

# PROGRESS ON THE WIPO BROADCASTING AND WEBCASTING TREATY

## I. INTRODUCTION

Though nations continue to debate the terms of a treaty that intends to add to and update rights for broadcasters established under the Rome Convention of 1961<sup>1</sup> and to extend such entitlements to webcasters, the year 2005 put an end in sight to this debate. Meetings of the World Intellectual Property Organization (WIPO) Standing Committee on Copyright and Related Rights (SCCR) last year concluded with an agreement to agree.<sup>2</sup> The common goal of the member countries is to finalize the WIPO Broadcasting and Webcasting Treaty as described by the SCCR documents entitled the *Second Revised Version of the Consolidated Text*<sup>3</sup> ("Consolidated Text") and the *Working Paper on Alternative and Non-Mandatory Solutions on the Protection in Relation to Webcasting*<sup>4</sup> ("Working Paper"). Worldwide sovereigns hope to enable the WIPO General Assembly in 2006 to move forward with a recommendation to convene a diplomatic conference for ratification of the proposed treaty as early as December 2006.<sup>5</sup> While this seemingly fast track may cause less concern to signatories of the Rome Convention, which already recognizes certain broadcasting entitlements, extension of these entitlements to the internet, and participation by the United States, have sparked domestic debate about the balances sought by copyright and the centralized regulation of the internet.

This article will briefly address (1) the background and goals of the treaty, (2) its expanded scope, (3) its potential conflict with existing copyright regimes, (4) U.S. authority to pass legislation creating the contemplated rights, and (5) the next steps towards finalizing the treaty.

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<sup>1</sup> International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations, Oct. 26, 1961, 496 U.N.T.S. 44 [hereinafter Rome Convention].

<sup>2</sup> See Press Release, World Intellectual Property Organization [WIPO], Momentum Grows To Update Broadcaster's Rights, WIPO/PR/2005/431 (Nov. 24, 2005) [hereinafter Momentum], [http://www.wipo.int/edocs/prdocs/en/2005/wipo\\_pr\\_2005\\_431.html](http://www.wipo.int/edocs/prdocs/en/2005/wipo_pr_2005_431.html).

<sup>3</sup> World Intellectual Property Organization [WIPO], Standing Comm. on Copyright and Related Rights [SCCR], *Second Revised Consolidated Text For A Treaty On The Protection Of Broadcasting Organizations*, SCCR/12/2 Rev.2 (May 2, 2005) [hereinafter Consolidated Text], [http://www.wipo.int/meetings/en/doc\\_details.jsp?doc\\_id=44069](http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=44069).

<sup>4</sup> WIPO SCCR, *Working Paper on Alternative and Non-Mandatory Solutions on the Protection in Relation to Webcasting*, SCCR/12/5 Prov. (Apr. 13, 2005) [hereinafter Working Paper], [http://www.wipo.int/meetings/en/doc\\_details.jsp?doc\\_id=44049](http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=44049).

<sup>5</sup> See Momentum, *supra* note 2.

## II. BACKGROUND AND GOALS

With a total of 82<sup>6</sup> contracting parties as of December 31, 2005, the 1961 Rome Convention on the Protection of Performers, Producers of Phonograms, and Broadcasting Organizations, to which the United States was not a signatory, established—among other entitlements—minimum rights of broadcast organizations to authorize or prohibit rebroadcasting, fixation, and reproduction:

Broadcasting organisations shall enjoy the right to authorize or prohibit:

- (a) the [simultaneous] 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 [as an excluded exception] 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.<sup>7</sup>

The limited definition of broadcasting in the treaty no longer applies in many circumstances. “[B]roadcasting’ means the transmission by wireless means for public reception of sounds or of images and sounds . . . .”<sup>8</sup> Technological developments since ratification have diluted the Rome Convention protections. Though the treaty limited itself only to wireless transmissions of analog sounds with or without images, broadcasting is broader today than the drafters of the Convention had anticipated. Competing with the airwaves are transmissions via cable and satellite, and analog signals have largely been replaced by digital signals. Thus, the narrow confines of the Rome Convention have proved insufficient to protect broadcasters.

Since 1997, WIPO has been working to update broadcasting rights to address signal piracy, a growing worldwide problem

<sup>6</sup> Press Update, WIPO, New Parties to WIPO-Administered Treaties in 2005, WIPO/UPD/2006/264 (Jan. 30, 2006), [http://www.wipo.int/edocs/prdocs/en/2006/wipo\\_upd\\_2006\\_264.html](http://www.wipo.int/edocs/prdocs/en/2006/wipo_upd_2006_264.html).

<sup>7</sup> Rome Convention, *supra* note 1, art. 13, at 4.

<sup>8</sup> *Id.* art. 3, ¶ (f), at 2.

resulting at least in part from internet technology.<sup>9</sup> Pirates digitize analog broadcast signals or copy digital transmissions and then upload or otherwise redistribute them, most often via the internet. Growing consumer adoption of broadband has prompted fears that without further protections, licensing a work for even a single broadcast may result in global redistribution and an inability to time releases in different regions. “Movie studios and other video producers are concerned that homes and individuals with internet access will soon be able to share movie-length digital broadcast files that they receive with the same ease that they now share unencrypted music files, and that widespread online piracy will be the result.”<sup>10</sup> The lack of control over the internet as a distribution channel has thus incited efforts to protect the broadcast signal itself as intellectual property.

