

# **BROADCASTS AND THE NEIGHBOURING RIGHT:**

## **CATCH-UP OR A FULL UPDATE?**

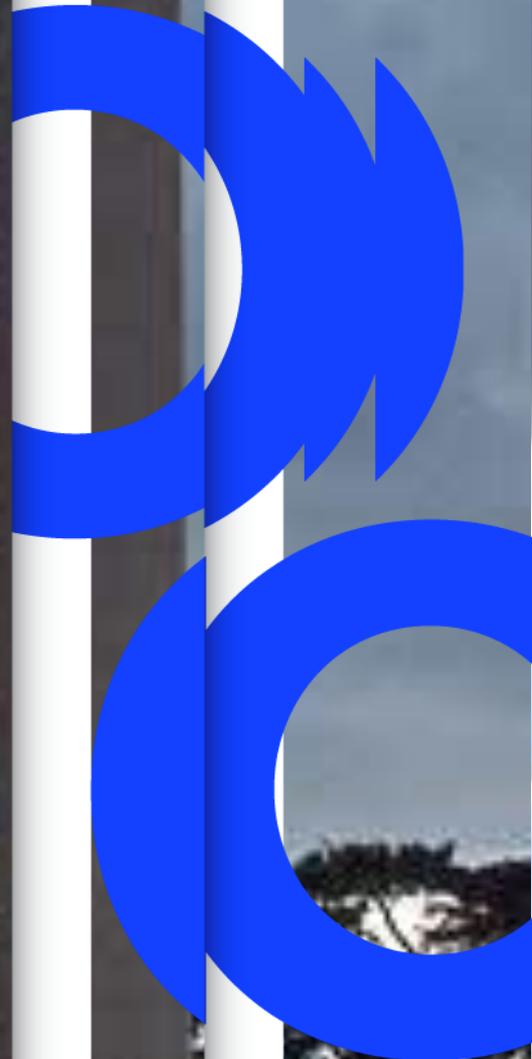
**BVA LUNCH-CAUSERIE - BELGIUM**

**19 MARCH 2018**

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HEAD OF INTELLECTUAL PROPERTY

**OR:**

***“HOW TO SURVIVE  
20 YEARS OF WIPO DISCUSSIONS .....”***



# CURRENT RIGHTS GRANTED TO BROADCASTERS (EU, ROME CONV, EAT, BSC)

- (a) **Retransmission** EAT, RC, Art. 8(3) Directive 2006/115 (partly)
- (b) **Communication to the public,**  
in places accessible against payment EAT, RC, Art. 8(3) Directive 2006/115
- (c) **Fixation**  
(but to include still “off-screen” photographs) EAT, RC, Art. 7(2) Directive 2006/115
- (d) **Reproduction or distribution** (of fixations) EAT, RC, Art. 2(2) 2001 InfoSoc Directive  
and Art. 9(1) Directive 2006/115
- (e) **“Making available” of fixations** Art. 3(2) sub d) Infosoc Directive
- (f) **Decoding of encrypted broadcasts** Directive 98/84 on Conditional Access, but  
not included on EU proposal for WIPO
- (g) **Pre-broadcast signals**  
(sent via a telecommunications link) Brussels Satellite Convention (but no “right”)
- (h) **Importation** of fixations or reproductions thereof EAT  
(made without authorization in a country without protection  
against the making of such fixations or reproductions)

# **CURRENT PROTECTION: OTHER ELEMENTS (IN EU LAW)**

## **- *Term of protection: 50 years***

Art. 3(4) Copyright Duration Directive 2006/116

## **- *Technological protection measures***

Article 6 InfoSoc Directive 2001/29 (similar to 1996 WIPO treaties).

## **- *Rights management information***

Article 7 InfoSoc Directive (similar to 1996 WIPO treaties)

## **-- *Exceptions or limitations***

Article 5 InfoSoc Directive (same as for copyright and related rights)

## **- *Enforcement of rights***

Article 8 InfoSoc Directive (general rules) and IPR Enforcement Directive 2004/48

# INTERNATIONAL PROTECTION OUTDATED

Protection under the 1961 Rome Convention is based on the technical, regulatory and competitive situation 55+ years ago, but is wholly inadequate for 21st century.

