.

Although *NAFTA* did not solve or take into account any broadcast signal theft problems among its members, it did account for intellectual property protection.<sup>52</sup> Article 1701 provides that “[e]ach party *shall* provide in its territory to the national of another Party *adequate and effective protection and enforcement* of intellectual property rights. ...”<sup>53</sup> There is vigorous debate about the meanings of “adequate” and “effective.” In theory, this provision is supposed to protect all intellectual property holders' rights in their works. While there are other U.S. laws on signal piracy, Canada and Mexico are under no obligation to follow these or any other U.S. law; therefore, there is no guarantee that a U.S. court will have jurisdiction over any foreign infringers.<sup>54</sup>

A major North American signal theft dispute occurred between a Canadian Internet company, iCraveTv, and several major U.S. broadcasters.<sup>55</sup> In November 1999, iCraveTv retransmitted, digitized, and streamed on the Internet the signal of seventeen different broadcasters so that iCraveTv users could directly access those broadcasts on their personal computers.<sup>56</sup> The U.S. broadcasters involved were, NBC, ABC, PBS, and WB. iCraveTv picked up the signals of these broadcasters through an antennae on top of a building in Toronto.<sup>57</sup>

Although iCraveTv's activities were legal in Canada, they were illegal in the United States.<sup>58</sup> In an attempt to protect itself from any liability, iCraveTv has its users click on several different agreements stating that they were located in Canada, and required its users to enter in a Canadian area code.<sup>59</sup> The U.S. broadcasters brought a copyright infringement suit, and rather than defending themselves on foreign soil, iCraveTv settled.<sup>60</sup>

Copyright piracy has also been a pervasive problem in Mexico.<sup>61</sup> One reason that piracy is so widespread in Mexico is that the Mexican government has failed to provide copyright holders with adequate legal remedies to enforce their rights.<sup>62</sup> Even though Mexico is a member to the WIPO Performers and Phonograms and WIPO Copyright Treaties, Mexico views those treaties as self-executing and has not made affirmative efforts to pass laws to enforce the protections and rights granted in those treaties.<sup>63</sup> Although Mexico may fail to implement the Broadcast Treaty, such a scenario seems unlikely based on Article 11 of the Chairman's non-papers, which specifically mandates that the member countries pass certain laws to protect all members' broadcasting organizations from infringement.<sup>64</sup> This clause may be the key for all U.S. copyright holders and broadcasters in enforcing their rights against any infringement occurring in Mexico.



broadcasting organizations "treatment no less favorable than it accords to its own broadcasting organization in respect of the application of the rights recognized expressly under the Treaty."<sup>68</sup>

Deciding which alternative to choose is significant because each one requires a member to accord a different level or protection to other member's broadcasting organizations; with Alternative K providing the most protection and Alternative VV providing the least protection. Any of these provisions, in combination with Article 11 of the Chairman's non-paper, which requires members to provide for at least one, if not two, means to implement

protection of the rights granted in the Treaty, would equip all members with the necessary enforcement mechanisms to combat signal piracy.<sup>69</sup>

## V. CONCLUSION

WIPO's SCCR recently held a convention to draft a Broadcast Treaty. The Broadcast Treaty has been met with much opposition. The members have been unable to reach consensus on how much protection to grant broadcasters. Many groups have publicly vocalized their opposition to the proposed Treaty, stating that that it grants broadcasters new exclusive rights in their transmissions for twenty years, even if the broadcasters do not have a right to the content sent in that transmission.<sup>70</sup> These opponents assert that this broad right may limit "legitimate, fair use" of content and "may also have the effect of restricting the rights of the underlying content owners."<sup>71</sup> To address these concerns, the U.S. successfully persuaded the General Assembly to narrow the scope of the Treaty to those provisions which are necessary to protect broadcasters' signals" from theft.

Currently, the proposed Treaty has adopted a signal-based approach where member countries must protect other members' broadcast signals and must provide adequate legal remedies for piracy occurring in their country.<sup>72</sup> The mandate that countries provide adequate legal remedies is essential for all members and their broadcasters, including the U.S., to combat signal piracy.