U.S. broadcasters have managed to prosper without any such property rights to date,<sup>11</sup> but not unlike the benefits that sound recording copyright vests in recording artists and their record labels, the ownership of broadcast transmissions would open new revenue streams and provide further means of protection against widespread copying on the internet. Those seeking to rebroadcast would need to license not only the underlying copyrighted works from authors and publishers, but also the transmissions themselves from the original broadcasters.

### III. EXPANDED SCOPE

The SCCR has been aggregating the proposals of differing nations and attempting to reach international consensus on the matter since its first session in November 1998.<sup>12</sup> In its current form, the Consolidated Text expands upon rights granted to broadcasting organizations under the Rome Convention. Under the proposed treaty, broadcasting is defined more broadly than it had been under the Rome Convention:

“[B]roadcasting” means the transmission by wireless means for public reception of sounds or of images or of images and sounds or of the representations thereof; such transmission by satellite is also “broadcasting.” Wireless transmission of encrypted signals is “broadcasting” where the means for decrypting are

<sup>9</sup> See Momentum, *supra* note 2.

<sup>10</sup> Susan P. Crawford, *The Biology of the Broadcast Flag*, 25 HASTINGS COMM. & ENT. L.J. 603, 610 (2003).

<sup>11</sup> See James Boyle, *More Rights are Wrong for Webcasters*, FIN. TIMES, Sept. 26, 2005, <http://news.ft.com/cms/s/441306be-2eb6-11da-9aed-00000e2511c8.html>.

<sup>12</sup> See Consolidated Text, *supra* note 3, at 3.

provided to the public by the broadcasting organization or with its consent. "Broadcasting" shall not be understood as including transmissions over computer networks.<sup>13</sup>

The addition of "the representations thereof" allows for recognition of digital broadcasting, and the clause expressly includes satellite transmissions. However, since the term remains limited to wireless transmissions, the Consolidated Text additionally defines cablecasting:

"[C]ablecasting" means the transmission by wire for public reception of sounds or of images or of images and sounds or of the representations thereof. Transmission by wire of encrypted signals is "cablecasting" where the means for decrypting are provided to the public by the cablecasting organization or with its consent. "Cablecasting" shall not be understood as including transmissions over computer networks . . . .<sup>14</sup>

Though it defines broadcasting and cablecasting separately, the proposed treaty seeks to protect transmissions by wire equally to wireless broadcasts. "The end result concerning the scope of application of the new Instrument (by providing separate definitions for broadcasting and cablecasting) is exactly the same as by using the broader definition of broadcasting,"<sup>15</sup> which would have encompassed transmissions by wire.

While the Consolidated Text provides rights only to broadcasting (wireless) and cablecasting (wired) organizations, the treaty seeks to extend those rights to webcasters, largely as a result of effective lobbying of the U.S. Government by the Digital Media Association<sup>16</sup> (DiMA), which represents Yahoo!<sup>17</sup> and other digital media organizations. Because of broad global opposition to the U.S. proposal, the Consolidated Text explicitly excludes webcasting from the definition of broadcasting, and no longer contains any relevant clauses and entitlements for webcasters.<sup>18</sup> Instead, the SCCR created the separate Working Paper, which teased out the web-related issues from the original treaty. According to the Working Paper:

"webcasting" means the making accessible to the public of transmissions of sounds or of images or of images and sounds or

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<sup>13</sup> *Id.* art. 2, ¶ (a), at 21.

<sup>14</sup> *Id.* art. 2, ¶ (c), at 23.

<sup>15</sup> *Id.* at 22 (internal quotations omitted).

<sup>16</sup> See generally Digital Media Association, <http://www.digmedia.org> (last visited Mar. 13, 2006).

<sup>17</sup> See generally Yahoo!, <http://www.yahoo.com> (last visited Mar. 13, 2006).

<sup>18</sup> Consolidated Text, *supra* note 3, at 2.

of the representations thereof, by wire or wireless means over a computer network at substantially the same time. Such transmissions, when encrypted, shall be considered as “webcasting” where the means for decrypting are provided to the public by the webcasting organization or with its consent.<sup>19</sup>

It further defines “simulcasting” simply as webcasting by a broadcasting organization occurring at the same time as an equivalent broadcast.<sup>20</sup>

Because these definitions are absent from the Consolidated Text, in order for the web-related aspects of the proposed treaty to take effect, the Working Paper must somehow be incorporated into the Consolidated Text. The SCCR proposes three alternative solutions for overlaying the internet-related provisions onto the broadcast treaty delineated by the Consolidated Text.<sup>21</sup> The first seeks to reintroduce the webcasting and simulcasting provisions as terms to which signatories can opt in by notifying WIPO. A signatory may: (1) simply ratify the treaty as it pertains to broadcasting and cablecasting, (2) ratify the treaty and notify the Director General of WIPO of its election to include protection for simulcasting, or (3) ratify the treaty and notify the Director General of its election to include protection for both simulcasting and webcasting.<sup>22</sup> Without giving such notification, a nation would not be bound to apply the protection to webcasting and/or simulcasting, and pursuant to a reciprocity provision, those nations that adopt greater protection would not need to provide such protection to other signatories that did not adopt to the same extent.

