

World Intellectual Property Organization (WIPO) Treaty on the Protection of Broadcasting Organizations

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Summary

Existing international agreements relevant to broadcasting protections do not cover advancements in broadcasting technology that were not envisioned when they were concluded. Therefore, in 1998 the Standing Committee on Copyright and Related Rights (SCCR) of the World Intellectual Property Organization (WIPO) decided to negotiate and draft a new treaty that would extend protection to new methods of broadcasting. The SCCR has not yet achieved consensus on a text.

In recent years, a growing signal piracy problem has increased the urgency of concluding a new treaty, resulting in a decision by the WIPO General Assembly to restrict the focus of the treaty to signal-based protections for traditional broadcasting organizations and cablecasting. Consideration of controversial issues of webcasting (advocated by the United States) and simulcasting protections have been postponed. However, much work remains to achieve a final proposed text as the basis for formal negotiations to conclude a treaty. Despite a concerted effort to conclude a treaty in 2007, in June 2007 the SCCR decided that more time and work were needed. Further discussions occurred during SCCR meetings in 2008, but no decisions were made. The treaty remains an active item on the SCCR agenda.

A concluded treaty would not take effect for the United States unless Congress were to enact implementing legislation and the United States were to ratify the treaty with the advice and consent of the Senate. Noting that the United States is not a party to the existing 1961 Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, various U.S. stakeholders have argued that a new broadcasting treaty is not needed, that any new treaty should not inhibit technological innovation or consumer use, and that Congress should exercise greater oversight over U.S. participation in the negotiations.

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As part of WIPO's Digital Agenda, a WIPO Treaty on the Protection of Broadcasting Organizations is envisioned to adapt broadcasters' rights to the digital era. Advocates of this treaty from the broadcasting industry observe that relevant international agreements[1] do not offer sufficient protection because advances in broadcasting technology and the parallel evolution of the industry are not covered by the terms of existing agreements. These proponents note that the primary agreement covering broadcasting and cablecasting rights, the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, was concluded in 1961 and predates home audio and video recording, telecommunications satellite systems and consumer satellite dishes, digital technology, wireless networks, and the ability of consumers to receive broadcasts via computer or mobile telephone. Accordingly, proponents assert the Convention does not adequately protect these new modes of broadcasting.

The proposed new broadcasting treaty would grant broadcasting and cablecasting organizations protection of their program transmissions for a fixed term of years, enabling them to prohibit copying and redistribution of transmissions without authorization, which could be enforced through technological means of preventing circumvention of encrypted transmissions and the like. Such protections would be distinct from the copyright of the creators of the content for program transmissions. However, opponents of the treaty respond that it is not necessary, noting that the development of the broadcasting industry in the United States has not been hurt by the fact that it is not even a party to the Rome Convention.

History of Negotiations

At its first session in November 1998, the Standing Committee on Copyright and Related Rights (SCCR) of the World Intellectual Property Organization (WIPO) decided to pursue in earnest discussions and submissions concerning the text of a new broadcasting treaty. Since 2004, the SCCR has been pushing for a diplomatic conference for final negotiations and adoption of a treaty; however, after ten years and 17 sessions plus two special sessions of preliminary negotiations in Geneva, Switzerland, no consensus has been reached on a text adequate for a diplomatic conference. At its May 2006 meeting, the SCCR decided to drop webcasting (transmitting over the Internet) and simulcasting (transmitting simultaneously via traditional broadcasting over the air and on the Internet) from the scope of the treaty, placing them into a separate, parallel negotiating track. The United States was almost the sole proponent of including webcasting in the treaty and had tried to bolster support for it by linking it to simulcasting, which the European Union advocated. The SCCR hoped to increase the likelihood of successfully concluding the treaty by dropping these highly controversial issues.

At its fall 2006 meeting, the WIPO General Assembly tentatively agreed to convene a diplomatic conference in November/December 2007 to conclude a treaty for the protection of only traditional broadcasting organizations and cablecasting organizations, contingent on the SCCR's successfully tabling a consensus proposed text. To that end, the SCCR held two special sessions, in January and June 2007, to "aim to agree and finalize, on a signal-based approach, the

[1] Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (Rome Convention), the Trade-Related Intellectual Property Rights Agreement of the World Trade Organization (WTO TRIPS) and the Brussels Convention Relating to the Distribution of Program-Carrying Signals Transmitted by Satellite (Brussels Convention).

objectives, specific scope and object of protection."[2] The emphasis on a signal-based approach was an attempt to narrow the focus of the treaty to signal theft and piracy in order to allay concerns that a new layer of intellectual property rights in the content of broadcasts would, in effect, extend protection beyond the expiration of copyrights for each broadcast transmission and keep or remove content from the public domain. At the second special session, it became apparent that the conclusion of a treaty by the end of 2007 would not be feasible, given the significant differences that remained among the positions of various parties. No further steps have been taken to organize a diplomatic conference, although the treaty remains on the agenda of the SCCR and was discussed during SCCR meetings in March and November 2008.