The future of the Broadcast Treaty is uncertain to say the least. In late June, unable to reach any sort of agreement on the Treaty, members decided the best course of action was to send the Treaty back to the SCCR's regular session for more discussion.<sup>73</sup> If no agreement is reached, then broadcasters may have to look for alternate means of protecting their signals from pirates. Considering the amount of time and discussion that members and other interested parties have spent on this issue, it is difficult to foresee the members reaching any sort of agreement on the Treaty anytime soon. **BLB**

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The Broadcast Treaty may help answer some of the questions that NAFTA left unanswered in terms of broadcast signal piracy. Article 8 of the Revised Basic Proposal deals with national treatment, which is how members must treat each others' broadcasting organizations.<sup>65</sup> The Revised Basic Proposal contains three different alternatives for national treatment. The first alternative, Alternative J, only requires a member to grant to other members the rights granted in the Treaty.<sup>66</sup> The second alternative, Alternative K, requires a member to extend to other members' broadcasting organizations any rights that it currently or may "hereafter grant to [its] nationals."<sup>67</sup> The third alternative, Alternative VV, mandates that a member accord other members'

## ENDNOTES: *Marlee Miller*

\* Marlee Miller is a native of Lafayette, LA. She received her bachelor's degree from Loyola University New Orleans in 2005. Currently, she is a third year law student at American University Washington College of Law. While in law school, she interned in the Policy Division of Media Bureau and in the Office of Commissioner Jonathan Adelstein, both at the Federal Communications Commission. After graduation, Marlee will be working in communications law at Leventhal, Senter & Lerman in Washington, DC.

<sup>1</sup> See Subject Matter and Scope of Copyright, 17 U.S.C. §§ 101–22, 102(a) (2007) (classifying live broadcasts as “fixed” original works of authorship); 17 U.S.C. § 101 (finding that live broadcasts are “fixations;” therefore broadcasters can receive copyright protection over their live broadcasts, but not the event or facts contained in the broadcast); see also *Nat'l Basketball Ass'n v. Motorola*, 105 F.3d 841, 847 (2d Cir. 1997) (reiterating that broadcasters only receive copyright protection if the subject matter of their broadcast is an original work of authorship).

<sup>2</sup> See *id.*

<sup>3</sup> See 17 U.S.C. § 111(d) (establishing the compulsory licensing system for cable operators' use of broadcast signals); 17 U.S.C. § 119(a) (establishing the compulsory licensing for satellite providers' use of broadcast signals).

<sup>4</sup> See Matthew D. Asbell, *Progress on the WIPO Broadcasting and Webcasting Treaty*, 24 CARDOZO ARTS & ENT. L.J. 349, 350–51 (2006); see also JUKKA LIEDES, *Draft Non-paper on the WIPO Treaty on the Protection of Broadcasting Organizations*, at 7, Mar. 8, 2007, available at [http://www.wipo.int/edocs/mdocs/sccr/en/sccr\\_s2/sccr\\_s2\\_paper1.pdf](http://www.wipo.int/edocs/mdocs/sccr/en/sccr_s2/sccr_s2_paper1.pdf).

<sup>5</sup> See Asbell, *supra* note 4, at 350.

<sup>6</sup> Susan A. Mort, *The WTO, WIPO, & the Internet: Confounding the Borders of Copyright and Neighboring Rights*, 8 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 173, 180 (1997) (defining the World Intellectual Property Organization as an international agency that was created by the United Nations in 1967 to “promote the protection of intellectual property worldwide and to administer the major international conventions”).

<sup>7</sup> Michel Geist, *Dangerous WIPO Broadcast Treaty*, P2PNet, <http://p2pnet.net/story/9827> (last visited Oct. 15, 2007).

<sup>8</sup> Berne Convention for the Protection of Literary and Artistic Works (1948 Brussels Text), art. 11*bis*, June 26, 1948, 828 U.N.T.S. 221.