The second alternative solution proposes to automatically include internet-related terms in the treaty, but to allow nations to opt out.<sup>23</sup> Signatories could (1) “ratify the treaty without reservation,” (2) ratify with a declaration that it “will not apply . . . to webcasting other than simulcasting,” or (3) ratify with a declaration that “it will not apply . . . to any webcasting, including simulcasting.”<sup>24</sup> Those making reservations could later withdraw these limitations to participate more fully. As with the first solution, a reciprocity provision would require a lowest common denominator treatment of rights between countries, where those

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<sup>19</sup> Working Paper, *supra* note 4, art. 2, at 7.

<sup>20</sup> *Id.* art. 3, ¶(3), at 9.

<sup>21</sup> Working Paper, *supra* note 4.

<sup>22</sup> *See Id.* cmt. 1.03, at 6.

<sup>23</sup> *Id.* cmt. 2.02, at 10.

<sup>24</sup> *Id.* cmt. 2.03, at 10.

that ratify without reservation need not recognize simulcasting or webcasting rights of those that opted out of such protections.

The third solution attaches the webcasting provisions as a protocol to the treaty, treating it as a distinct legal text subject to ratification, accession, or adhesion by the participants.<sup>25</sup> This would effectively make webcasting a separate aspect of the treaty to which parties could individually sign on at any date on or after ratification of the broadcast treaty.

There is some debate over whether the concept of webcasting in the proposed treaty is limited to live streaming audio and/or video, or if it extends as far as Flash animations and other streaming recordings, or even to websites themselves. James Love, the director of the Consumer Project on Technology,<sup>26</sup> a non-governmental organization, recently criticized the proposed treaty as a vast extension of entitlements for web publishers. He claimed:

Any web page operator who makes any combination or representations of “images or sounds . . . accessible to the public . . . at substantially the same time,” would be granted a new right, to authorize or prohibit anyone from copying the data, or republishing or re-using the information in any form.<sup>27</sup>

However, the official comments in the Working Paper suggest a less extensive interpretation:

The elements “to the public” and “at substantially the same time” serve to limit the definition to accessibility of *real-time streaming* that may be received by several receivers at the same time. The receiver may log in to the program flow at a given point of time and receive what follows but cannot influence the program flow otherwise.<sup>28</sup>

As such, ordinary web-pages would seem to be granted no protection beyond what is normally afforded them by copyright and related laws. Despite the seemingly ambiguous language of the Working Paper, the official comments limit the webcasting entitlement to real-time transmissions to multiple receivers.<sup>29</sup>

On the other hand, in the case of a web-page, it remains unclear whether the HTML, Flash, or other code covered by

<sup>25</sup> *Id.* cmts. 3.01-3.03, at 14.

<sup>26</sup> See generally Consumer Project on Technology, <http://www.cptech.org> (last visited Mar. 13, 2006).

<sup>27</sup> Posting of James Love to The Huffington Post, A UN/WIPO Plan to Regulate Distribution of Information on the Internet, [http://www.huffingtonpost.com/james-love/a-unwipo-plan-to-regulat\\_b\\_11480.html](http://www.huffingtonpost.com/james-love/a-unwipo-plan-to-regulat_b_11480.html) (Nov. 30, 2005).

<sup>28</sup> Working Paper, *supra* note 4, cmt. 1.06, at 6 (emphasis added).

<sup>29</sup> *Id.*

copyright is considered a protected signal under the proposed treaty, providing the web publisher with rights irrespective of his programming of the page. Would simply uploading an HTML file to a web domain for the first time be enough to entitle a web operator to rights whether or not he wrote the code or owned the content of the page? Certainly, in accordance with the Working Paper definition, multiple users could receive the same program flow nearly simultaneously even though they would not necessarily do so. The comments seem to contemplate images and sounds that are controlled at the source by the webcaster, rather than interactive components that the user directs. Therefore, basic web-pages are likely not to be granted the treaty rights.

