
Technological Progress and the End of Broadcasters' Rights (First Draft)

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- ❑ 1. The Latest Amendment of the Copyright Law and Broadcasters' Rights

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- Rome Convention (1961)
 - Article 13 [Minimum Rights for Broadcasting Organizations]

Broadcasting organisations shall enjoy the right to authorize or prohibit:

(a) the **rebroadcasting** of their broadcasts;

(b) the **fixation** of their broadcasts;

(c) the **reproduction**:

(i) of fixations, made without their consent, of their broadcasts;

(ii) of fixations, made in accordance with the provisions of Article 15, of their broadcasts, if the reproduction is made for purposes different from those referred to in those provisions;

(d) the **communication to the public of their television broadcasts** if such communication is made in places accessible to the public against payment of an entrance fee; it shall be a matter for the domestic law of the State where protection of this right is claimed to determine the conditions under which it may be exercised.

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- **Article 45 of the Copyright Law of China (2010) * :**
 - A radio station or television station shall have the right to prohibit the following acts performed without its permission:
 - (1) **retransmitting** its programs; and
 - (2) making a sound **recording** or video recording of its programs and **reproducing** such recording.
 - The term of protection for the right specified in the preceding paragraph shall be **fifty years**, expiring on December 31 of the fiftieth year after the first transmission of a program.

 - *Translated by Prof. Jiarui Liu

The Proposed Draft of 2020:

Article 45 A radio station or television station shall have the following rights ~~to prohibit the following acts performed without its permission~~ in respect of the signal carrying a program that it transmits:

- (1) authorizing another to retransmit ~~retransmitting its programs; and;~~
- (2) authorizing another to fix or reproduce ~~making a sound recording or video recording of its programs and reproducing such recording;~~ and
- (3) authorizing another to communicate to the public through information network.

The term of protection for the right specified in the preceding paragraph shall be fifty years, expiring on December 31 of the fiftieth year after the first transmission of a programs ~~signal~~.

- **Article 47 of the Copyright Law of China (2020)*:**

Radio and television stations have the right to prohibit the following conduct that does not have their permission:

- (1) Rebroadcast of radio and televisions broadcasts by wired or wireless means;
- (2) Recording or duplication of radio or television;
- (3) **Dissemination of their radio and television broadcast to the public through information networks.**

Radio and television stations exercise of the rights provided for in the preceding paragraph must not affect, restrict, or infringe upon others' exercise of copyright or copyright-related rights.

The duration for protection of the rights provided for in the first paragraph of this article is fifty years, ending on December 31 of the fiftieth year after the first broadcast on radio or television.

❑ 2. Existing Copyright or Neighboring Right Protection for Program Contents

- Audiovisual works
 - ❑ “Cinematographic works and works created by a process analogous to cinematography”
- Work of Compilations
 - ❑ Compile by selection or arrangement of preexisting works or passages therefrom into a new work
 - ❑ News programs;
 - ❑ Hours-long broadcast
 - ❑ ...
- Audiovisual Production
 - ❑ sound recordings or video recordings

■ The dual-track system in China:

- Films or film-alike works having high originality/ creativity: **Author's Rights**
 - Article 4(11) of the Regulations for Implementing Copyright Law (2013)
"Cinematographic works and works created by means similar to cinematography" refer to works **filmed on a certain medium**, consisting of **a series of images** with or without accompanying sounds, and disseminated with the aid of certain appropriate devices or other methods;

- Sound or Video Recordings: **Neighboring Rights**
 - Article 5 of the Regulations for the Implementation of Copyright Law (2013)
 - "Video recording" refers to a recording of successive and related images or pictures with or without accompanying sounds, **excluding cinematographic works or works created by means similar to cinematography.**

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- The Limits of Content-Based Protection
 - If a broadcaster does not make contribution to its program contents, for instance, when all contents are licensed by a third party or brought from public domain, it could not directly rely on the existing rights over the contents to prevent others' rebroadcast or retransmission.

