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INTELLECTUAL PROPERTY OFFICE  
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WORLD INTELLECTUAL  
PROPERTY ORGANIZATION

## **REGIONAL SEMINAR FOR COUNTRIES OF ASIA AND THE PACIFIC ON THE RIGHTS OF BROADCASTING ORGANIZATIONS**

organized by  
the World Intellectual Property Organization (WIPO)  
in cooperation with  
the Intellectual Property Office of the Department  
of Trade and Industry of the Republic of the Philippines

**Manila, October 25 and 26, 2001**

PRESENT SITUATION REGARDING THE INTERNATIONAL AND NATIONAL  
PROTECTION OF THE RIGHTS OF BROADCASTING ORGANIZATIONS

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## BACKGROUND

I would like to address my remarks to the ongoing work in the World Intellectual Property Organization (WIPO) on a possible new treaty to improve protection internationally for broadcasters. In doing so, I would like to also explain the situation regarding broadcasting organizations in the United States and also touch on technological developments and their relation to traditional concepts of broadcasting. This issue will be the principal matter for discussion at in the WIPO Standing Committee on Copyright and Related Rights (SCCR) which will meet in Geneva from November 26 to 30, 2001.

The current proposals that so far have been circulated in WIPO have dealt with only the rights of "traditional" broadcasting organizations. However, the concerns of "webcasters" and others who distribute programming *via* interactive or near interactive means using the Internet and other types of communication media have been raised in the discussions that have so-far taken place. The interests of traditional broadcasters, as well as their concerns with unduly complicating the ongoing discussions by the inclusion of these new categories of "broadcasters," also have been represented in those discussions. As well, copyright owners and performers are concerned that any new protection for broadcasters not detract from their rights guaranteed under other WIPO treaties.

It is important to emphasize that in our view, the discussions in WIPO are still in an early stage and the United States has not yet taken a position on this matter other than to note its importance. There has, as yet, been no overwhelming groundswell of support for the negotiation of such a treaty in the United States as our broadcasters, both traditional and non-traditional, enjoy significant protection under U.S. copyright and communications law. This is not the case in many other of our trading partners where broadcasters enjoy only limited legal protection. Moreover, there have also been continual issues with border transmissions between Canada and the U.S., or the Caribbean and the U.S.

However, as other markets are opening to U.S. broadcasters and webcasters expand their world-wide reach, interest in improving protection internationally is becoming an issue of more concern. We are carefully considering all of the issues involved including the types of broadcasting organizations to be covered by such an agreement and will work to ensure that the position ultimately adopted by the United States will reflect the interests of all of the relevant stakeholders.

While the United States has not proposed specific language on a new instrument aimed at updating the rights of broadcasters at this time, this does not mean that the United States does not recognize that new technological developments, since the Rome Convention was negotiated nearly 40 years ago, both in the way broadcast signals are transmitted and the potential means by which they can be retransmitted by third party retransmitters, requires a reassessment, re-evaluation and modernization of the protection of broadcast signals at the international level. In this regard, we acknowledge and appreciate the thoughtful contributions of treaty language from the delegations of Switzerland, Argentina, Japan, and the European Union to begin the process and help focus our thinking on how such protection of broadcast signals might best be accomplished.

I note, that the submissions of all of these countries make clear that they are proposals designed to address protection for the broadcast *signal* and are in no way intended to affect or abrogate copyright or neighboring rights or other protections afforded to any literary or

artistic works, phonograms or performances incorporated in those signals. Indeed this principle is also reflected in the draft instrument that was prepared by the various broadcaster unions. This to be a sound principle that should garner widespread support and hopefully will help to assuage the concerns of the many other groups whose creative efforts are included in a broadcast signal.

## PROTECTION OF BROADCASTERS IN THE UNITED STATES

Broadcasters enjoy substantial protection under U.S. copyright and broadcasting laws. As copyright owners, they are entitled to full copyright protection in the program content that they develop. As well, broadcasters claim copyright protection in the compilation of programming that they provide—the so called “broadcast day.” Broadcasters also enjoy protection of their signals against unauthorized interception and retransmission under broadcasting or telecommunications laws. The Communications Act of 1932, in particular, provides basic protection against the retransmission of a broadcaster’s signal and reception. Broadcast copyright legislation has been amended over the years to address changing technologies including cable and satellite broadcasting technologies, and the growth of the Internet.

In reviewing those proposals that have been submitted, we find much that is already incorporated in our domestic legislation as it governs the relationships among broadcasters and those, such as cable and satellite operators who retransmit their signals. We also have provisions protecting scrambled pre-broadcast and encrypted signals through which broadcast networks feed signals to their affiliated stations. I think it fair to say these provisions have worked well for all concerned and have not caused any appreciable disruptions to the listening and viewing public. I would like to review briefly how some of these provisions work.