The proposed treaty would grant entitlements beyond those originally conceived by the Rome Convention. The Consolidated Text grants rights of (A) retransmission, (B) transmission following fixation, (C) fixation, (D) reproduction, (E) distribution, (F) communication to the public, and (G) making available of fixed broadcasts; many of these rights are exclusive.<sup>30</sup> Since the SCCR has not yet achieved consensus on several of these entitlements, some of the provisions offer alternative versions, where rights to prohibit are suggested as substitutes for exclusive rights to authorize. Rights to prohibit are narrower in order to protect other rights holders, such as the owners of copyrights:

In the discussions within the Standing Committee, many Delegations have stressed the need to draw up a balanced Instrument that takes into account the rights and interests of all rightholders and the society at large. Reference has also been made to the different general approaches for building up protection for broadcasting organizations, i.e. either a system of *full-fledged intellectual property rights*, including exclusive rights, or a *more limited system* designed to prevent the theft of signals. This difference has been expressed in some proposals by the creation of two categories of rights of broadcasting organizations, the first as *exclusive rights* or “specific protections” and the second as other rights or “*rights to prohibit*.” The majority of proposals, however, do not make this distinction and suggest a series of exclusive rights to be established in the style of related rights in the WPPT or in the style of many national legislations. All Delegations have expressed the need for a balanced system and have proposed in the Preamble “non-prejudice” and “safeguard” clauses concerning the rights of the owners of program

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<sup>30</sup> Consolidated Text, *supra* note 3, art. 6-12, at 38-58.

content.<sup>31</sup>

Where an exclusive right to authorize would reserve the right to the broadcaster, requiring licenses under almost all circumstances, a right to prohibit would err on the side of allowing other parties to utilize broadcasts, particularly when the content was in the public domain or licensed by the party, unless the broadcaster had given express prior notice of its intent to exercise its right to limit such use. We now turn to each of the enumerated rights, whether proposed as full-fledged, exclusive rights to authorize, or narrower rights to prohibit.

#### A. *Right of Retransmission*

The Consolidated Text proposes to reaffirm the Rome Convention's rebroadcasting right by entitling broadcasters and cablecasters to exclusive control over signal distribution during the signal's transmission. "Broadcasting organizations shall enjoy the exclusive right of authorizing the retransmission of their broadcasts by any means, including rebroadcasting, retransmission by wire, and retransmission over computer networks."<sup>32</sup> Simultaneous rebroadcasting, whether by wire, by radio waves, or over the internet, would not be permitted without a license from the original broadcaster. For example, without a license from the local public radio station, Sirius Satellite Radio<sup>33</sup> could not transmit "All Things Considered"<sup>34</sup> via satellite from the signal broadcast it simultaneously received.

#### B. *Right of Transmission Following Fixation*

Protection against deferred transmission is provided in a separate right of transmission following fixation, which was not provided by the Rome Convention. "Broadcasting organizations shall enjoy the exclusive right of authorizing the transmission of their broadcasts following fixation of such broadcasts."<sup>35</sup> Subsequent broadcasters would always need to obtain a license to transmit a previously recorded broadcast, even if the recording was authorized. In the alternative, the proposed treaty may allow nations to provide broadcasting organizations with a narrower

<sup>31</sup> *Id.* Introduction ¶ 11, at 5 (emphasis added).

<sup>32</sup> *Id.* art. 6, at 39.

<sup>33</sup> See generally SIRIUS Satellite Radio, <http://www.sirius.com> (last visited Mar. 12, 2006).

<sup>34</sup> See generally *All Things Considered* (National Public Radio), <http://www.npr.org/templates/rundowns/rundown.php?prgId=2> (last visited Mar. 12, 2006).

<sup>35</sup> Consolidated Text, *supra* note 3, art. 11, at 53.



“right to prohibit the transmission of their broadcasts following unauthorized fixations of their broadcasts.”<sup>36</sup> The more limited right would only apply where a recording was unauthorized.

### C. *Right of Fixation of Transmission*

Just as the Rome Convention provided,<sup>37</sup> the proposed treaty gives broadcasters and cablecasters the exclusive right to fixation of their transmissions. “Broadcasting organizations shall enjoy the exclusive right of authorizing the fixation of their broadcasts.”<sup>38</sup> This entitlement follows the WIPO Performances and Phonograms Treaty (WPPT), which provides an exclusive right to performers in the broadcast and fixation of their unfixed performances.<sup>39</sup> Hypothetically, in the same way that Brazilian musician Seu Jorge<sup>40</sup> could prevent the broadcast of his live performance of David Bowie’s song, “Changes” by WFUV<sup>41</sup> FM radio under the WPPT, the station, if permitted to broadcast the show, could prevent others from unauthorized recording of their broadcast.

### D. *Reproduction of Fixation*

While there is agreement that the proposed treaty should require a right of reproduction of the fixation of a broadcast, there are two separate approaches to the structure and scope of this right. Most nations proposed “an unqualified intellectual property-type exclusive right”<sup>42</sup> adopted from the WPPT.<sup>43</sup> “Broadcasting organizations shall enjoy the exclusive right of authorizing the direct or indirect reproduction, in any manner or form, of fixations of their broadcasts.”<sup>44</sup> However, the U.S. and Egypt suggested separate reproduction rights in keeping with those granted by the Rome Convention:<sup>45</sup>

- (1) Broadcasting organizations shall have the right to prohibit the reproduction of fixations of their broadcasts other than those referred to in paragraph (2).
- (2) Broadcasting organizations shall enjoy the exclusive right of

<sup>36</sup> *Id.*

<sup>37</sup> Rome Convention, *supra* note 1, art. 13 (b), at 4.