□ 3. Traditional Justifications for Broadcasters' Rights

□ Broadcasters' Intellectual or Financial Input

- *“Referred to as ‘broadcasters' rights’, the purported justification for their existence derives from the need to equip broadcasters with mechanisms to prevent others from free-riding on their investment of time, skill, and effort in working the infrastructure of the television industry.”* (Shyam Balganes, at 1305, citing CLAUDE MASOUYE, WORLD INTELLECTUAL PROP. ORG. [WIPO], GUIDE TO THE ROME CONVENTION AND TO THE PHONOGRAMS CONVENTION (William Wallace trans., 1981).)

□ Better copyright protection for content suppliers

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- Shyam Balganes, "The Social Costs of Property Rights in Broadcast (and Cable) Signals," 22 Berkeley Technology Law Journal 1303 (2007).
 - Hugenholtz P. Bernt, The WIPO Broadcasting Treaty, A Conceptual Conundrum, European Intellectual Property Review (EIPR), Vol. 41, #4, 2019, 199-202

□ HU Kangshen, NPC Official (1990):

- Why the law protects broadcasters' rights:
 - The amount of creative work done by radio and television stations in the process of program production determines the types of rights to programs.
 - Some of TV programs are produced in a creative way similar to film works ··· TV stations can enjoy all the rights stipulated in Article 10 of the Copyright Law.
 - For other programs they produce, radio or television stations can only enjoy neighboring rights.

□ 4. The Costs of Broadcasting

- **Main Costs:**

- Creating program contents or purchasing license from content suppliers.
- **Sending or transmitting the content to its editing studio;**
- Adapting or editing the content to prepare a pre-broadcast version;
- **Transforming the pre-broadcast version into a signal;**
- **Broadcasting or transmitting the signal to targeted audience.**

■ Decreasing Cost in Digital Era

- *“Digital production lowers the cost of recording and editing television content and permits major quality improvements. With video footage in digital format, scenes can be edited and modified using computer-aided imaging techniques; backgrounds can be altered easily and characters may even be created. Such modifications can be achieved more cheaply, and with better results, than using older production techniques. Moreover, digital video equipment is relatively inexpensive, assisting the growth of small, independent movie producers. Digital recording and transmission, including the use of satellite video links, improves the speed and quality of news gathering and sports reporting.” (The Economic Regulation of Broadcasting Markets, at 48.)*



■ Terrestrial broadcast:

- Traditionally, analogue broadcasting through **terrestrial towers** requires “each channel to have a dedicated frequency band.”
- “Digital broadcasting signals are converted into a digital format and, by means of compression and multiplexing techniques, this allows many more channels to be transmitted in the same bandwidth. ” “**Analogue transmission is relatively inefficient** in its use of spectrum, placing a tight constraint on the number of programmes that can be broadcast simultaneously, while digital signals are much more efficient.
- (The Economic Regulation of Broadcasting Markets, at 84-85)

■ Satellite calling service:

- “The Iridium communications service was launched on November 1, 1998 and went into Chapter 11 bankruptcy on August 13, 1999. Iridium failure was largely due to insufficient demand for the service and poor management. The cost for the equipment and service was out of the range for most customers. Originally the handset was at \$1300.00 and the service was **at \$7.00 per minute**. After spending over \$5 billion on the Iridium system they only were able to obtain 55,000 subscribers.” (GlobalComm, History of the Handheld Satellite Phone, <https://globalcomsatphone.com/history-of-the-handheld/>)
- Nowadays, there are several major service providers competing in the market, TT1H (天通一号, China, **1.6 RMB** per minute), Inmarsat (IMO, **1.8**), Iridium (USA, **6.4**) and Thuraya (阿联酋**1.8**)。 The calling rate is about 1.6-6.4 RMB per minute. For data transmission, the rate is about **16-30 per MB**. Data uploading at 384kbps to 580kbps.
- Today’s standard rate for satellite calling is 1/40 of that in 1990s! (https://www.sohu.com/a/368269840_119066)

■ **Satellite Broadcast service:**

- ❑ To rent a satellite TV broadcast channel, “the Uplink chargers are about **4500-31500 USD** per month.” An audio radio channel is much cheaper. It can cost around **850 USD a month**.
- ❑ (<https://www.youtube.com/watch?v=fV8ae62f2Go>.)