## Some press headlines:

- ***TV show piracy increased 150% just in the past year*** (Study Envisional, 2004)
- ***Cyber-pirates jeopardizing the £1 billion TV UK Premier League broadcasting rights deals*** (The Register, 2005)
- ***Global satellite signal theft looms large*** (Telecomweb, 2005). Satellite operators estimate revenue losses of approximately \$2 billion+ worldwide
- ***Lve television fastest-growing segment of copyright infringement*** (DETICA research, jointly commissioned by Google/PRS)
- ***Pirate IP-TV websites become “formidable competitor to established pay TV”*** (IRDETO study, 2016; Top 100 pirate websites 16 million visits per month)

# INTERNATIONAL PROTECTION: MAIN GAPS

- ***(Broad) retransmission right***

to include retransmissions via wire or Internet, and “deferred” retransmissions

- ***Making-available right*** – core right to protect against online piracy

- ***Broadcasters’ online signals + pre-broadcast signal***

Otherwise risks also for **offline** protection / abuse by pirates

- ***Possibly: Signal integrity***

Screen display + quality of “signalling” (e.g. Hbb TV) important in future (5G)



# The WIPO Broadcasters' Treaty: 1998 - ?

Broadcasters  
(public and commercial)

Other right-owners

WIPO Member States



Consumers, 'Civil Society', IT industry

# How it all started...



**December 1996:**

New WIPO “Internet” Treaties for

- authors (WCT/Geneva)
- record producers and (musical) performers (WPPT/Geneva)
- actors (WAVPT/Beijing)

**And what about broadcasters?**

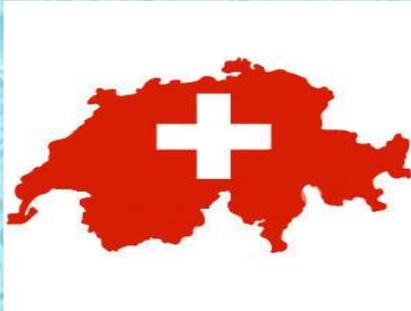
*WIPO World Symposium, Manila, April 1997:*

→ Work on possible Treaty for broadcasters to start

*Committee on Copyright & Related Rights (SCCR) 1998:*

→ Joint Treaty proposal from broadcasters’ unions

# Fast progress in the beginning...



**1999:**

First Treaty-language proposal  
(*Switzerland*)

Other countries soon followed (**2000-2002**):



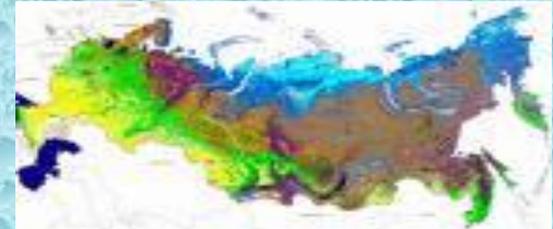
*Argentina*

*Japan*

*EU*

*Uruguay*

*Honduras*



And many countries  
(*e.g. Russia*)  
very supportive!

# Comparison of Treaty proposals (2002)

## EBU INTERNAL NOTE

### COMPARISON OF TREATY-LANGUAGE PROPOSALS SUBMITTED TO WIPO

Rights requested by broadcasters	Switzerland	Argentina	Japan	EC	Uruguay	Honduras
Rebroadcasting (simultaneous and deferred)	Yes (retransmission)	Yes	Yes* *NB possible determination of conditions of exercise of rights	Yes (retransmission)	Yes (retransmission)	Yes (retransmission)
Cable distribution	Yes (retransmission)	Yes (NB possible service area exception)	Yes* (under definition of communication to the public)	Yes (retransmission)	Yes (retransmission)	Yes
Communication to public in places accessible to public - without restriction to paying audience	Yes Yes	Yes Yes	Yes Yes (possible determination of conditions of exercise of right)	Yes No	Yes Refers to EC text but wishes deletion of restriction	Yes (only television) No
Fixation - including still photos	Yes Intended	Yes No	Yes Yes	Yes No, but believes to be covered	Yes No	Yes Yes
Reproduction	Yes	Yes	Yes	Yes	Yes	Yes
Distribution	Yes (sale or other transfer of ownership)	No	Need should be evaluated; thinks reproduction right sufficient to deal with rental	Yes through sale or transfer of ownership	Yes through sale or transfer of ownership	Yes (reproduction or copies made without authorization) incl. rental
Making available	Yes	Yes	Yes	Yes	Yes	Yes
Decoding	Yes	Yes	Requires further discussion	No	Yes	Yes
Uses of pre-broadcast programme-carrying signals	Intended	No, but under discussion	Should be discussed	Yes	Yes	Unclear
Importation/distribution of fixation made without authorization in country where not protected	No	No	No	No	No	Yes
Duration: 50 years from when broadcast takes place	"From first time"! Intended? (not in Swiss law)	"From first time"!	Yes from when broadcast took place	"From first time"!	"From first time"!	"From first time"!