<sup>9</sup> *Id.*

<sup>10</sup> International Convention for the Protection of Performers, Producers, of Phonograms and Broadcasting Organizations, Oct. 26, 1961, 496 U.N.T.S. 43 [hereinafter Rome Convention] (The United States is not a member to the Rome Convention because U.S. Copyright law does not recognize or protect “related” or “neighboring” rights).

<sup>11</sup> Carte P. Goodwin, *Live in Concert...and Beyond: A New Standard of Contributory Copyright Infringement*, 13 EMORY INT'L L. REV. 345, 351 (1999) (defining “neighboring rights” as “the rights of performing artists in their performances, the rights of producers of phonograms (i.e., sound recordings) in their phonograms, and the rights of broadcasting organizations in their radio and television programs”); see Rome Convention, art. 14 (The Rome Convention gives broadcasting organizations the right to authorize or prohibit the rebroadcasting, fixation, and reproductions of their broadcasts and sets the term of protection at twenty years from the end of the year in which the broadcast took place).

<sup>12</sup> Agreement on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods, art. 51, Apr. 15, 1994, 1869 U.N.T.S. 299, [hereinafter TRIPS Agreement] (Article 51 mandates that members adopt procedures that allow a holder of copyright, trademark, or related right to “lodge an application in writing with competent authorities, administrative or judicial” to have the customs authorities suspend “the release into free circulation of” an imported counterfeit trade or pirated copyright goods); cf. Danistan Saverimuthu, *The Regulation of New Media Broadcasting in Canada Post-iCraveTv.com*, 19 J. MARSHALL J. COMPUTER & INFO. L. 331, 339 (2001) (explaining that TRIPS gives “broadcasters the right to authorize and to prohibit the rebroadcasting via wireless means as well as communications to the public of their broadcasts”).

<sup>13</sup> See Mort, *supra* note 6 at 206.

<sup>14</sup> World Intellectual Prop. Org., *Revised Draft Basic Proposal for the WIPO Treaty on the Protection of Broadcasting Organizations*, at 3, (July 31, 2006), available at [http://www.wipo.int/edocs/mdocs/sccr/en/sccr\\_15/sccr\\_15\\_2.pdf](http://www.wipo.int/edocs/mdocs/sccr/en/sccr_15/sccr_15_2.pdf) [hereinafter *Revised Basic Proposal*]; see *Government Remains Divided on WIPO Broadcast Treaty*, Bridges Weekly, Vol. 11. No. 2 (Jan. 24, 2007), <http://www.ictsd.org/weekly/07-01-24/story3.htm> (stating that broadcasters and cablecasters have been advocating for “exclusive rights to prohibit or authorize the use of anything they transmit—implying rights over both transmissions and the content of works being transmitted. They claim that this would be a level of protection comparable to the rights enjoyed by performers and the recording industry under the 1961 Rome Convention.”).

<sup>15</sup> *Government Remains Divided*, *supra* note 14.

<sup>16</sup> See Asbell, *supra* note 4, at 357.

<sup>17</sup> See Geist, *supra* note 6.

<sup>18</sup> *Government Remains Divided*, *supra* note 14.

<sup>19</sup> *Id.*

<sup>20</sup> *WIPO General Assembly Finds Way Forward on Broadcast Treaty, Development Agenda*, Bridges Weekly, Vol. 10 No. 32 (Oct. 4, 2006), <http://www.ictsd.org/weekly/06-10-04/story1.htm>.

<sup>21</sup> See *id.*

<sup>22</sup> See Sherwin Siy, *WIPO Meeting on the Broadcast Treaty: Day 2*, Public Knowledge (Jan. 19, 2007), <http://www.publicknowledge.org/node/793>; see also William New, *WIPO Committee Seeks Footing For Broadcasting Treaty Talks*, Intellectual Property Watch (Jan. 17, 2007), available at [http://www.ip-watch.org/weblog/index.php?p=508&cres=1024\\_ff](http://www.ip-watch.org/weblog/index.php?p=508&cres=1024_ff).

