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WIPO Treaty on the Protection of Broadcasting Organizations

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Summary

Because existing international agreements relevant to broadcasting protections do not cover advancements in broadcasting technology that were not envisioned when they were concluded, in 1998 the Standing Committee on Copyright and Related Rights (SCCR) of the World Intellectual Property Organization (WIPO) decided to proceed with efforts to negotiate and draft a new treaty that would extend protection to new methods of broadcasting, but has yet to achieve 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 to restrict the focus to signal-based protections for traditional broadcasting organizations and cablecasting. Consideration of controversial issues of protections for webcasting (advocated by the United States) and simulcasting will be postponed. However, considerable work remains to achieve a final proposed text as the basis for formal negotiations to conclude a treaty by the end of 2007, as projected. A concluded treaty would not take effect for the United States unless Congress enacts implementing legislation and the United States ratifies the treaty with the advice and consent of the Senate. Noting that the United States is not a party to the 1961 Rome Convention, various 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.

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. Broadcasting industry advocates of the need for this treaty observe that existing 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

[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).

broadcasting and cablecasting rights, the Rome Convention, 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.

From its first session in November 1998, the SCCR 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 eight years and fifteen sessions of preliminary negotiations, 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 would hold two special sessions, one in January 2007, which has just concluded, and another in June 2007, to "aim to agree and finalize, on a signal-based approach, the 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. Since reportedly significant differences yet remain among the positions of various parties, the conclusion of a treaty by the end of this year is uncertain.

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[2] *Report*, WIPO Doc. WO/GA/33/10 (Oct. 3, 2006).

The Revised Draft Basic Proposal, WIPO Doc. SCCR/15/2 (July 31, 2006)[3] remains the basis for negotiations and will be the default text if the SCCR fails to achieve a consensus text that would enable a diplomatic conference to proceed. The Revised Draft Basic Proposal was considered inadequate to support a successful diplomatic conference because it essentially incorporates every major alternative text for the articles about which there remain major differences 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 shall 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 floated a proposed definition of "signal" in an informal "non-paper" at the first special session in January 2007.[4] 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. Therefore, it may be useful to consider some of the major points of contention for the treaty.

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. 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 stakeholder roundtables held by the U.S. Patent and Trademark Office (USPTO) in September 2006 and January 2007.[5] The stakeholders issuing the statements comprise a range of 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

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[3] Available at [http://www.wipo.int/edocs/mdocs/sccr/en/sccr_15/sccr_15_2.pdf] (last visited Jan. 25, 2007).

[4] Text reprinted at [http://www.ip-watch.org/weblog/index.php?p=508&res=1024&print=0] (last visited Jan. 25, 2007). "Signal" would be defined as "an electronically-generated carrier capable of transmitting programmes."

[5] Links to these statements are accessible via [http://www.eff.org/IP/WIPO/broadcasting_treaty/] (last visited Jan. 25, 2007).

likely to harm consumers' existing rights, and stifle technology innovation."[6] 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."[7]

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. 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. The European Union in particular has advocated that a new treaty should comply with the Rome Convention. However, some stakeholders observed[8] that the narrowed treaty focus on a signal-based approach is more akin to the Brussels Convention.[9] Fourth, to the extent the treaty permits rights beyond 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. The treaty should also, in their view, permit additional limitations and exceptions appropriate in a digital network environment. Fifth, the stakeholders contend that the treaty should exclude coverage of fixations, transmissions or retransmissions over a home network or personal network.

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. Stakeholders allege that this would inhibit such networking services and related technology innovations. 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. Finally, to the extent that Internet transmissions may be included in the scope of the treaty, stakeholders advocate that it should ensure that intermediate network service

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[6] Statement of Electronic Frontier Foundation to USPTO Roundtable on Proposed WIPO Broadcasting Treaty, Sept. 5, 2006, [http://www.eff.org/IP/WIPO/broadcasting_treaty/EFF_uspto_090506.pdf] (last visited Jan. 25, 2007).

[7] *Id.*

[8] William New, *WIPO Negotiators Try to Bear Down on Broadcasting Treaty*, Intellectual Property Watch (Jan. 18, 2007), available at [http://www.ip-watch.org/weblog/index.php?p=509&res=1024&print=0] (last visited Jan. 25, 2007).

[9] 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.

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.

The South Centre, an intergovernmental organization of developing countries, issued a research paper on the broadcast treaty in September, 2006, 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.[10] Recommendations similar to those discussed above include 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 Draft Basic Proposal; and (4) do not include obligations concerning the protection of TPMs and DRM schemes, or at least consider including limitations and exceptions as minimum standards to these obligations to ensure they do not impede access to content.

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."[11] 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. It decided that "webcasting" "unnecessarily implied that ordinary activity on the World Wide Web would be covered by the definition." The United States affirmed its advocacy of extending the same protections to "netcasting" as were and would be extended to traditional broadcasting and

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[10] 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?* (September 2006), available at [http://www.southcentre.org/publications/researchpapers/ResearchPapers9.pdf] (last visited Jan. 25, 2007).

[11] *Submission of the United States of America to the WIPO Standing Committee on Copyright and Related Rights*, WIPO Doc. SCCR/15/INF/2 (Aug. 22, 2006).

cablecasting, but asserted that such protections would only be whatever was necessary to prevent signal theft/piracy.

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. Furthermore, if the final text of the treaty adopted by WIPO includes Alternative AAA to Article 27 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.[12] 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 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 stakeholders that are either opposed to the treaty or concerned about the 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.[13] They had also urged that the U.S. Copyright Office and the USPTO 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.[14] 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.[15]

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[12] It was also not a signatory when the Convention was concluded, so it would appear that Congress has never previously considered the Convention.

[13] Examples of such letters are available via [http://www.eff.org/IP/WIPO/broadcasting_treaty/] (last visited Jan. 25, 2007).

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

[15] William New, *Agreement Reached on WIPO Development Agenda, Patents; No Broadcasting Yet*, Intellectual Property Watch (Sept. 30, 2006), available at [http://www.ip-watch.org/weblog/index.php?p=410&res=1024&print=0] (last visited Jan. 25, 2007).