# Position of the USA?



**New Treaty proposal (December 2002):**

- Limited scope of rights (no RC)
- But: Inclusion of “webcasters”

# 2003/2004: WIPO under heavy political influence

WTO (and other) lobbying



Rise of "Civil Society" NGOs

➡ No further discussion on substantive legal issues (more on «process»)



Other right-owners (more) supportive of broadcasters' Treaty



# Political impasse 2005 - 2010



**Vast majority of delegations still in favour** of convening a Diplomatic Conference (DipCon) for adopting a Treaty

But: **Key countries not prepared to give up positions**  
*before* DipCon



**Chairman** (Liedes): Combine all alternative proposals  
(Result: Basic Proposal of 100+ pages)

**→ Increased risk of failing to reach agreement on final Treaty text**  
(Note: 2000 WIPO DipCon on audiovisual performances failed)

# 2011: NEW TEXT PROPOSAL (SOUTH-AFRICA/MEXICO)

New approach:

Not “Rome+”, but “narrow” Treaty in addition to Rome

- ✓ Technologically neutral
- ✓ Filling the gaps in protection
- ✓ Modern, forward-looking (“future-proof”)



# **BACK TO BASICS !**

**(AFTER EACH 3RD YEAR OR SO.....)**

# **PUBLIC BENEFITS OF BROADCASTING**

- **employment opportunities**
- **investments in sports, education and culture**
- **diversified information on national and local events**
- **consolidation of national and cultural identity**
- **societal benefits of free, independent journalism**
- **enhancing public awareness and media literacy**
- **special programming for niche/minority audiences**
- **promotion of local culture and artists**
- **creation of new services on a variety of platforms**
- **convenient (time- and place-independent) access**



# FROM PROGRAMME MAKING



# TO EDITING SIGNALS



# TO "BROADCASTING"



## PROGRAMMES

(EMBODIED BY)

## SIGNALS

(PRODUCED BY)