<sup>23</sup> See Siy, *supra* note 22.

<sup>24</sup> See *id.*

<sup>25</sup> See William New, *WIPO Broadcast Treaty Talks Break Down*, Intellectual Property Watch (June 22, 2007), available at [http://www.ip-watch.org/weblog/index.php?p=664&cres=1024\\_ff](http://www.ip-watch.org/weblog/index.php?p=664&cres=1024_ff).

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> See *id.* (“After more than 9 years of discussions, efforts to find a treaty formulation that deals with piracy of broadcast signals, but which does not harm copyright owners and legitimate users of broadcasts have failed.”); see also *Blogging WIPO: Broadcasting Treaty Deferred Indefinitely*, Electronic Frontier Foundation (June 22, 2007), <http://www.eff.org/deeplinks/archives/005333.php> (referring to the decision to send the Treaty back to committee as “welcome news”).

<sup>29</sup> William New, *WIPO Broadcast Treaty Talks Sent Back to Committee*, Intellectual Property Watch (June 22, 2007), available at [http://www.ip-watch.org/weblog/index.php?p=668&cres=1024\\_ff](http://www.ip-watch.org/weblog/index.php?p=668&cres=1024_ff).

<sup>30</sup> *Revised Basic Proposal*, *supra* note 14, at 3.

<sup>31</sup> *Revised Basic Proposal*, *supra* note 14, Preamble, at 11.

<sup>32</sup> *Revised Basic Proposal*, *supra* note 14, art. 6, at 31.

<sup>33</sup> *Revised Basic Proposal*, *supra* note 14, Explanatory Comments on Article 6, at 30.

<sup>34</sup> Jukka Liedes, *Draft Non-Paper on WIPO Treaty on the Protection of Broadcasting Organizations*, June 20, 2007, at 3, available at <http://ipwatch.org/files/WIPO%20Treaty%20on%20the%20Protection%20of%20Broadcasting%20Organizations.pdf>.

<sup>35</sup> *Revised Basic Proposal*, *supra* note 14, art. 6, at 31.

<sup>36</sup> *E.g.*, *Revised Basic Proposal*, *supra* note 14, art. 9, at 41; see *Revised Basic Proposal*, *supra* note 14, Explanatory Comments on Article 9, at 40 (protecting broadcasters “against all retransmissions, by any means, including rebroadcasting and retransmission by wire, by cable or over computer networks”).

<sup>37</sup> *E.g.*, *Revised Basic Proposal*, *supra* note 14, art. 10, at 43; see *Revised Basic Proposal*, *supra* note 14, Explanatory Comments on Article 10, at 42.

<sup>38</sup> *E.g.*, *Revised Basic Proposal*, *supra* note 14, art.11, at 45.

<sup>39</sup> E.g., *Revised Basic Proposal*, *supra* note 14, art.12 at 47; see *Revised Basic Proposal*, *supra* note 14, Explanatory Comments on Article 12 at 46, 48 (explaining the difference between the three alternatives: Alternative N, like Article 7 and 11 of WPPT, would treat the right of reproduction as an unqualified *intellectual property exclusive right*; Alternative O would only grant broadcasters the right to prohibit the reproduction of fixations of the broadcasts, but give broadcasters the exclusive right to authorize the reproduction of broadcasts from fixation made “pursuant to Article 14”; Alternative HH is similar to Alternative N but allows for contracting parties to opt-into another formula of the right of reproduction, provides for such an exclusive right only when the reproduction of the broadcast from the fixation is made pursuant to and is permitted by Article 17, and when the fixation is made without the broadcasting organization’s consent, places an obligation on the contracting parties to prohibit the reproduction of fixations of the broadcasts where the broadcasting organization has not authorized such reproduction) (emphasis added).

