

**The WIPO Background Discussion of the Proposed
'Broadcasters' Treaty' and Its Implications for the Domestic
Law of Australia and Japan^{*}**

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^{*} Ogawa M, ' The WIPO Background Discussion of the Proposed "Broadcasters' Treaty" and Its Implications for the Domestic Law of Australia and Japan' (2000) 43 *Transactions of Information Processing Society Japan* 3099-3112.

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Broadcasting organisations play a considerable role in the process of disseminating culture. In 1961, broadcasting organisations' rights were recognised by the 'Rome Convention'. The rapid advance in technology since its inception however has undermined the Convention's ability to function adequately. The World Intellectual Property Organisation (WIPO) therefore initiated discussions to prepare a new 'Broadcasters' Treaty' in 1998. This article analyses the background discussions of the WIPO Standing Committee and provides an overview of the proposed new treaty. It then anticipates the domestic regulations likely to be required in common and civil law systems, particularly as common law systems traditionally protect such rights through copyright as opposed to the civil law doctrine of neighbouring rights. This article contrasts likely regulations under Australia's common law system with those of Japan, a civil law country. The problems ultimately devolve around two matters: the rationale for protection of broadcasting organisations in modern terms and the justice issues of access control.

1. Introduction

The significance of the role of broadcasting organisations in the process of disseminating culture is not disputed. The 1961 Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (the Rome Convention) recognised the rights of re-broadcasting (s.13(a)), fixation (s.13(b)) and reproduction of the fixation (s.13(c)). As for television broadcasting, the right of communication to the public where people can gain access by paying an entrance fee (s.13(d)) is also recognised. However, advances in technology¹ (including broadcast

¹ On the issue of technological developments between the establishment of the Rome Convention and now, see, Francon, A. 'Should the Rome Convention on neighbouring rights be revised?', *Copyright Bulletin*, Vol.XXV, No.4, p.21 (1991), also, Thomas,

technology) since the establishment of the Convention means that the Rome Convention cannot effectively protect the rights of broadcasting organisations. As regards the rights of performers, phonogram producers and broadcasting organisations, which have been protected by the Rome Convention, the World Intellectual Property Organisation (WIPO) has already established the WIPO Performances and Phonograms Treaty. Therefore the formation of a new Treaty for broadcasters is also a prospect. There is still indecision as to the content of the treaty, yet considering the implications of the proposed treaty for domestic laws is likely to provide an effective yardstick for further discussion of the contents of the new treaty. Common law countries traditionally protect broadcasting organisations by copyright; they have not recognised neighbouring rights which are separate rights from copyright normally recognised by civil law countries. Thus we need to understand copyright concepts both of common law countries and civil law countries to review the global trend of domestic implementation following a new treaty for broadcasting organisations. Generally, English law is often used to typify the law of common law countries in contrast to German law in respect of civil law. This article considers the position in the Asia-Pacific region, and accordingly the Australian Copyright Act 1968 and Japanese Copyright Law are contrasted.

This article reviews the background discussion of the Standing Committee on the WIPO New Treaty for the Protection of the Rights of Broadcasting Organisations referred to as the Broadcasters' New Treaty, and examines what changes would be required to implement these rights under the domestic law of Australia, whose

I.D, 'Revision of the Rome Convention: is it necessary and timely?', *Copyright Bulletin*, Vol.XXV, No.4, pp.32-33 (1991)

copyright law is typical of common law countries, and of Japan whose law is typical of civil law countries, to clarify the focus of further discussion.

2. Discussions at the Standing Committee of WIPO

The First Session

The first session of the Standing Committee² was held at Geneva from November 2-10, 1998. In the Memorandum prepared by the International Bureau of WIPO³, the current conventions, regional agreements, national legislation relating to the protection of broadcasting organisations and the issues which had previously been considered to require further examination at the WIPO World Symposium on Broadcasting, New Communication Technologies and Intellectual Property, held in Manila in April 28-30, 1997 and the WIPO Symposium for Latin American and Caribbean Countries on Broadcasting, New Communication Technologies and Intellectual Property, held in Cancun, Mexico in February 16-18, 1998 were reported. A report confirming the need for further discussion of a new treaty was adopted, and a recommendation that the International Bureau should invite proposals was made.