From the inception of our Communications Act, in 1932, there has been a prohibition against one broadcast station retransmitting, in whole or in part, the signal of another broadcast station without its consent. In 1992 this provision was expanded such that no cable system or other multichannel video program distributor could transmit the signal or any part thereof without the express authority of the originating station. There are some limitations on this exclusive signal. One is that a television broadcaster can forgo their right to negotiate for retransmission consent of their signal in exchange for assured coverage. Another, which may be of interest to the distinguished delegate from Australia who, in the past, has expressed concern about the effect an exclusive retransmission right might have on service to remote areas, is that the right cannot be asserted against a satellite carrier providing network programming service to dish owners in remote areas who are unable to receive an adequate signal from any local broadcaster providing the same network service. This basic requirement was set forth in the Satellite Home Viewer Act of 1988.

Our experience with this exclusive retransmission right is that it has not resulted in any appreciable disruption of service to the public. While there have been some instances of stalemates in negotiations between broadcasters and cable or satellite carriers, combined public and political pressures have resulted in restoration of service generally within a matter of weeks.

The broadcast organizations to whom this retransmission right applies are radio stations and over-the-air commercial television broadcasting stations. Non-commercial television stations were not included because, at the time, they opted for mandatory carriage.

With respect to pre-broadcast and encrypted signals, U.S. law basically prohibits all means of conduct consisting of, or relating to, the interception of encrypted or scrambled signals retransmitted to a broadcast station for purposes of retransmission to the general public, and even if such signals are not encrypted or scrambled, they may not be used for purposes of direct or indirect commercial advantage or private gain.

Finally, I would report the results of two domestic lawsuits that may be of some interest in our discussions. In one, a corporate entity in a neighboring country commenced the Internet retransmission of local and U.S. origin television broadcast signals over the Internet, ostensibly under the auspices of a compulsory license in that country. However, because of the borderless nature of the Internet, this activity resulted in their reception by substantial numbers of Internet subscribers in the United States. This activity was enjoined by a U.S. federal court, which had jurisdiction over the defendant due to its business contacts, for violation of U.S. copyright law.

In a related development, it is my understanding that the compulsory licensing authority in that country is considering the application for a special tariff by another company desiring to engage in similar conduct. This application, has been opposed by U.S. and local broadcasting and content interests. The U.S. Government's view is that a country that permits the retransmission of broadcast signals, over the Internet under a compulsory license would likely violate the Berne Convention because there is no technology that effectively will stop Internet retransmission of those signals at a country's borders. The practical result is that Internet retransmissions authorized by country X's compulsory license *de facto* authorize those retransmissions potentially to every country in the world, regardless of whether they provide for exclusive or compulsory licensing.

The applicant has since decided to drop its bid for a compulsory license to retransmit television stations over the Internet. The company has reviewed its advertising based business model, and is considering switching to subscription model, consequently, they consider that no new tariff may be required since their new business model would be more like "traditional" cable rebroadcasting. Some experts argue that this is not a final solution because legal issues involving rebroadcasting television signals over the Internet still are unresolved in that country's copyright laws.

In conclusion, I would like to identify some of the issues that have been raised in previous WIPO discussions and in the proposals so far submitted to WIPO. We would like to see these topics addressed in discussions regarding a possible new treaty. They include the following:

- Retransmission rights for broadcasters, especially with respect to cable, satellite and Internet retransmission of signals.
- Protection against deferred rebroadcasts.
- Protection against the distribution (rental, sale, retransmission) of unauthorized reproductions of such broadcasts, *via* analog or digital means or the Internet.

- Protection for pre-broadcast transmissions from networks to their affiliates or of program syndicators to stations.
- Protection against extracting, making or exploiting portions of broadcasts, such as still photographs, audio portions of audiovisual broadcasts, etc.
- Protections for limited purpose copies of works used in transmissions, for archiving or actual transmission purposes.
- Term of protection.
- Protection of decoding/encoding, Rights Management Information (RMI) and Technological Protection Measures (TPMs) used by broadcasters.
- Border enforcement or control measures against actual transmissions, fixations or other reproductions.
- Assuring appropriate limitations and exceptions parallel to those in the WCT and WPPT are applicable to broadcasters rights.
- Addressing the relationship of any proposed treaty with the WCT, WPPT and other treaties to assure consistency.

In addressing these issues, we will need to look at past concerns, current issues and must think about how to deal with what the future may offer. We must also carefully consider how expanded rights for broadcasters will interact with the rights of authors, copyright owners and neighboring right owners in order to avoid conflicts. Among new technologies, for example, the continued increased deployment of broadband technologies, with 2<sup>nd</sup> generation speeds of up to 150 MB, make possible live streaming of broadcasts as well as other forms of media *via* the Internet, and could potentially turn any household computer into a broadband re-broadcaster. Another interesting new technology, worldwide digital radio, typically broadcasts from terrestrial satellites using MP3 format, but can also transmit data to PC's or radio stations, also merges one-way Internet communication and traditional broadcasting.

These issues are also important to the developing regions of the world. The Republic of Korea is a leader in introducing wide-spread broad-band communication, in part, because of its high population densities in urban areas. Digital radio is currently being deployed over some of the least developed regions of Africa and Asia, thereby shrinking the world further and becoming a potent vehicle for bridging the so-called "digital divide." We will need to anticipate these and other emerging technologies as we proceed to detailed negotiations and their impact on rights holders.

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