<sup>40</sup> E.g., *Revised Basic Proposal*, *supra* note 14, art.13 at 51; see *Revised Basic Proposal*, *supra* note 14, Explanatory Comments on Article 13 at 51, 53 (describing the three alternatives: “Alternative P would grant broadcasting organizations the exclusive right of authorizing the distribution of fixations of their broadcast... [which] extends to the sale or other transfer of ownership of the original and copies of fixations of broadcasts”; Alternative Q provides broadcasting organizations with “a right to prohibit the distribution to the public and the importation of reproductions of unauthorized fixations of their broadcasts”; and Alternative II would treat the right of distribution as an unqualified intellectual property-type exclusive right, while leaving it up to the contracting parties “to determine the conditions for exhaustion of the right of distribution” and offering an option “to grant broadcasting organizations protection through a prohibition”).

<sup>41</sup> E.g., *Revised Basic Proposal*, *supra* note 14, art.14 at 55; see *Revised Basic Proposal*, *supra* note 14, Explanatory Comments on Article 14 at 54 (providing explanations for Alternative JJ and Alternative KK: Alternative JJ treats the right of authorizing all transmissions by any means as an exclusive right; Alternative KK gives contracting parties the option to choose “to provide to broadcasting organizations protection by prohibiting the transmission from unauthorized fixations, where the broadcasting organization has not authorized such transmission”).

<sup>42</sup> E.g., *Revised Basic Proposal*, *supra* note 14, art.15 at 57; see *Revised Basic Proposal*, *supra* note 14, Explanatory Comments on Article 15 at 56, 58 (analyzing the three proposals: Alternative R treats broadcasting organizations’ right to authorize the making available to the public of their broadcasts from fixation as an exclusive right; Alternative S gives broadcasting organizations the right to prohibit the making available to the public of their broadcasts from unauthorized fixations; Alternative LL is similar to Alternative R but offers the contracting parties the option to protect the broadcasting organizations through a “prohibition of making available to the public of broadcast from unauthorized fixations” where “the broadcasting organizations have not authorized such acts”).

<sup>43</sup> *Revised Basic Proposal*, *supra* note 14, art. 24 at 85.

<sup>44</sup> *Id.*

<sup>45</sup> Jukka Liedes, *Draft Non-Paper on the WIPO Treaty on the Protection of Broadcasting Organizations*, at 10 (Mar. 8, 2007), available at [http://www.wipo.int/edocs/mdocs/sccr/en/sccr\\_s2/sccr\\_s2\\_paper1.pdf](http://www.wipo.int/edocs/mdocs/sccr/en/sccr_s2/sccr_s2_paper1.pdf) (requiring that each member provide for at least one of the following enforcement mechanisms: “(i) protection by means of the grant of a copyright or other specific right, such as a right related to copyright; (ii) protection by means of the law relating to unfair competition, or misappropriation; (iii) protection by means of a right of prohibition, or of providing for a prohibition, or of adequate measures to prevent unauthorized acts; [or] (iv) protection by means of penal sanctions”).

<sup>46</sup> See Sunny Handa, *Retransmission of Television Broadcasts on the Internet*, 8 Sw. J.L. & TRADE AM. 39, 53 (2001) (noting that the FTA took effect on January 1, 1989).

<sup>47</sup> *Id.* at 54.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 56.

<sup>50</sup> See *id.* at 53 (noting that the FTA took effect on January 1, 1989); see e.g., Sunny Handa, “A Review of Canada’s International Copyright Obligations” 42 MCGILL L.J. 961, 969 (1997) (“Until it signed N.A.F.T.A. in 1992, Canada... [W]ith respect to copyright of each of the parties (Canada, Mexico, and the United States)...”),

<sup>51</sup> *Id.* at 979 (“N.A.F.T.A. was designed not merely to complement the earlier F.T.A., but to create a new relationship between the three parties [Mexico, of course, being the third], resulting in significant overlap with the measures negotiated between the U.S. and Canada in the F.T.A.”).