<sup>38</sup> Consolidated Text, *supra* note 3, art. 8, at 43.

<sup>39</sup> WIPO Performances and Phonograms Treaty, art. 6, Dec. 20, 1996, S. Treaty Doc. No. 105-17, 2186 U.N.T.S. 245, 43 OJ L89/15 (2000), [http://www.wipo.int/treaties/en/ip/wppt/trtdocs\\_wo034.html](http://www.wipo.int/treaties/en/ip/wppt/trtdocs_wo034.html) (last visited Mar. 12, 2006) [hereinafter WPPT].

<sup>40</sup> *See generally* Seu Jorge website, <http://www.seujorge.com> (last visited Mar. 13, 2006).

<sup>41</sup> *See generally* WFUV FM radio, <http://www.wfuv.org>. (last visited Mar. 13, 2006).

<sup>42</sup> Consolidated Text, *supra* note 3, art. 9 explanatory comments, at 44.

<sup>43</sup> WPPT, *supra* note 39, art. 7, at 82.

<sup>44</sup> Consolidated Text, *supra* note 3, art. 9, at 45.

<sup>45</sup> Rome Convention, *supra* note 1, art. 13 (c), at 4.

authorizing the reproduction of their broadcasts from fixations made pursuant to Article 14 when such reproduction would not be permitted by that Article or otherwise made without their authorization.<sup>46</sup>

Under this alternative language, permission to record the signal would not necessarily constitute permission to copy it, and even acceptable excuses for making a record without permission would not serve as a legal defense to unauthorized reproduction of the recorded signal. The proposed treaty may allow contracting parties to adopt either provision.

Regardless of which version of this entitlement is adopted, the proposed treaty does not intend to excuse transient digital reproductions. The explanatory comments express that the term “reproduction” is intended to “fully apply in the digital environment . . . . It is understood that the storage . . . in digital form in an electronic medium constitutes a reproduction.”<sup>47</sup> As such, in the webcasting context, even temporary storage of streaming audio or video in the random access memory (RAM) of a personal computer would be considered reproduction and thus entitle the webcaster to prohibit anyone from even viewing the protected content without a license.

#### E. *Right of Distribution*

Just as there is not yet a consensus on whether the reproduction entitlement should be an exclusive right of authorization or a narrower right of prohibition, the distribution right has been proposed in both alternatives. Not present in the Rome Convention, the distribution right seeks to provide control over the sale of compact discs (CDs), digital video discs (DVDs), or other tangible recordings of broadcasts. The European Community and other nations suggested that “[b]roadcasting organizations shall enjoy the exclusive right of authorizing the making available to the public of the original and copies of fixations of their broadcasts, through sale or other transfer of ownership.”<sup>48</sup> These countries take a narrow view of the phrase, “original and copies of fixations”, as applying only to recordings in tangible form,<sup>49</sup> and seek to require distributors of CDs and DVDs

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<sup>46</sup> Consolidated Text, *supra* note 3, art. 9, at 45.

<sup>47</sup> *Id.* Introduction ¶ 20, at 7.

<sup>48</sup> *Id.* art. 10, at 47.

<sup>49</sup> *Id.* Introduction ¶ 21, at 8 (“[T]he expressions ‘copies’ and ‘original and copies’, being subject to the right of distribution and the right of rental under the said Articles, refer exclusively to fixed copies that can be put into circulation as tangible objects.”).

to obtain a license from the original broadcaster, in addition to any copyright owners before distributing recordings of a broadcast. The issue of exhaustion of the distribution right under the first sale doctrine is left to domestic law.<sup>50</sup> Rather than propose an exclusive right to authorize, the U.S. and Egypt proposed a non-exclusive right to prohibit distribution. “Broadcasting organizations shall have the right to prohibit the distribution to the public and importation of reproductions of unauthorized fixations of their broadcasts.”<sup>51</sup> The absence of the phrase, “original and copies of fixations” may imply that this alternative version does not seek to limit itself to tangible distribution. As with the reproduction entitlement, the proposed treaty may allow contracting parties to adopt either version of the distribution right.

#### F. *Right of Communication to the Public*

The proposed right of communication to the public would give broadcasters and cablecasters the exclusive right to prevent unauthorized parties from charging a fee to allow members of the public to listen to or watch the transmitted content. “Broadcasting organizations shall enjoy the exclusive right of authorizing the communication to the public of their broadcasts, if such communication is made in places accessible to the public against payment of an entrance fee.”<sup>52</sup> Though WIPO is actively considering deletion or other qualification of the article granting this entitlement, the right, if enacted, would slightly expand upon a similar clause in the Rome Convention, which was previously limited to public performance of television broadcasts.<sup>53</sup> As such, a local nightclub could not charge for admission and utilize its XM Satellite Radio<sup>54</sup> subscription to pipe continuous hip-hop music onto its dance floor without obtaining a license from XM Satellite Radio.