Draft Treaty Text and Papers

The Revised Draft Basic Proposal (WIPO Doc. SCCR/15/2/Rev.) and the Non-Paper on the WIPO Treaty on the Protection of Broadcasting Organizations (SCCR/S1/WWW[75352]), an unofficial paper prepared by the SCCR Chair in April 2007, provided the basis for negotiations at the second special session in June 2007, and apparently remain the current working text.[3] The Revised Draft Basic Proposal is considered inadequate to support a successful diplomatic conference because it essentially incorporates every major alternative text for those articles where major differences remain among the WIPO parties. For example, there are two alternatives for Article 18, one providing that the term of protection shall be 50 years, the other, that the term be 20 years. The protections available under the Rome Convention have a term of 20 years, and the longer 50-year term proposed for the new treaty has been controversial. Furthermore, this text does not define a "signal," although the Chairman of the SCCR reportedly floated a proposed definition of "signal" in an earlier informal non-paper at the first special session in January 2007.[4] Article 2 in the April 2007 Non-Paper does not define "signal" but does define "broadcast" in terms of signals. There appears to be uncertainty and disagreement among the negotiating parties as to precisely what a "signal-based" approach means for the narrowed focus of a new treaty. Consequently, some parties suggest that a "signal-based" approach, mandated by the WIPO General Assembly, may still encompass certain elements of exclusive rights including the right to prohibit certain uses of a broadcast, which remains a major point of contention. These two examples are indicative of the lack of consensus affecting most of the provisions of the Revised Draft Basic Proposal.

At the November 2008 meeting of the SCCR, an Informal Paper was issued by the Chairman of the SCCR,[5] but the SCCR did not make any formal decisions based on the paper. The paper sets

[2] *Report*, WIPO Doc. WO/GA/33/10, ¶ 107(iv) (October 3, 2006), available at http://www.wipo.int/edocs/mdocs/govbody/en/wo_ga_33/wo_ga_33_10.pdf.

[3] Despite the reference to WIPO Doc. SCCR/15/2/Rev., which is a further revision of WIPO Doc. SCCR/15/2 (July 31, 2006, available at http://www.wipo.int/edocs/mdocs/copyright/en/sccr_15/sccr_15_2.pdf), there does not appear to be a published text of this further revision. Based on references and descriptions in later SCCR meeting documents, it appears that the two document numbers (WIPO Doc. SCCR/15/2 and WIPO Doc. SCCR/15/2/Rev.) actually refer to the same document. The April 2007 Non-Paper is available at http://www.wipo.int/edocs/mdocs/copyright/en/sccr_s2/sccr_s2_paper1.pdf. It is called a "non-paper" because it has no formal WIPO document number and is in the nature of a further draft text circulated at the second SCCR special session.

[4] Text reprinted at http://www.ip-watch.org/weblog/index.php?p=508&res=1024&print=0. "Signal" would be defined as "an electronically-generated carrier capable of transmitting programmes."

[5] Informal Paper, WIPO Doc. SCCR/17/INF/1 (Nov. 3, 2008), available at http://www.wipo.int/edocs/mdocs/copyright/en/sccr_17/sccr_17_inf_1.pdf.

forth and analyzes the range of positions on various issues that remain unresolved. It is intended to facilitate further discussion by examining the reasons behind some of the major differences among the negotiators and their stakeholders. For example, a number of WIPO member countries are parties to the 1961 Rome Convention; therefore, they view the new treaty as building on concepts in the Rome Convention which granted broadcasting organizations exclusive rights over rebroadcasting, fixation (recording of a broadcast in a medium such as optical disk), reproduction, and communication to the public. These rights are related to and are based on traditional concepts of intellectual property rights, that is, copyright in content which may be the subject of a broadcast. These WIPO members want the new treaty to provide for exclusive rights, which would be extended to new areas such as webcasting (broadcasts over the Internet), retransmission, protection of pre-broadcast signals, and technological devices to protect such exclusive rights. On the other hand, WIPO member countries that are not parties to the Rome Convention view the treaty as a free-standing endeavor that need not be based on the provision of exclusive rights. Some stakeholders are concerned that an exclusive rights-type of treaty would extend a new layer of intellectual property rights in content similar to copyright-type protections. They argue that this type of treaty would keep content out of the public domain and thus restrict the public's access to such content.