<sup>52</sup> North American Free Trade Agreement, U.S.-Can.-Mex., art. 1701, Dec. 17, 1992, 32 I.L.M. 289 (1993) [hereinafter NAFTA].

<sup>53</sup> *Id.* (emphasis added).

<sup>54</sup> See 47 U.S.C. § 605(e)(3)(A) (2007); see also 17 U.S.C. § 111(c)(4) (2007) (Section 111 (c) of the U.S. Copyright Act applies specifically to cable operators who send broadcasters’ signals via coaxial cable and establishes a compulsory copyright license system for Canadian and Mexican broadcasts sent into the U.S. through cablecast. It gives a compulsory license to those Canadian and Mexican broadcasters that were either currently licensed to broadcast in the U.S. or are located within a certain distance of their country’s border with the U.S. If cable operators fail to abide by these geographic limits then they are liable for copyright infringement. More importantly, the protection provided by this law is very limited and does not prevent non-cable operators from pirating a broadcaster’s signal and retransmitting it in its original form or an altered form); 47 U.S.C. § 605(a) (2007) (The Communications Act specifically protects American broadcasters from signal piracy by proscribing the unauthorized interception of any radio communication, either interstate or foreign, and the divulgence of any of the pirated signal’s content to others.).

<sup>55</sup> See Michael Geist, *iCraveTv and the New Rules of Internet Broadcasting*, 23 U. ARK. LITTLE ROCK L. REV. 223, 225 (2000).

<sup>56</sup> See *id.*

<sup>57</sup> See *id.*

<sup>58</sup> See Saverimuthu, *supra* note 12 at 335 (Under Canadian law, “broadcasters retain copyright only insofar as they license or are assigned a copyright or where they create the actual programming broadcast, such as in the case of news or sports telecasts”); see also 17 U.S.C. §§ 102, 111(b) (2007) (U.S. broadcasters receive a similar protection over any original content, in addition to certain protections over their signal, including protection against the “secondary transmission of a performance of display of a work embodied in a primary transmission”).

<sup>59</sup> See *id.* at 347 (noting that even if a user did not have a Canadian area code they could get one from iCraveTv’s homepage which listed their area code).

<sup>60</sup> See *id.* at 335.

<sup>61</sup> See Heather Sapp, *North American Anti-Circumvention: Implementation of the WIPO Internet Treaties in the U.S., Mexico, and Canada*, 10 COMP. L. REV. & TECH. J. 1, 23 (2005).

<sup>62</sup> See *id.*

<sup>63</sup> See *id.* at 17, 23–24.

<sup>64</sup> See Liedes, *supra* note 44, at 10.

<sup>65</sup> *Revised Basic Proposal*, *supra* note 14, art. 8 at 37.

<sup>66</sup> See *id.* Explanatory Comments on Article 8 at 36; see also Liedes, *supra* note 45 at 9 (containing a similar alternative but putting it in Article 7 and referring to it as the “WPPT Model”).

<sup>67</sup> See *Revised Basic Proposal*, *supra* note 14 Explanatory Comments on Article 8, at 36; see also Liedes, *supra* note 44 at 9 (containing a similar alternative but putting it in Article 7 and referring to it as the “Berne Model”).

<sup>68</sup> See *Revised Basic Proposal*, *supra* note 14 Explanatory Comments on Article 8, at 36; see also Liedes, *supra* note 44 at 9 (containing a similar alternative but putting it in Article 7 and referring to it as the “TRIPS Model”).

<sup>69</sup> See Liedes, *supra* note 44 at 10.

<sup>70</sup> Q. Boyer, *Public Hearing on WIPO Broadcast Treaty to be Held in Washington DC May 9th*, YNotMasters (Apr. 27, 2007), [http://www.ynot.com/modules.php?op=modload&name=News&file=news\\_article&sid=28912](http://www.ynot.com/modules.php?op=modload&name=News&file=news_article&sid=28912).

<sup>71</sup> *Id.*

<sup>72</sup> *Government Remains Divided*, *supra* note 14.

<sup>73</sup> New *supra* note 25.