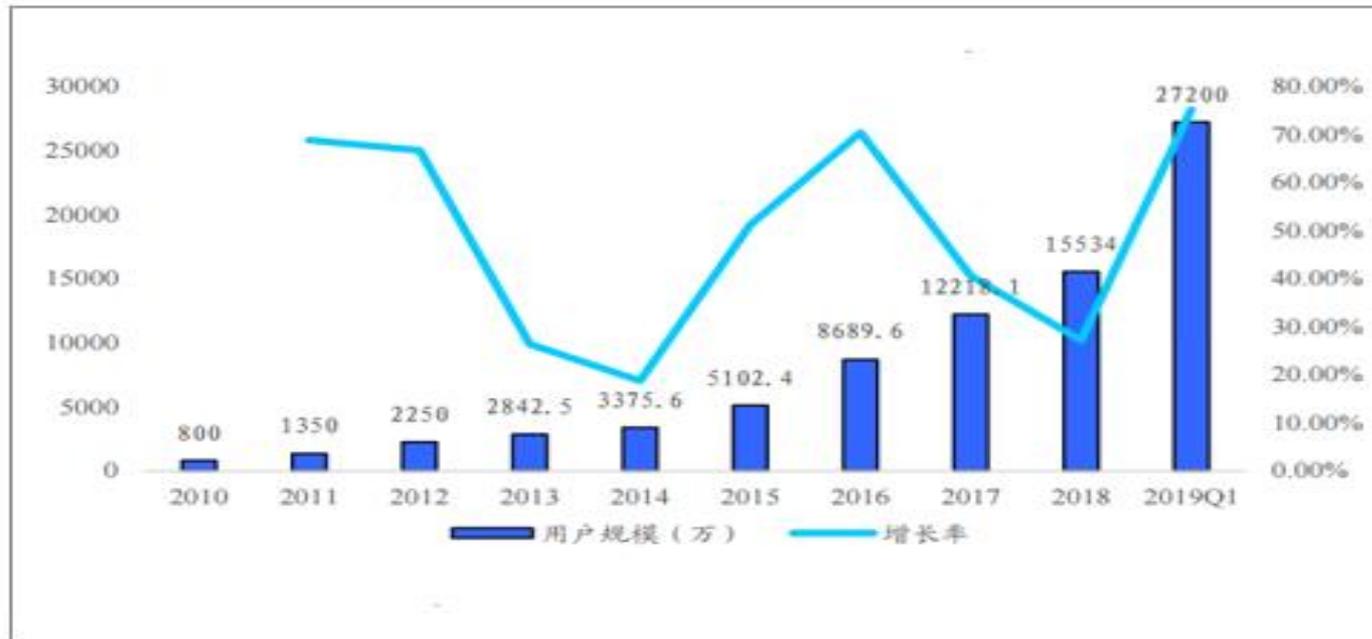
- ❑ At this price rate, a three-hour high definition satellite broadcast could roughly cost a broadcaster 131USD ($[31500/(30*24)] *3=131\text{USD}$).
- ❑ For a radio broadcaster, a three-hour satellite broadcast could be as low as 3-5USD!
- ❑ A typical 3-hour rebroadcast’s cost of less than 150 USD is by no means substantial. The radio broadcast’s 3-5 USD would completely negligible.
- ❑ Even the cost of broadcast were doubled or tripled, for example, to 500 USD per football game, it would still be insubstantial, unable to justify an extra property-alike protection.