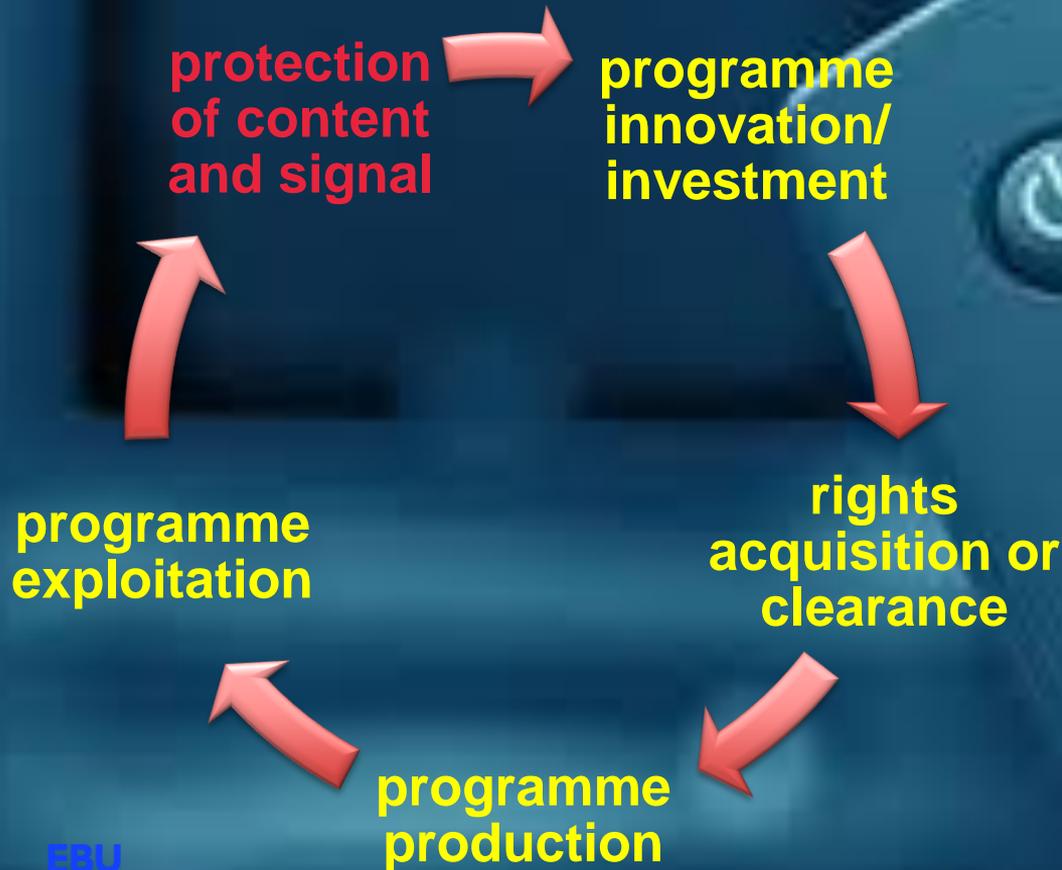
## BROADCASTERS

(INVESTING IN)

## PROGRAMMES (...)



# IP RIGHTS LIFECYCLE



# OBJECT AND NATURE OF PROTECTION: THE FUNDAMENTALS (1)

The neighbouring right protects programme **investment** (= as phonogram producer)

This means **a) Independence**

- of **audience** (public or commercial broadcasting, small or large circles of consumers)
- of **content** (“signal-based” means that protection of content (or not) is irrelevant)
- of **transmission** (each signal receives its own, separate protection)
- of **technology** (object is programme-carrying signal, not a delivery technique)
- of **fixation** (programme-carrying signal can be exploited in both fixed or unfixed forms)

## OBJECT AND NATURE OF PROTECTION: THE FUNDAMENTALS (2)

The neighbouring right protects programme **investment**  
(= as phonogram producer)

This means also

**b) No interference** with content right-holders' prerogatives ( = **separate** remedy)

# MIGRATION TO THE 21<sup>ST</sup> CENTURY



**BBC**

TV

News

Sport

Weather

Radio

CBBC

CBeebies

# THE FUTURE IS HYBRID (TV)

60 million households in Europe have Internet-connected TV sets (170 mio worldwide)



**Glastonbury 2013**  
Choose a stage

Wimbledon Live

**Formula 1**  
British Grand Prix

**EBU**  
OPERATING EUROVISION AND EURORADIO

**BBC one**

More from  
BBC One

**BBC iPlayer**



**Holby City**  
Episode 7



**Doctors**  
Episode 10



**Merlin**  
Episode 7

# BBC ONLINE COVERAGE OF SPORTS EVENTS: RED-BUTTON SERVICES

## CATCH UP LIVE VIDEO



▶ **Djokovic reaches last eight** 3 mins



▶ **Murray set to face Soderling** 3 mins



▶ **Wimbledon day 9 highlights** 3 mins



**LIVE**  
▶ **30 min left**

**BBC One**  
Day 10 Coverage



▶ **BBC Two**  
Federer v Hewitt



▶ **Centre Court**  
Murray v Soderling

**Court No. 1**  
Williams v Sharapova



▶ **Court No. 1**  
Williams v Sharapova

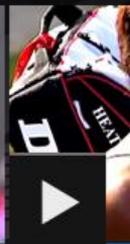


▶ **Court No. 2**  
Nadal v Fish

**Court No. 3**  
Bryan/Bryan v Aspelin...



▶ **Court No. 3**  
Bryan/Bryan v Aspelin...