² 'Report'(1998)

<wysiwyg://Content.27/http://www.wipo.org/eng/meetings/1998/sccr_98/sccr1_9.htm>

³ The International Bureau, 'Existing International, Regional and National Legislation Concerning the Protection of the Rights of Broadcasting' (1998)
<http://www.wipo.org/eng/meetings/1998/sccr_98/sccr1_3.htm>

The Second Session

The second session of the Committee⁴ was held from May 4-11, 1999. A Draft of the treaty from Switzerland,⁵ proposals from EC,⁶ Japan⁷ and Mexico⁸ (also from Cameroon⁹ after the session) and certain drafts and proposals from some Non Governmental Organisations¹⁰ were submitted. The contents of these proposals were largely in accordance with the issues that required further examination at the Symposia mentioned above. The rights to be granted to broadcasting organisations enumerated in the proposals are the rights of re-broadcasting, cable distribution (including cable retransmission), making available, reproduction (including making photographs), decoding encryption, importation and distribution of fixations or reproductions made without authorisation. In addition, the definition of broadcasting or broadcasting organisations, the relation to other conventions, national treatment,

⁴ 'Report' (1999) <http://www.wipo.org/eng/meetings/1999/sccr_99/sccr2_11.htm>

⁵ Switzerland, 'Proposal for a Protocol on the Rights of Broadcasting Organizations Under the WIPO Performances and Phonograms Treaty' (1999) <http://www.wipo.org/eng/meetings/1999/sccr_99/sccr2_5.htm>

⁶ European Community and Its Member States, 'Submission on the protection of rights of broadcasting organizations' (1999) <http://www.wipo.org/eng/meetings/1999/sccr_99/sccr2_5.htm>

⁷ Japan, 'Suggestion on the Protection of the Rights of Broadcasting Organizations' (1999) <http://www.wipo.org/eng/meetings/1999/sccr_99/sccr2_5.htm>

⁸ Mexico, 'Proposals and Comments by the National Copyright Institute' (1999)

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wysiwyg://Content.7/http://www.wipo.org/eng/meetings/1999/sccr_99/sccr2_7.htm>

⁹ Cameroon, 'Proposal by Cameroon for the Protection of the Rights of Broadcasting Organizations' (1999) <http://www.wipo.org/eng/meetings/1999/sccr_99/sccr2_12.htm>

¹⁰ ABU, ACT, AER, IAB, ASBU, CBU, EBU, NAB, NANBA, OTI and URTNA, 'WIPO Treaty for the Protection of the Rights of Broadcasting Organizations' (1999), National Association of Commercial Broadcasters in Japan, 'Substantive Provisions of the WIPO Treaty for the Protection of the Rights of Broadcasting Organizations' (1999) etc. <http://www.wipo.org/eng/meetings/1999/sccr_99/sccr2_6.htm>

limitations, the duration of protection, the technological measures and rights management information were mentioned. Although many of the participants supported the proposals, the right of making photographs from television signals was objected to by Hungary and the right of decoding encryption was objected to by the U.K. and Australia. In addition, Switzerland asserted that the new treaty should not be an independent treaty but a protocol to the WIPO Performances and Phonograms Treaty.

The Third Session

The third session¹¹ was held from November 16-20, 1999. A draft bill by Argentina¹² and proposals by African countries¹³ and Tanzania¹⁴ were submitted during this session. The contents of those submissions were along the lines of the previous session - there was nothing particularly novel to be found in these submissions. Asian countries issued a statement¹⁵ drawing attention to the benefits of the submissions to

¹¹ 'Report'

(1999)

<wysiwyg://Content.4/http://www.wipo.org/eng/meetings/1999/sccr_99/sccr3_11.htm>

¹² Argentina, 'WIPO Protocol on the Protection of the Broadcasts of Broadcasting Organisations' (1999)

<wysiwyg://Content.3/http://www.wipo.org/eng/meetings/1999/sccr_99/sccr3_4.htm>

¹³ 'Report of the Regional Roundtable for African Countries on the Protection of Databases and on the Protection of the Rights of Broadcasting Organisations, Held in Cotonou, from June 22 to 24, 1999 (1999)

<http://www.wipo.org/eng/meetings/1999/sccr_99/sccr3_2.htm>

¹⁴ United Republic of Tanzania, 'Proposals' (1999)

<wysiwyg://Content.3/http://www.wipo.org/eng/meetings/1999/sccr_99/sccr3_5.htm>

¹⁵ Bangladesh, China, Fiji, India, Indonesia, Mongolia, Pakistan, Philippines, Singapore, Sri Lanka, Thailand and Viet Nam, 'Statement Adopted at the Regional Roundtable for Countries of Asia and the Pacific on the Protection of Databases and on the Protection of the Rights of Broadcasting Organisations, Held in Manila, from

developing countries. Japan, the U.K. and EC questioned the definitions. The U.K., EC and Australia demanded further discussion on the right of decoding encrypted signals, and Argentina, Peru and Switzerland presented the supporting view on setting the right of decoding encryption.

