**12 reasons why questioning the broadcasters’ need for a “making available-right” is wrong**

1. The act of making available of (fixed) broadcasts (e.g. via on-demand use) is by far the most commonly used form of unauthorized use of broadcasts, and this right is thus the core of any meaningful Treaty for broadcasters. Leaving this right out would deprive the Treaty of its main purpose.
2. For authors, the act of “making available” is a sub-category of “communication to the public” which was already recognized in Art. 11, 11bis, 14 and 14bis Berne Convention 1967 as an exclusive right of authors. This means that in 1996 such act of making available was implicitly or at least arguably covered already – and secondly that right to prohibit or authorize was thus already acquired/owned by producers. The “Internet piracy threat” was nevertheless considered a strong enough argument to create an explicit new right for authors in the WCT and as a separate right for music performers/producers in the WPPT. The piracy threat was for broadcasters recognized at the 1997 WIPO symposium of Manila, and has ever since increased, with the growing easy of copying and new redistribution technologies.
3. The main reason for the broadcasters’ related right is the need for being entitled to seek remedies in the broadcasters' own right, independent from the rights to the content. This was recognised by the Rome Convention in 1961. With the new media and technologies, this ability to act independently and swiftly against broadcast piracy is even more crucial today, so as to allow prima-facie evidence for urgent injunctive remedies.
4. The situation is the same as for phonogram producers; when their recordings are made available online by pirates, they need to react quickly, and as separate neighbouring right-holders they do not need to involve the music copyright-holders. The making available right for broadcasters is thus the equivalent of Art. 14 WPPT with exactly the same purpose. Has any government before it adhered to the WPPT ever asked record producers to provide their reasons for an effective remedy to online infringements? Of course not.
5. The independence of the related right from the underlying rights is normal in copyright/IP: Any performer can act in his own right, just as any translator or any compilation rights-holder, in addition to the author(s) of the performed or original works. Just as any technical device or process could be infringing two (or more) different patents at the same time.
6. To combat online piracy, rights of fixation or reproduction are not suitable because these acts are only of a preparatory nature and can be done by another party than the actual “communicator”; the infringing act that needs prohibited or authorized is providing the public with access to the Internet “upload”, and the party engaged in that upload is the one who is “making available”.
7. Broadcast piracy requires legal action much swifter than in other areas. In reality, a court action could be necessary almost immediately (within hours) after discovery of the signal infringement (e.g. sports events where most of the value has a very short life-span), or even at discovery of the threat of an infringement (e.g. announcement that a certain broadcast will soon be made available). In such cases, the broadcaster whose signal is taken is the one most directly affected. In such cases, the content rights owners - who have been paid already for the lawful broadcast - may be far away, in other time-zones of the world, and then obviously difficult to reach and the damage will become irrecoverable. Moreover, for sports and news events, where quick action is essential, there are no underlying IP rights at all. Relying on content protection is thus no option.
8. There are also practical reasons why it would be inefficient to require individual content rights owners taking action in respect of piracy of individual programmes - multiple claimants would increase costs, slow down proceedings and it is in practice unrealistic to expect that all right-holders affected get involved and coordinate themselves in the proceedings - in particular not all right-holders would be able to afford this scale of litigation, and they would clearly expect the broadcaster to deal with infringements.
9. Already today, but even more in the future, the consumption of broadcasts on a time and place (and device) chosen by the public is in strong demand, and broadcasters need to make the investments required for allowing the public such convenient use. The making available right is the one covering that investment.
10. The Treaty is putting broadcasters on the same level as other right-holders (authors, musical performers and actors) having already received updated international protection. It would be a clear anomaly if only the contributors to broadcast programming, but not the broadcasters themselves, were protected against online broadcast piracy. This would be impossible to explain to future generations dealing with IP law.
11. The Rome Convention provides a post-fixation right, namely the right of reproduction. This means that in all (close to 100) RC countries, broadcasters should already share – in their own right - in proceeds from the making available of fixed broadcasts (e.g. private copy levies). In real practice this is solved, and in no RC country has this fact caused any problem. So there is no reason to expect any difficulty with content rights when introducing the “making available” right on Treaty level, as it does not make a higher financial claim.
12. The Treaty would provide a clear message to the outside world that broadcast piracy cannot be condoned and that broadcasters' rights must be duly and globally respected. If the need for the making available right in the broadcasters’ treaty is denied, the intrinsic value of the rights necessary for the production of broadcasts will be reduced. This will first hit the sports events, as these rights are most badly affected by online piracy. In the long term, the same effect will apply to other broadcasts, as the public will no longer respect copyright protection to any broadcast production, and ultimately this will lead to devaluation of copyright in general. This means that ultimately everyone will lose out.

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