▶ **Court**  
Watson

**Court**  
Djokov



# OFFLINE - ONLINE - FIXED BROADCASTS: "START-OVER" SERVICE





# WHY PROTECTING BROADCASTERS' ONLINE SERVICES / SIGNALS?

1. Treaty to be future-proof (no “2 steps”)
2. Increased programme delivery via Internet
3. Connected TV / “red button” services: both fixed and non-fixed signals need protected
4. Audio/video streaming via (open) Internet increasingly easy to copy and redistribute
5. Preventing piracy loopholes in signal-based protection (circumvention of Treaty)
6. Justification for online signal protection is the same as for broadcasters' offline services

Main question is “how” :

→ part mandatory, part via reciprocity



# **WHY BROADCASTERS DIFFER FROM “WEBCASTERS”**

**Webcasters not defined**

**No link with linear programme service (different rights clearance)**

**Recognition of broadcasters' special status not based on delivery technique**

**Webcasters not subject to media or audiovisual policy obligations**

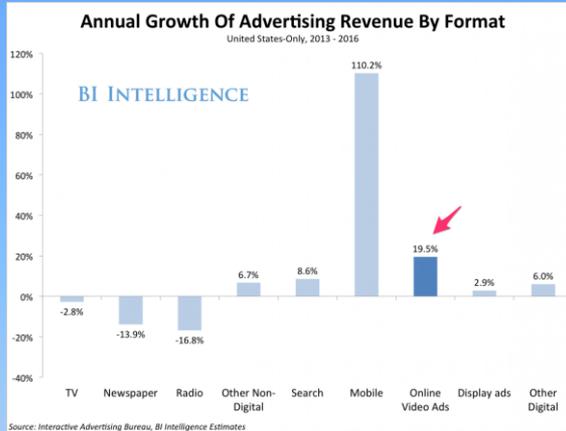
**e.g. establishment requirements; protection of minors (and human dignity);  
advertising rules; accessibility (for deaf or hearing impaired)**

**No obligation for contribution to production of original content**



**New media buying  
sports streaming rights**

## BUT FOR HOW LONG?



**Erosion of  
linear scheduling**



**Online is  
taking over  
advertising  
revenue**



**Telco mergers with  
news entities**

**Platforms investing  
in original content**

# CONSEQUENCES FOR LEGAL PROTECTION (ALSO IN EUROPE)

## Increased need for protection

- of signals delivered via non-wireless means (e.g. online)
- whether the signal is fixed or not
- against piracy on any platform (by any means)
- in both the domestic and cross-border contexts

# CONSEQUENCES FOR WIPO DRAFTING NECESSARY IMPROVEMENTS OF CHAIRMAN TEXT (SCCR35/12):

## CORE ELEMENTS:

- Scope of application (which signals to protect mandatory v. optional)
- Scope of protection (rights)

