



KEI Statement on WIPO's May 1, 2007 "Non-paper on the WIPO Treaty on the Protection of Broadcasting Organizations"

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Summary

* The May 1, 2007 non-paper will be the basis of the discussion to take place June 18-22 at the special second session of the SCCR. The European Union and other proponents of a Rome-based approach present the non-paper as the narrowest treaty that can be "accepted". It is designed to give intellectual property rights for broadcasting content, and it is designed to extend those rights to the Internet. It is not about preventing the theft of signals. It is not about piracy. It risks the introduction of a thicket of new rights that will harm the Internet.

* We urge Congress to engage the U.S. Delegation to oppose any new treaty that introduces an intellectual property right for merely packaging and distributing works. It is possible to put an end the current negotiations, if the U.S. Delegation rejects the European Commission's proposal (the May 1, 2007 draft). The broadcasting treaty can be discussed at a later date, if and when anyone can identify a compelling reason to introduce such a treaty.

Background

The World Intellectual Property Organization (WIPO) Standing Committee on Copyright and Related Rights (SCCR) has met twice a year since 1998, for a total of 15 times. The SCCR's topic of discussion, up until the Tenth Session, focused on both a possible treaty on the protection of non-original elements of databases (a follow-up to a treaty that failed in a 1996 diplomatic conference), and a new treaty for broadcasting organizations.

Since November 2003, the SCCR has focused almost entirely on the proposal for a Broadcasting Treaty. The negotiations have addressed a number of controversial topics, including the identification of potential "beneficiaries" of the treaty (traditional TV and radio, satellite and cable television, or, most controversially, webcasting), the nature of the protections (a new intellectual property right for the "casting" entity, like the 1961 Rome Convention, or a signal-theft model, like the 1974 Brussels Satellite Convention), and other topics.

A large coalition of civil society NGOs, libraries, and innovative businesses have opposed the extension of the treaty to the Internet, and have argued that the treaty should follow the 1974 Brussels Satellite Convention approach, which addresses the theft of signals, but which does not create an intellectual property right in content. These groups are concerned that a treaty that follows the "rights" approach from the Rome Convention will create problems for consumers by making it more difficult to share or repurpose information, will present new liabilities for anyone hosting digital content, and will create new orphan works as it becomes more complicated and time-consuming to clear the rights of both broadcasters and copyright owners. This will only benefit a handful of large companies that merely package content into cable and satellite channels, at the expense of both consumers and copyright owners. The timing of the treaty has also been questioned, coming, as it does, at a time when transmission costs are falling, and technologies and business models are changing, especially given the abundance of legal rights in the 1996 WIPO Digital Copyright Treaties which already protect

creative works. Why do this now, when there is no pressing need, no one can explain the purpose of the treaty, and we are still learning about the technology and business models?

In May 2006, the SCCR agreed that the treaty would only cover "traditional" television and radio broadcasting, which are the two technologies covered by the 1961 Rome Convention, as well as any combination or representation of "images and sounds" delivered by cable and satellite television, and that it would not deal with the Internet. In October 2006, the WIPO General Assembly (GA) decided to convene two meetings in January and June 2007 to clarify outstanding issues. The convening of a Diplomatic Conference at the end 2007 is contingent upon whether WIPO Member States reach an agreement on a revised basic proposal. The General Assembly of the World Intellectual Property Organization (WIPO) in its thirty-third session in 2006, stated that:

“The sessions of the SCCR should aim to agree and finalize, on a signal-based approach, the objectives, specific scope and object of protection with a view to submitting to the Diplomatic Conference a revised basic proposal, which will amend the agreed relevant parts of the Revised Draft Basic Proposal (document SCCR/15/2). The Diplomatic Conference will be convened if such agreement is achieved.”

Many delegations and NGOs stated that there should be no Diplomatic Conference until WIPO members can agree upon the basic paradigm for the treaty. Do member states want a "rights" approach, or a "signal theft" approach?

After the January 2007 special session, the Chair circulated a draft non-paper and WIPO received comments on that draft. 15 member states and the European Community submitted comments. 7 member states expressed their support for a signal-theft approach, 4 did not express support for that approach and 4 did not directly address the issue.

Recent developments

On May 1st, 2007, WIPO made a new draft available on its website:
http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=77333

The May 1, 2007 non-paper will be the basis of the June 18-22 discussion at the special second session of the SCCR. The European Union and other proponents of a Rome approach present the non-paper as the narrowest treaty that can be "accepted". It is designed to give intellectual property rights for broadcasting content, and it is designed to extend those rights to the Internet. It is not about preventing the theft of signals. It is not about piracy. It is about rent-seeking. It risks the introduction of a thicket of new rights that will harm the Internet. Some of the most controversial rights (post-fixation and reproduction) are supposedly gone, but the exclusive rights of retransmission and deferred retransmission are there, and they effectively mean the same thing.

The USPTO and the LOC have an uneven history in the negotiations. The U.S. Delegation was initially strongly supportive of a new ROME plus treaty, and wanted to extend it to the Internet. Then the U.S. Delegation agreed to proceed on a "traditional broadcasting only" approach, and began to push for a signal theft approach. More recently the U.S. Delegation seems to be accommodating the European Commission position, which promotes a position that is contrary to U.S. legal traditions, and which will harm consumers and create new risks for the Internet.

We urge Congress to request that the U.S. Delegation oppose any new treaty that introduces an intellectual property right for merely packaging and distributing works. It is possible to put an end the current negotiations, if the U.S. Delegation rejects the European Commission's proposal (the May 1, 2007 draft). The broadcasting treaty can be discussed at a later date, if and when anyone can identify a compelling reason for the adoption of such a treaty.