10 aide-memoires for the WIPO Broadcaster’s Treaty

1. Of all (current) SCCR issues, the BT is undisputable the oldest and most debated topic. Numerous “regional consultation” meetings and “information” sessions with explanatory presentations by broadcasters from all over the world have taken place, and various studies on current legal gaps and on its impact on society were published and discussed. As most mature topic, it has thus priority over all other SCCR issues.
2. The WIPO mandate on the BT to the SCCR is open-ended and timely unlimited: It does not require any recommendation or any explicit conclusion to continue the item on the agenda (NB other than Limitations & Exceptions for Libraries or for the Other-than-visually Impaired. Also for the Resale Right or for Copyright in the Digital Environment to be taken up as SCCR issues requires a separate mandate for each.)
3. The GA mandate of 2006 for concluding the Treaty stated that the scope should be confined to the protection of broadcasting and cablecasting organizations “in the traditional sense.” This criterion is intended to exclude pure webcasting organisations from the beneficiaries, but not to deny protection of online signals by broadcasters.
4. It was also stated in 2006 that preparations for the Diplomatic Conference (scheduled for 2007) should be based on a “signal-based approach”; this clarifies that protection relates to the signals of broadcasters and not to their content. This distinction is also the basis for the 1961 Rome Convention (RC) which includes (*inter alia*) rights of fixation, reproduction of fixations and distribution. However, this means that a suggestion that the Treaty should not cover any “post-fixation” rights, is unwarranted.

1. Text-based discussions on the Treaty re-emerged via the proposal by South-Africa and Mexico in 2011. That proposal’s new approach was not to include / extend the RC rights, but to create a new Treaty, independent of RC, so that non-RC countries could also adhere, filling the existing (and growing) offline and online gaps (see no.7).
2. In order to keep the text under editorial control (i.e. preventing the error of SCCR/15/2 grown into 200+ pages), it was decided in 2014 to confine exclusively the Chair with the task of drafting. Thereby, inclusion of “tactical proposals” (merely intended to make the text politically unacceptable to the majority of delegations, thus giving rise to unnecessary delays) can be largely avoided. In particular, with respect to part C of the latest revised consolidated text (inserted at the last moment without discussion) this should have been “noted” only but not included in the “official” working document.
3. The text shows drafting and conceptual matters to be solved. Drafting issues relates to the definitions and the pre-broadcast signal, while conceptual issues are the Rights and the Scope, both of which need to be supplementing the RC in view of modern technologies. The RC protects only wireless signals against simultaneous wireless use (and against fixation, reproduction and distribution). The Treaty should thus include Rights against non-simultaneous uses (*i.e*. plus deferred retransmission and making available of signals) and protection (Scope) of non-wireless signals.
4. As the “making-available right” is the core right of the other WIPO Treaties (WCT, WPPT or WAVPT), this Treaty is politically not worth pursuing without that right: The IP community has no valid reason to justify a different treatment of broadcasters. Also, 60 years’ experience with the RC and 20 years with EU law has demonstrated that content rights’ and neighbouring rights’ ownership does not interfere on this particular right (or any other right) in common. A broadly defined “retransmission right” including the making-available concept is not ideal, but a possible compromise.
5. Part B and even less so, part C, of the current text SCCR/34/3 (rev.) are mostly not improvements of the original SCCR/34/3, in particular:
   1. Limiting protection to signals “transmitted within the term” is erroneous since each new broadcast has its own term of protection;
   2. An “opt-in” for all online signals apart from simulcasts would create loopholes in the protection (since a reservation would imply protection only if both countries involved have included such protection in their domestic law) and thereby undermine protection of offline signals too (thus, curtailing the RC);
   3. A “right to prohibit” is an equivalent to “adequate and effective” protection;
   4. On issues as L&E, TPM and RMI, a wording different from the other WIPO Treaties would make no sense, as they would have no effect in practice;
   5. The proposals on “general principles”, “cultural diversity” and “defence of competition” are neither specific nor germane to the broadcast sector, but are of a horizontal nature which should thus be subject to other SCCR topics.
6. Points 8 and 9 show that the sole area of real “negotiation” is the Scope, *i.e.* the decision which online signals are to be included in a mandatory manner and which ones possibly subject to a reservation or “opt-out”. Given today’s technology, the inclusion only of online simulcast signals would not be sufficient (see above no. 9.b); as a minimum, mandatory protection must include also broadcasters’ catch-up signals.

However, it must be realized that the Scope is unlikely to be “fully solved” at SCCR level, because then in fact a Diplomatic Conference would be practically superfluous: If the DipCon were intended to solve only drafting issues, a preparatory committee of international copyright experts would be able to solve that task rather swiftly. Hence, scheduling of a DipCon date should not be made dependent on having a unanimous SCCR view on the Scope, as such condition could easily be abused to infinite delays.

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**Regarding the SCCR35 and SCCR36:**

The WBU proposes that the next SCCR35 in November 2017 should

* discuss a new revised Chairman’s Text, including the final outstanding provisions on
  + Relation to Other Treaties,
  + National Treatment,
  + Formalities and Reservations,
  + Application in Time, and
  + Enforcement of Rights

[NB apart from Application in Time, all these can be aligned with the Beijing Treaty wording]; the Preamble is not urgent and can be left open for the DipCon;

* discuss the proposal of Argentina, Colombia and Mexico (outlined in SCCR/33/5), as due to the US Presidency elections in November 2016 this was postponed from SCCR33 to SCCR34, but in May 2017 was postponed again;

* explain to delegations that a lack of protection for broadcasters’ online signals would also undermine protection of the corresponding offline signals;
* improve the (non-conceptual) drafting issues, so as to allow that the SCCR36 (in early? Spring 2018) can - and should - finalize the Basic Proposal.

**Regarding the WIPO GA 2017**

Given the continuing risk of linkages, which have caused constant failures at the WIPO GA to make progress on the BT roadmap since 2014, the WIPO Secretariat’s report for the GA in October 2017 will require separate deliberations on strategy.