The Chairman's informal paper discusses other issues, including the scope of post-fixation rights, the right of retransmission over the Internet, the term of protection, the protection of technological measures, limitations on and exceptions from the protections granted under the treaty (similar to existing exceptions to copyright for news reporting, education, and scientific research), definition of "signal-based" protection, and other secondary issues. Some of these are discussed below as points of contention.

The paper concludes with two options for proceeding with negotiations. One option would be to make another attempt to conclude a treaty based on the Revised Draft Basic Proposal. The other option would be to conclude a treaty based on the Geneva Phonograms Convention of 1971 and the Brussels Satellite Convention. This would depart from the existing documents and proposals under consideration by the SCCR, but it would accomplish the goals of international protection for broadcast signals and prevention of piracy of signals. Protection at the national level could be accomplished via copyright laws, unfair competition laws, or administrative laws and sanctions. If neither of these options or other possible options can lead to a decision on a new treaty, the paper ends by recommending that the SCCR should expressly end current efforts to conclude a new treaty, remove it from its active agenda, and avoid spending further time, energy and resources. Such a decision could include a timetable for revisiting the matter later.

Although further discussions occurred during the November 2008 SCCR meetings, no decisions were made, and the proposed treaty remains an active item on the SCCR agenda. Given the current lack of consensus, it may be useful to consider some of the major points of contention for the treaty as expressed by various stakeholders.

Points of Contention

The principles expressed in various stakeholder statements are fairly representative of common objections raised by treaty opponents and also of some of the concerns or positions expressed by various WIPO country-parties during negotiations. A joint statement distributed by 41 corporations, industry associations, and non-governmental organizations at the first special session of the SCCR advocated several guidelines for a treaty text, while not conceding their

position that a treaty is not necessary at all.[6] This statement is similar to earlier statements issued by many of the same stakeholders at the September 2006 meeting of the WIPO General Assembly and to positions expressed at U.S. stakeholder roundtables held jointly by the U.S. Copyright Office and the U.S. Patent and Trademark Office (USPTO) in September 2006, January 2007, and May 2007.[7] The stakeholders issuing these statements at the SCCR meetings and the U.S. roundtables comprise a range of international and national organizations representing Internet service providers, computer technology companies, libraries and information professionals, content creators/owners, and consumer groups.

First, the stakeholders assert there is no need for a treaty: "The United States has a flourishing and well-capitalized broadcasting and cablecasting sector, notwithstanding its decision not to accede to the [Rome Convention]. We see no necessity for the creation of new rights to stimulate economic activity in this area. [Longstanding negotiations do not] justify the creation of rights that would be exceedingly novel in U.S. law and that are likely to harm consumers' existing rights, and stifle technology innovation."[8] Before the creation of such rights, the stakeholders maintain that "there should be a demonstrated need for such rights, and a clear understanding of how they will impact the public, educators, existing copyright holders, online communications, and new Internet technologies."[9]

Second, according to the stakeholders, the treaty should not be "rights-based," that is, grant exclusive rights in broadcasts similar to copyright. Rather, it should be, in their view, "signal-based," meaning that the prevention of theft or piracy of pre-broadcast signals should be the focus of the treaty.[10] Third, stakeholders assert that the treaty should not be negotiated with reference to whether it detracts or departs from the Rome Convention, although the signers of the statement believe that strong signal protections are consistent with the Rome Convention.[11] Some stakeholders have observed[12] that the narrowed treaty focus on a signal-based approach is more akin to the Brussels Convention.[13] Fourth, to the extent the treaty permits rights beyond

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[6] *Joint Statement of Certain Civil Society, Private Sector and Rightsholders Representatives for the First Special Session of the SCCR* [hereinafter *Joint Statement for First Special Session*], available at http://www.eff.org/files/filenode/broadcasting_treaty/NGO_joint_statement_SCCR_S1.pdf.