#### G. *Right of Making Fixed Broadcasts Available to the Public*

The proposed treaty also contemplates a right to make fixed

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<sup>50</sup> *Id.* art. 10, at 47:

Nothing in this Treaty shall affect the freedom of Contracting Parties to determine the conditions, if any, under which the exhaustion of the right in paragraph (1) applies after the first sale or other transfer of ownership of the original or a copy of the fixation of the broadcast with the authorization of the broadcasting organization.

<sup>51</sup> *Id.* art. 10, at 47.

<sup>52</sup> *Id.* art. 7, at 41.

<sup>53</sup> Rome Convention, *supra* note 1, art. 13 (d), at 5.

<sup>54</sup> See generally XM Satellite Radio, <http://www.xmradio.com> (last visited Mar. 12, 2006).

broadcasts available at times and places chosen by the public where public communication is limited to settings designated by those who enjoy that right. "Broadcasting organizations shall enjoy the exclusive right of authorizing the making available to the public of their broadcasts from fixations, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them." Whether adopted as an exclusive right of authorization or, in the alternative, as a right to prohibit, this entitlement will protect broadcasters from those who simply place recorded broadcasts in publicly accessible shared folders on personal computer networks or on internet sites.

#### H. *Other Proposed Treaty Terms*

Depending on which version of the Consolidated Text is eventually ratified, the term of the rights proposed by the treaty would be either twenty or fifty years from the date of first broadcast, though a majority of WIPO member nations, including the U.S., favor the longer term. Reminiscent of the Digital Millennium Copyright Act,<sup>55</sup> the treaty as currently proposed would also require certain legal remedies against unauthorized circumvention of technological protection measures, unauthorized removal or alteration of digital rights management information, and knowing distribution, importation, retransmission, or making available to the public any broadcast whose digital rights management information was removed or altered without authorization. Some nations are seeking limitations and exclusions for education, research, public interest, and cultural diversity.<sup>56</sup>

#### IV. THE CONFLICT WITH COPYRIGHT

A further concern of critics is the ability of these new rights to upset the balance sought by copyright. Copyright aims to weigh the grant to current authors against free public access for the benefit of future authors.<sup>57</sup> Since webcasting rights would not

<sup>55</sup> See generally Digital Millennium Copyright Act, 17 U.S.C. § 1201 (1998).

<sup>56</sup> See WIPO SCCR, *Proposal by Brazil on The Protection of Broadcasting Organizations, Corrigendum*, SCCR/13/3 Corr. (Nov. 21, 2005), [http://www.wipo.int/meetings/en/doc\\_details.jsp?doc\\_id=53241](http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=53241); WIPO SCCR, *Proposal by Chile Concerning The Treaty for The Protection of Broadcasting Organizations*, SCCR/13/4 (Nov. 22, 2005), [http://www.wipo.int/meetings/en/doc\\_details.jsp?doc\\_id=53349](http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=53349).

<sup>57</sup> See *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975):

Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts . . . When technological change has rendered its literal terms ambiguous, the Copyright Act must be construed in light of this basic purpose.

depend on the existence of copyrights in the underlying work, free content could potentially be usurped from the public domain by webcasters. That is, the transmission of public domain content might prevent any other from transmitting the same webcast, especially if transmission signals could not be distinguished. Without a way to tell that two transmission signals are the same, one might have to rely on the content alone to determine if there was an infringement of webcasting rights. Public domain might thus become proprietary, and public no more.

Rather than rely on the content itself, countries will likely attempt to adopt a means of identifying broadcasts.<sup>58</sup> The Federal Communications Commission (FCC) has already unsuccessfully sought to create such a scheme, where digital television receivers and other devices sold in the U.S. would have been required to recognize a code embedded in broadcasts to enable prevention of unauthorized redistribution.<sup>59</sup> The Motion Picture Association of America (MPAA) and others continue to lobby Congress for this “broadcast flag” regime of marking transmissions with identifying information.<sup>60</sup>

Furthermore, by giving exclusive rights to webcasters licensed to transmit copyrighted content, the treaty would compel negotiations between potential rebroadcasters and both authors and webcasters.<sup>61</sup> The addition of parties-in-interest creates a greater likelihood of hold-outs, and potentially ties up commerce and internet development. Although a copyright holder may wish to license his work to a second webcaster, the original webcaster might interfere by not allowing the use of his signal. The treaty would thus create inefficiency by forcing new webcasters, who wish to avoid the burdens of seeking and paying for additional licenses, to create wholly new transmissions of the same content as previous webcasts.

However, the entitlement would be limited to the transmitted signal, exclusive of the content itself. The preamble of the Consolidated Text recognizes that “the objective to establish an international system of protection of broadcasting organizations *without compromising the rights of holders of copyright* and related rights

<sup>58</sup> See, e.g., Susan P. Crawford, *Shortness of Vision: Regulatory Ambition in the Digital Age*, 74 *FORDHAM L. REV.* 695, 714 (2005).

<sup>59</sup> *Amer. Lib. Assn. v. F.C.C.*, 365 U.S. App. D.C. 353 (2005).