3.Implementation by Domestic Law

Australian Copyright Act 1968

The Copyright Act 1968 protects the rights of broadcasting organisations by means of granting copyright in the Subject-Matter of broadcasts. Broadcasts are protected just by being broadcasted by broadcasting organisations. Copyright subsisting in broadcasts is recognised apart from copyright in works even where the broadcast is made using the works of others. Copyright subsisting in broadcasts comprises the rights of fixation (s.87(a)), reproduction (s.87(b)), re-broadcasting (s.87(c), and the rights to be seen or to be heard in public (s.86(b)) and of cable distribution (s.86(d)) where the broadcast is a cinematograph film. The importation and distribution of the fixation or reproduction of broadcasts that are not licensed constitute an infringement of copyright. (s.102). In the Copyright Amendment (Digital Agenda) Bill 1999¹⁶ (introduced into the House of Representatives in September 1999 and which to date has not been enacted) contains provisions concerning the right of cable distribution for broadcasts other than cinematograph films, the right of cable distribution for broadcasts and cinematograph films, and obligations regarding technological

June 29 to July 1, 1999' (1999)

<wysiwyg://Content.3/http://www.wipo.org/eng/meetings/1999/sccr_99/sccr3_6.htm>

¹⁶ The Parliament of the Commonwealth of Australia House of Representatives, Copyright Amendment (Digital Agenda) Bill 1999: A Bill for an Act amend the *Copyright Act 1968*, and for related purposes

measures and rights management information. To implement the proposed new broadcasting treaty, provisions concerning right of decoding encryption will be required. The Digital Agenda Bill already contains obligations concerning technological measures that restrict making, selling, letting on hire, distributing, exhibiting, importing and making available online decoding devices to receive broadcasts. If these provisions come into force, there will be access control without allowing the right of decoding encrypted signals.

Japanese Copyright Law

The Copyright Law of Japan protects broadcasting organisations by way of granting neighbouring rights (Art. 89 (3)) . And, for cable distributors, the same rights have been granted as those applying to broadcasting organisations. (Art. 89 (4)) The Japanese Copyright Law already facilitates the right of fixation and reproduction (Art. 98 and Art. 100-2), the right of re-broadcasting and cable distribution (including cable re-distribution, Art. 99 and Art. 100-3), the obligations concerning technological measure and rights management information (Art. 120-2 and Art. 113(3)) and restrictions on the importation and distribution of the fixation or the reproduction of broadcasts if made without authorisation (Art. 113(1) (2)). Therefore amendments which will need to be made after the new treaty is ratified will be limited to setting the rights of making available and decoding encryption. These rights, except decoding, are already allowed in copyright so that broadcasting organisations will have both copyright and neighbouring rights where the broadcasts are produced by the broadcasting organisations themselves.

4. Remaining Issues

Discussions of the 'Broadcasters' New Treaty' will develop in the direction of raising the level of the protection of rights of broadcasting organisations. The remaining issues to be focused on involve two matters.

The first matter is the rationale for the protection of broadcasting organisations in modern terms. Hungary objected to providing the rights regarding the making of photographs from television signals and making them available, for the reason that subject-matter which is not identifiable as a part of a broadcast should not be included within the ambit of protection - since the protection of broadcasting organisations is for the purpose of protecting the investment made by those broadcasting organisations. If the rationale for the protection of broadcasting organisations is merely the protection of the return on the investment, conduct that does not affect the return on the investment should not be protected. Also, Japan, the U.K. and EC asserted that the definitions of "broadcasting" and "broadcasting organisation" should be discussed further. Once the rationale for the protection of broadcasting or broadcasting organisations is clarified, the range of broadcasting or broadcasting organisations which should be protected will be determined automatically.

The second matter is the issue of access control. The U.K., EC and Australia have questioned the right of decoding encryption. Recognising the right of decoding substantially means nothing but recognising the right of reception of broadcasts. Accordingly, further discussion is required to determine whether restrictions on the reception of broadcasts which have been admitted freely will be exercised in the

future. Australia asserted, as the reason for questioning the right of decoding, that the receiving right of broadcasting is not allowed and also that the decoding right overlaps the obligations regarding technological measures. However technological measures are primarily intended to restrict the action of using which is objectified to the neighbouring rights. Therefore, for example, the restriction on cancellation of the copy protection would not be recognised to formulate the overlap of the right of reproduction normally. The restriction on the action of using, which is not based on the neighbouring rights, equates to recognising the neighbouring rights substantially, which poses a problem. To choose whether the decoding right should be admitted or not, further discussion of the way of dealing with the reception of broadcasting is required.