[7] Links to these statements are accessible via http://www.eff.org/issues/wipo_broadcast_treaty. A stakeholder statement circulated at the May 2007 U.S. roundtable, *Statement Concerning The WIPO Broadcast Treaty Provided by Certain Information Technology, Consumer Electronics And Telecommunications Industry Representatives, Public Interest Organizations, and Creative Community Representatives*, is available at http://www.publicknowledge.org/pdf/wipo-statement-20070509.pdf. For a summary of stakeholder views expressed at the May 2007 U.S. roundtable, see *IT, Consumer Groups Share Concerns Over Latest Draft of WIPO Broadcasters' Treaty*, 74 Patent, Trademark & Copyright Journal (BNA, May 18, 2007).

[8] Statement of Electronic Frontier Foundation to USPTO Roundtable on Proposed WIPO Broadcasting Treaty, September 5, 2006, available at http://www.eff.org/files/filenode/broadcasting_treaty/EFF_uspto_090506.pdf.

[9] Id.

[10] *Joint Statement for First Special Session*, *supra* note 6.

[11] Id.

[12] William New, *WIPO Negotiators Try to Bear Down on Broadcasting Treaty*, Intellectual Property Watch (January 18, 2007), available at http://www.ip-watch.org/weblog/index.php?p=509&res=1024&print=0.

[13] The Convention provides for the obligation of each contracting State to take adequate measures to prevent the unauthorized distribution on or from its territory of any program-carrying signal transmitted by satellite. The distribution is unauthorized if it has not been authorized by the organization—typically a broadcasting organization—that has decided what the program consists of. The obligation applies to organizations that are nationals of a Convention party. However, the Convention provisions are not applicable where the distribution of signals is made from a direct broadcasting satellite.

protection against signal theft/piracy, the stakeholders claim that mandatory limitations and exceptions similar to those under copyright laws should be included in the treaty to ensure that the treaty does not prohibit uses of broadcast content that are lawful under copyright law.[14] The treaty should also, in their view, permit additional limitations and exceptions appropriate in a digital network environment.[15]

Fifth, the stakeholders contend that the treaty should exclude coverage of fixations, transmissions or retransmissions over a home network or personal network.[16] Concerns have been raised that because the Revised Draft Basic Proposal envisions protections for technological protections measures (TPM) and digital rights management schemes (DRM), the beneficiary broadcasting organizations would have the ability to control signals in a home or personal network environment.[17] Stakeholders allege that this would inhibit such networking services and related technology innovations.[18] Sixth, despite the removal of webcasting and simulcasting from the scope of the treaty, the phrase "by any means" in various articles of the Revised Draft Basic Proposal would, in the stakeholders' view, include control over Internet retransmissions of broadcasts and cablecasts.[19] Finally, to the extent that Internet transmissions may be included in the scope of the treaty (or future related treaty), stakeholders advocate that it should ensure that intermediate network service providers are not subject to liability for alleged infringement of rights or violations of prohibitions due to actions in the normal course of business or actions of customers.[20]

The South Centre, an intergovernmental organization of developing countries, issued a research paper on the broadcast treaty in January 2007, which expressed some of the same concerns with regard to the benefits that the treaty would have for developing countries, as well as additional concerns.[21] The South Centre paper makes recommendations similar to those discussed above. It suggests that the negotiators: (1) consider maintaining that the rationale and scope of application of the new instrument be limited to signal protection; (2) do not accept the inclusion of any exclusive rights, or at the least, that such rights do not extend beyond those incorporated in the Rome Convention, unless clear evidence is found for the need to grant such rights and mechanisms to address the potential harms they may cause are developed; and (3) ensure that appropriate safeguards to pursue public policy objectives and limitations and exceptions are included in the text. Additionally, the South Centre recommends that the negotiators: (1) refrain from expanding protection to include delivery via computer networks as well as any reference to webcasting (which is at odds with the position of the United States and webcasting advocates); (2) provide for special treatment to public service broadcasting and/or discrimination between commercial and non-commercial broadcasting; (3) limit the maximum term of protection to 20 years, if exclusive rights are required for signal protection, rather than the 50 years in the Revised

[14] *Joint Statement for First Special Session*, *supra* note 6.

[15] Id.

[16] Id.

[17] Id.

[18] Id.

[19] Id.

[20] Id.

[21] Viviana Munoz Tellez and Andrew Chege Waitara, South Centre Research Paper 9, *The Proposed WIPO Treaty on the Protection of Broadcasting Organisations: Are New Rights Warranted and Will Developing Countries Benefit?* (January 2007), available at http://www.southcentre.org/index.php?option=com_docman&task=doc_download&gid=7&Itemid=.

Draft Basic Proposal; and (4) do not include obligations concerning the protection of technological protections measures (TPM) and digital rights management schemes (DRM), or at least consider including limitations and exceptions as minimum standards to these obligations to ensure they do not impede access to content.