<sup>60</sup> Crawford, *supra* note 58, at 714; Press Release, Motion Picture Association of America (MPAA), Statement by MPAA President and CEO Dan Glickman Regarding American Library Association v. FCC (May 6, 2005), [http://www.mpaa.org/Legal\\_cases\\_broadcast.asp](http://www.mpaa.org/Legal_cases_broadcast.asp).

<sup>61</sup> Love, *supra* note 27; Boyle, *supra* note 11.

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in *works* and other protected subject matter carried by broadcasts, as well as the need for broadcasting organizations to acknowledge these rights.”<sup>62</sup>

Moreover, as previously discussed, some of the entitlements are proposed as limited rights to prohibit, rather than exclusive rights to authorize, in order to protect existing copyrights. The scope of application of the treaty specifies, “[t]he protection granted under this Treaty extends only to signals used for the transmissions by the beneficiaries of the protection of this Treaty, and not to works and other protected subject matter carried by such signals.”<sup>63</sup> Although U.S. copyright law would recognize the broadcasting of sound recordings as public performance,<sup>64</sup> the WIPO treaty claims to protect only the signal, not the underlying works.

## V. U.S. AUTHORITY TO LEGISLATE

Such rights were not contemplated by the U.S. Constitution when it provided Congress with the power “to promote the [p]rogress of [s]cience and useful [a]rts, by securing for limited [t]imes to [a]uthors and [i]nventors the exclusive [r]ight to their respective [w]ritings and [d]iscoveries.”<sup>65</sup> Since broadcasters are neither authors nor inventors, they are not constitutionally entitled to the exclusive rights authorized by the Patent and Copyright Clause. Congress could not expand copyright protection to recognize broadcasters as authors since there is not the requisite modicum of originality<sup>66</sup> in converting a work to a transmittable signal. U.S. copyright law does, however, provide rights via compulsory licensing for the public performance of sound recordings by means of digital non-broadcast transmissions.<sup>67</sup> While this encompasses webcasts, it entitles the copyright holder, not the webcaster, to such rights.

Because the Patent and Copyright Clause does not provide the necessary authority for Congress to grant the proposed rights to broadcasters, the power to do so must be derived from the Interstate Commerce Clause,<sup>68</sup> though it additionally must be constrained by the constitutional right to free speech.<sup>69</sup> The

<sup>62</sup> Consolidated Text, *supra* note 3, at 15 (emphasis added).

<sup>63</sup> *Id.* at 29.

<sup>64</sup> Copyright Act, 17 U.S.C. § 101(2) (2005).

<sup>65</sup> U.S. CONST. art. 1, § 8 cl. 8.

<sup>66</sup> See *Feist Publ'ns v. Rural Tel. Serv.*, 499 U.S. 340, 362 (1991).

<sup>67</sup> Copyright Act, 17 U.S.C. 106 (2005).

<sup>68</sup> See *generally* U.S. CONST. art. 1, § 8 cl. 3.

<sup>69</sup> See *generally id.* at amend. I.

imposition of these new entitlements:

would confer upon some speakers the power to prevent others from repeating or copying speech they have not authored, but have merely performed. Such power would directly abridge freedom of speech, make speech less accessible to others, allow broadcasters and webcasters to constrain speech that is not their creation, impair the copyrights of authors, and to profit by impoverishing the public's access to the discourse of others.<sup>70</sup>

Congress has yet to act outside of the bounds of its power, but the FCC, which it created and to which it delegated authority to regulate media entities, has not shown the same restraint.<sup>71</sup> The FCC neither has explicit authority nor ancillary jurisdiction to grant the rights proposed by the WIPO treaty.<sup>72</sup> In fact, in *American Library Association v. F.C.C.*, the FCC lacked jurisdiction to compel the makers of digital television receivers to include technology to recognize the broadcast flag.<sup>73</sup> On March 2, 2006, Representative Mike Ferguson of New Jersey, with bipartisan co-sponsorship, introduced a bill to provide limited congressional support to the FCC's authority.<sup>74</sup> The Audio Broadcast Flag Licensing Act of 2006 would allow the FCC to require implementation of the broadcast flag or similar technology only with regard to satellite and radio broadcasts of digital audio.

While some believe Congress will write some version of the broadcast flag regime into law,<sup>75</sup> the president with senatorial backing may sign the WIPO treaty, regardless of its potential unconstitutionality, and pave the way for global adoption of the broadcast flag.<sup>76</sup> Since the broadcast flag scheme has never been tried as the law in any nation and there has been no comparison of the benefits and detriments of broadcaster rights between signatories and non-signatories to the Rome Convention, critics are concerned that the WIPO treaty is a grand and dangerous experiment.<sup>77</sup> They implore the Copyright Office and the Patent and Trademark Office to consult with technology companies, who,

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<sup>70</sup> John Mitchell, Comments on Proposal to Grant Broadcasters the Right to Suppress the Speech of Others, (Feb. 8, 2006), <http://www.cptech.org/ip/wipo/bt/mitchell02082006.pdf>.

<sup>71</sup> See generally Communications Act of 1934, 47 U.S.C. § 151 (2005).