- Satellite Broadcast service:
- *“The Happy Satellite Nerd Episode 112 For Galaxy 19, The up-link charges per month are about \$4500 per 1Mbps. To give a ball park figure what it would cost to have a channel on satellite: (For example, RT on G19 uses 4Mbps for a 720x480 SD Channel using MPEG 2) A 720x640 channel about **\$10,000/month** for a @2MBPS mpeg2 SD channel, Some Standard Definition channels only use 1MBPS \$4500/month A 720p Channel could cost over \$20,000/month 1080p Channel Could cost over \$31,500/month for a @7MBPS Mpeg 4 h.264 It can cost around **\$850 a month For a Audio Radio Channel.***
- *“You may also may have to get a dedicated internet connection To the uplink company, How ever much that costs? -You can stream cheaper But FTA can reach area’s that internet cant - Lots of Cable and over the air subchannels use Satellite for channel distribution - **\$30,000 a month for space on a satellite that costs \$400 Million** I have people say they can get there own satellites, LOL Usally how it works it the TV channel rents the transponder space!”*

- **Broadband Internet:**

- It not only reduces the cost of transmission, but also attracts users from traditional TV broadcasters therefore threatens the existence of radio or TV broadcasters.

The Explosive Rise of IPTV: Now should be more than 300 millions users



<https://www.chyxx.com/industry/201909/778195.html>。

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- ❑ Harder to Justify Broadcasters' right
 - Almost zero cost of network transmission
 - ❑ Although **satellite or terrestrial tower** broadcast (transmission) still have a substantial cost, the alternative solution is almost free.
 - ❑ Saving transmission cost does not bring a significant advantage to competitors any longer.
 - Existing Copyrights and Neighboring Rights

□ 5. Better Protection for Content Suppliers or Performers ?

- The benefits of broadcasters' enforcement
- Alternatives to broadcasters' enforcement
 - Authorize a broadcaster to sue
 - Join a collective society of copyrights
- Administrative costs in broadcasters' enforcement
 - Compare a broadcasters with a non-exclusive licensee

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- No need to protect non-exclusive licensee (broadcasters)
 - ❑ *Armstrong Cork Canada Ltd. v. Domco Industries Ltd.* 66 C.P.R. (2d) 46 (1982)
 - ❑ Standardized licensing rules help to lower down the cost of social communication.
 - ❑ Only allowing the owner or exclusive licensee to sue, forcing it to internalize all the costs. If a non-exclusive licensee is not satisfying with the default rule, it could seek for a transfer of copyright or an exclusive license.
 - ❑ Only exceptional situations, like collective society

Armstrong Cork Canada Ltd. v. Domco Industries Ltd.

66 C.P.R. (2d) 46 (1982)

This involves the interpretation and application of s. 57 of the Patent Act, R.S.C. 1970, c. P-4, which provides as follows:

- (1) Any person who infringes a patent is liable to the patentee and **to all persons claiming under him** for all damages sustained by the patentee or by any such person, by reason of such infringement.
- (2) Unless otherwise expressly provided, the patentee shall be or be made a party to any action for the recovery of such damages.

The predecessor of s. 57 was s. 32 of the Patent Act, R.S.C. 1927, c. 150. It provided as follows:

32. Every person who, without the consent in writing of the patentee, makes, constructs or puts in practice any invention for which a patent has been obtained under this Act or any previous Act, or who procures such invention from any person not authorized by the patentee or his legal representatives to make or use it, and who uses it, shall be liable **to the patentee or his legal representatives in an action of damages for so doing**; and the judgment shall be enforced, and the damages and costs that are adjudged shall be recoverable, in like manner as in other cases in the court in which the action is brought.

■ 6. Threat to the Public Interest

- ❑ Free access to contents in public domain
 - Many public domain resources are under control of the broadcasters in China.
- ❑ Tolerated Uses
 - *Tim Wu, Tolerated Use, 31 Colum. J. L. & Arts. 617 (2008)*

■ 7. A Narrow Interpretation of Existing Law

- The scope of broadcasters:
 - “Radio and televisions broadcasts” only includes traditional broadcast by wireless means.
 - Webcast or cablecast not viewed as broadcast
- Substantiality requirement:
 - Only “radio or television broadcast” that involves substantial investment enjoys such a protection.
- Consistency with TRIPs Agreement

8. Conclusions

- The development of digital technologies have almost eliminated the necessity of neighboring right protection for broadcasters.
- The latest expansion of broadcaster's rights is not justifiable.
- Chinese courts should interpret the existing law narrowly to protect the public interest.