U.S. Government Positions and Responses to Domestic Concerns

As noted above, the United States has been the primary advocate for extending protections to webcasting, whether in a new broadcasting treaty or in a separate agreement or protocol. In a statement submitted to the SCCR, the United States clarified that it "never intended that protection be afforded to the ordinary use of the Internet or World Wide Web, such as through e-mail, blogs, websites and the like. We intended only to cover programming and signals which are like traditional broadcasting and cablecasting, i.e. simultaneous transmission of scheduled programming for reception by the public."[22] In the statement, the United States sought to replace the term "webcasting" with "netcasting" and clarified that "netcasting" was limited to transmissions over computer networks carrying programs consisting of audio, visual or audio-visual content or representations thereof which are of the type that can be, but are not necessarily, carried by the program carrying signal of a broadcast or cablecast, and which are delivered to the public in a format similar to broadcasting or cablecasting. The United States noted that "webcasting" "unnecessarily implied that ordinary activity on the World Wide Web would be covered by the definition."[23] The United States reaffirmed its position that extending the same protections to "netcasting" as were and would be extended to traditional broadcasting and cablecasting, but asserted that such protections would be limited to preventing signal theft/piracy.[24]

Assuming that the treaty is eventually successfully concluded and that the United States is a signatory, any such treaty would not take effect for the United States unless and until the treaty was ratified by the United States with the advice and consent of the Senate, and Congress enacted implementing legislation.[25] Furthermore, if the final text of the treaty adopted by WIPO includes Article 27, Alternative AAA (one of several alternate versions of Article 27 included in the draft), of the Revised Draft Basic Proposal, a party to the new broadcast treaty would be required to become a party to the Rome Convention first, which would mean that the United States would also have to consider ratification of that Convention, to which it is not currently a party.[26] Implementing legislation would likely be necessary to establish new protections or amend existing ones in broadcasting laws and perhaps copyright laws. Currently, 47 USC §§ 325 and 605 and 18 USC §§ 2510-2512 provide for broadcasting protections, and title 17 of the U.S. Code contains the copyright laws. Additionally, webcasting/netcasting and simulcasting may be

[22] *Submission of the United States of America to the WIPO Standing Committee on Copyright and Related Rights*, WIPO Doc. SCCR/15/INF/2 (August 22, 2006), available at http://www.wipo.int/edocs/mdocs/copyright/en/sccr_15/sccr_15_inf_2.pdf.

[23] Id.

[24] Id.

[25] Restat. 3d of the Foreign Relations Law of the U.S., § 111(4), comment i; §303(1) and (2), comment d.

[26] It was also not a signatory when the Convention was concluded, so it would appear that Congress has not previously considered the Convention.

included in a separate agreement or as a protocol to a new broadcasting treaty, unless they are reconsidered for inclusion in the new broadcast treaty itself.

Certain U.S. stakeholders, either opposed to the treaty or concerned about the potential inclusion of certain protections, have called on Congress to hold hearings on the treaty to determine whether a new treaty is necessary or at least to exercise greater oversight over the U.S. delegation's positions on the treaty.[27] They had also urged the U.S. Copyright Office and the U.S. Patent and Trademark Office (USPTO) to solicit public commentary, which those agencies did through the aforementioned roundtables. These stakeholders are concerned that without public input, major changes in U.S. telecommunications and copyright laws will be effected via implementation of a new broadcast treaty without a full opportunity for domestic debate.[28] Partly in response to the objections raised by stakeholders in the information and communications technology industries, the United States reportedly sought to ensure that a diplomatic conference would not proceed if special sessions failed to resolve the major disagreements.[29] Furthermore, the Senate Judiciary Committee expressed concerns about the Treaty to the U.S. Copyright Office and USPTO, urging advocacy of a narrow, signal-theft based approach, and opposing a new layer of exclusive rights.[30]

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[27] Examples of such letters are available via http://www.eff.org/issues/wipo_broadcast_treaty.

[28] *IT, Consumer Groups Question Need for New Broadcasters' Treaty*, 20 World Intellectual Property Report (BNA, October 2006).

[29] William New, *Agreement Reached on WIPO Development Agenda, Patents; No Broadcasting Yet*, Intellectual Property Watch (September 30, 2006), available at http://www.ip-watch.org/weblog/index.php?p=410&res=1024&print=0.

[30] Letter dated March 1, 2007, available at http://www.eff.org/files/filenode/broadcasting_treaty/letter_leahy_specter_pto.pdf.

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