<sup>72</sup> Crawford, *supra* note 58, at 728.

<sup>73</sup> *Amer. Lib. Assn. v. F.C.C.*, 365 U.S. App. D.C. 353 (2005).

<sup>74</sup> See Audio Broad. Flag Licensing Act of 2006, H.R. 4861, 109th Cong. (2006). Is this enacted or not? If enacted, must say (enacted) at the end of the citation.

<sup>75</sup> See Crawford, *supra* note 58, at 713.

<sup>76</sup> *Id.* at 714.

<sup>77</sup> Boyle, *supra* note 11.

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they argue, will be stifled by controls imposed by content companies.<sup>78</sup> Taking an exceptionalist view that the technology of the internet is so different that different rights and regulations should apply to it, critics who attribute the vast development of the internet to its decentralized structure forecast a chilling effect if it becomes subject to centralized governance.<sup>79</sup> They oppose efforts to attach webcaster's rights to what is essentially a broadcasting treaty, but proponents argue that wholesale importing of rights intended for radio and television onto the internet provides the benefit of technologically neutral regulation.<sup>80</sup>

## VI. THE NEXT STEPS

The 32nd Session of the WIPO General Assembly, which was held from September 26, 2005 to October 5, 2005, decided to accelerate work with a goal of adopting the international treaty by 2007. Member states "aim to agree and finalize a basic proposal . . . to enable the 2006 WIPO General Assembly to recommend the convening of a Diplomatic Conference in December 2006 or at an appropriate date in 2007."<sup>81</sup> At the first meeting of the SCCR since the 2005 General Assembly decision, Mr. Jukka Liedes, the chairman, expressed his confidence in "a much greater understanding of the concepts and issues" as evidenced by the "high quality debates . . . now higher than ever."<sup>82</sup> Mrs. Rita Hayes, WIPO Deputy Director General in charge of copyright-related matters, concurred that "this meeting of the SCCR showed a genuine willingness by all member states to finalize these talks in a balanced way."<sup>83</sup> The Consumer Project on Technology (cptech.org), The Electronic Frontier Foundation (eff.org), Intellectual Property Justice (ipjustice.org) and others remain worried that the broadcast treaty will shift control over copyrighted and public domain works from authors and the public, respectively, to broadcasting organizations, including website developers.

Some nations continue to offer refinements to the treaty. Chile and Brazil have recently proposed amendments to exclude educational and public interest uses of broadcast signals from the

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<sup>78</sup> Love, *supra* note 27.

<sup>79</sup> Crawford, *supra* note 58, at 744.

<sup>80</sup> Love, *supra* note 27.

<sup>81</sup> Momentum, *supra* note 2.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*



rights to be granted under the treaty.<sup>84</sup> Brazil further hopes to impose a limitation based on the cultural diversity aims recently recited by the United Nations Educational, Scientific and Cultural Organization (UNESCO),<sup>85</sup> and seeks to make the treaty an actual extension of the Rome Convention, limiting participation only to signatories of the Convention, and thus excluding the U.S.<sup>86</sup>

The next meeting of the SCCR will occur from May 1 to May 5, 2006 in Geneva, Switzerland.<sup>87</sup>

*Matthew D. Asbell\**

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<sup>84</sup> See generally WIPO SCCR, Proposal by Brazil on The Protection of Broadcasting Organizations, Corrigendum, SCCR/13/3 Corr. (Nov. 21, 2005), [http://www.wipo.int/meetings/en/doc\\_details.jsp?doc\\_id=53241](http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=53241); WIPO SCCR, Proposal by Chile Concerning The Treaty for The Protection of Broadcasting Organizations, SCCR/13/4 (Nov. 22, 2005), [http://www.wipo.int/meetings/en/doc\\_details.jsp?doc\\_id=53349](http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=53349).

<sup>85</sup> See generally U.N. Educ., Scient. and Cult. Org., Convention on the Protection and Promotion of the Diversity of Cultural Expressions, CLT-2005 (Oct. 20, 2005), [http://portal.unesco.org/culture/en/ev.php-URL\\_ID=29388&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/culture/en/ev.php-URL_ID=29388&URL_DO=DO_TOPIC&URL_SECTION=201.html).

<sup>86</sup> WIPO SCCR, Proposal by Brazil on The Protection of Broadcasting Organizations, Corrigendum, SCCR/13/3 Corr. (Nov. 21, 2005), [http://www.wipo.int/meetings/en/doc\\_details.jsp?doc\\_id=53241](http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=53241).

<sup>87</sup> WIPO SCCR, 14th Session, (forthcoming May, 2006), [http://www.wipo.int/meetings/en/details.jsp?meeting\\_id=9943](http://www.wipo.int/meetings/en/details.jsp?meeting_id=9943).

\* Staff member, Recent Developments, *Cardozo Arts and Entertainment Law Journal*; J.D. Candidate, 2007, Benjamin N. Cardozo School of Law. Special thanks to Peter Nurnberg for his guidance and encouragement throughout the year, Joe Baranello, the entire AELJ staff, and Aline Alves.