## Consequences for **definitions**:

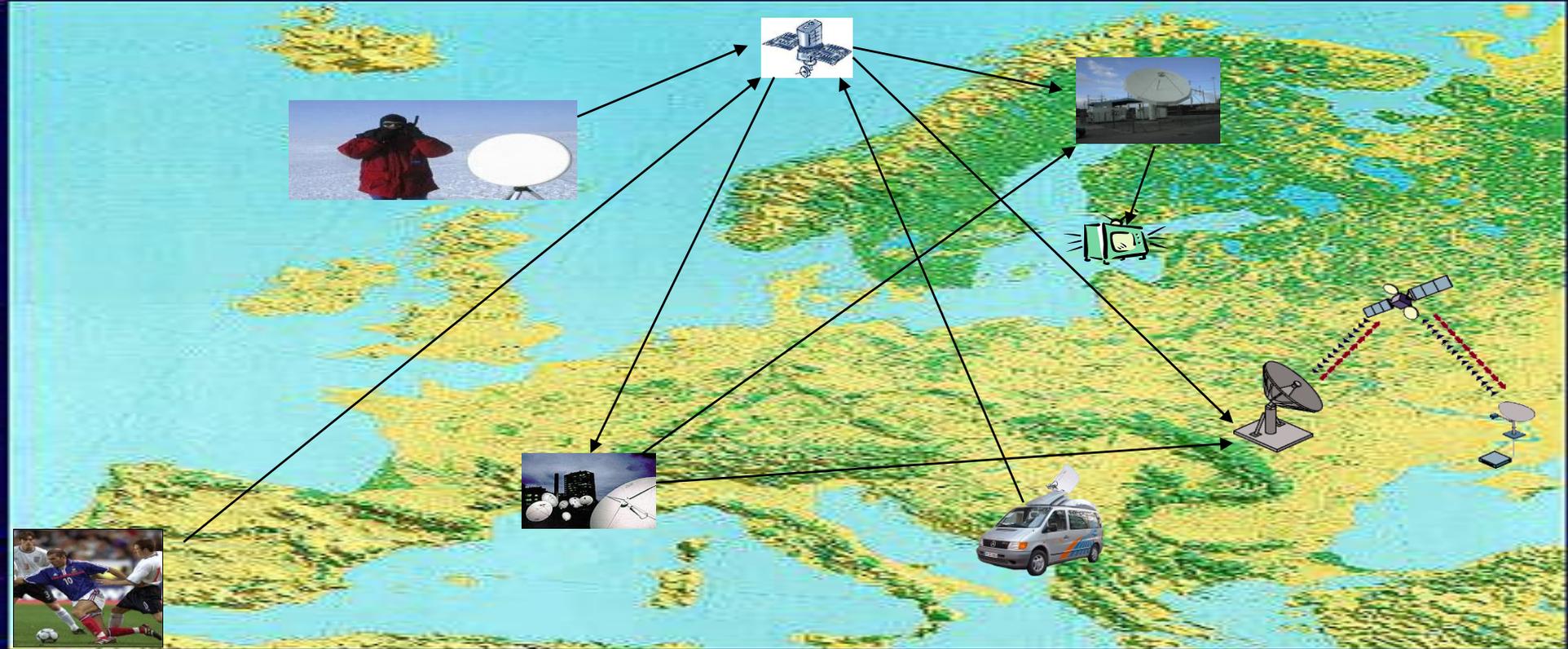
- Broadcasting **organisation**  
(excluding webcasters preferably via “Agreed Statement”)
- Retransmission (to include «deferred» transmissions)

# SCOPE OF PROTECTION (RIGHTS)

## Minimum for new Treaty:

- Retransmission of signal simultaneous or deferred via any means (= via any platform, i.p. Internet)
  - Making available (on-demand), via any means
- + Pre-broadcast signal

# Pre-broadcast signals: Transmissions via telecommunication



50 earth-stations spread over Europe can uplink to the satellite, providing connections with 200+ European TV stations

# NEW DEFINITION OF "BROADCASTING"?

**NB:** Definition only "*for the purpose of the Treaty*"  
(= constitutive, not as "usage")

## Options:

1. Exclude transmissions over computer networks,  
but solve via "scope"
2. Stay neutral (wireless or by wire),  
but clarify through "Agreed Statement"
3. No definition (as in RC)  
(webcasters excluded via definition of "br. organisation")
4. Other solution?



## BROADCASTING (AS NEIGHBOURING RIGHT)

**Platform neutral:** Signal remains protected "*in any subsequent format*"

i.e. also if retransmitted (cable, IP-TV, OTT, mobile...)

**NB. Media law:**

- online simulcasts
- linear webcast (of scheduled programme by AVMS provider)

already recognised in EU law

# WHICH ONLINE SIGNALS?

**Online = offline (e.g catch-up):  
Mandatory protection**

**Online = Long-term ("catalogue") VOD:  
"Opt-in" (subject to reciprocity)**

**Online = (Closely) Related to offline (e.g. sports):  
Mandatory (WBU preferred)  
or Reservation to "adequate/effective"**



Place of  
transmitters /servers  
relevant?



# DESIRED ACHIEVEMENT FOR 2018

Finalize Basic proposal  
and GA to schedule Diplomatic Conference  
for the Treaty in (early) 2019



# EUROPEAN COURT (C-279/13, C MORE ENTERTAINMENT):

*"MEMBER STATES ARE  
NOT PRECLUDED FROM  
EXTENDING THE  
EXCLUSIVE RIGHT OF  
THE BROADCASTING  
ORGANISATIONS  
REFERRED TO IN  
ARTICLE 3(2)(D) AS  
REGARDS ACTS OF  
COMMUNICATION TO  
THE PUBLIC (...)."*



**UPDATE OF  
EU LAW  
OVERDUE**

# WHY NOT START IN BELGIUM?



A silhouette of a person with a large backpack looking through binoculars, framed by a circular grid pattern against a cloudy sky.

**To be continued....**