

## **Testimony of James Packard Love**

### **Hearing on: The Scope of Copyright Protection**

**January 14, 2014**

#### **Subcommittee on Courts, Intellectual Property, and the Internet**

Thank you for the invitation to testify on the scope of copyright. My name is James Packard Love. Since 1990, I have worked on issues relating to intellectual property rights, first as an employee of the Center for Study of Responsive Law (CSRL), where among other things, I directed the Center's Taxpayer Assets Project (TAP) and the Consumer Project on the Technology (CPTech). Since 2006, I have been the Director of Knowledge Ecology International (KEI), a non-profit organization with offices in Washington, DC and Geneva, Switzerland.<sup>1</sup> Beginning in 1994, I have participated in international negotiations over intellectual property norms and practices, including copyright, related rights for performers and producers of phonograms, broadcaster rights, and sui generis protections of databases. I also participate in other negotiations relevant to the scope of copyright protection, such as the World Intellectual Property Organization (WIPO) proposals for norm setting in the areas of intellectual property rights in traditional knowledge (TK), genetic resources (GRs) and traditional cultural expressions (TCEs), and various trade negotiations over intellectual property rights in regulatory test data.<sup>2</sup> KEI also follows other intellectual property issues, including those relating to patents and other types of industrial property.

Since 2002, I have followed the negotiations at the World Intellectual Property Organization (WIPO) over a new treaty for broadcasting organizations, and my testimony today will focus on this negotiation, which stalled in 2007, but has regained momentum in recent months.

At the risk of excessively simplifying details, the historical context WIPO negotiations can be summarized as follows.

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<sup>1</sup> Knowledge Ecology International (KEI) is a not for profit non governmental organization that searches for better outcomes, including new solutions, to the management of knowledge resources. KEI is focused on social justice, particularly for the most vulnerable populations, including low-income persons and marginalized groups. KEI was created as an independent legal organization in 2006, assimilating the staff and work program of the Consumer Project on Technology (CPTech), while redefining the mission of the organization. In 2006, KEI received the MacArthur Award for Creative and Effective Institutions, for its work in advancing the public interest in intellectual property policy. The KEI web page is at <http://keionline.org>.

<sup>2</sup> Including but not limited to the limited obligations to provide protections against unfair commercial use for the regulatory data used to register pharmaceutical or agricultural chemical products under Article 39.3 of the WTO TRIPS Agreement, Article 1711 of NAFTA, or in other trade agreements.

## **The 1961 Rome Convention**

In 1961, several countries, not including the United States, agreed to a new international treaty whose beneficiaries were performers, producers of phonograms, and broadcasting organizations.<sup>3</sup> This agreement, commonly referred to as the Rome Convention, was designed to expand the scope of intellectual property rights beyond those then protected by the two leading copyright agreements, the Berne Convention and the Universal Copyright Convention -- treaties that protected authors.

The diplomatic conference that produced the 1961 Rome Convention was convened jointly by two UN agencies -- the International Labour Organization (ILO), and the United Nations Educational, Scientific and Cultural Organization (UNESCO) -- and the United International Bureaux for the Protection of Intellectual Property (BIRPI), a private organization that became the specialized UN agency for intellectual property in 1974 under its current name, the World Intellectual Property Rights (WIPO).

The most commonly expressed rationale for the 1961 Rome Convention was concern regarding the welfare of performers, and this was the earliest issue raised, including work by the ILO dating from 1926, and raised during various revisions of the Berne Convention.

Producers and manufactures of phonographic records and broadcasting organizations later managed to attach their lobbying efforts to the interests of the performers, and all three entities, performers, producers of phonograms and broadcasting organizations, were included in a draft treaty written by a committee of experts in 1951. While the ILO had been chiefly concerned about the welfare of performers, the rights to the two new beneficiaries, producers of phonograms and broadcasting organizations, were for business entities.

The Rome Convention created special, nuanced rights for each of the three beneficiaries. These were described as neighboring rights at the time, to illustrate the relationship of the rights to copyright.

The first Article of the Rome Convention said that the new rights “shall in no way affect the protection of copyright in literary and artistic works.”

### **Article 1: Safeguard of Copyright Proper<sup>4</sup>**

Protection granted under this Convention shall leave intact and shall in no way affect the protection of copyright in literary and artistic works. Consequently, no provision of this Convention may be interpreted as prejudicing such protection.

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<sup>3</sup> International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, Done at Rome on October 26, 1961. [http://www.wipo.int/treaties/en/text.jsp?file\\_id=289757](http://www.wipo.int/treaties/en/text.jsp?file_id=289757)

<sup>4</sup> The titles of the Articles in the Rome Convention were given later by WIPO to “facilitate their identification.” There are no titles in the signed text.

Some delegates were skeptical of the need for the Convention.

At the opening of the Conference, the Delegation of France declared that it considered a convention on neighbouring rights both superfluous and untimely: superfluous because most of the situations covered by it can be regulated by contracts, and untimely because international conventions follow rather than precede juridical developments.<sup>5</sup>

The question of the adequacy of contracts was discussed extensively during the 1961 negotiations, and remains relevant today as WIPO considers a new treaty specifically for the protection of broadcasting organizations. The ILO had seen the 1961 Rome treaty as a mechanism to increase the incomes of performers, and to establish their contributions as independent protectable creative expressions. Phonogram producers and manufacturers could establish their rights through contracts with authors and performers, but under the treaty obtained separate economic rights.<sup>6</sup> Broadcasting organizations were an odd fit, and in the eyes of many had a weak claim for an intellectual property right in content they did not author, perform, produce or own.

The tortured rationale for including all three beneficiaries in the 1961 treaty was described by UNESCO as follows:<sup>7</sup>

2.1 Mr. SABA (representing Mr. Vittorino Veronese, Director-General of Unesco) delivered the first opening address on behalf of the Director-General . . .

2.4 Performers had always played the part of intermediaries between authors and audiences and that role was no less important from the social than from the cultural standpoint. The same part was also being played, in a new way, by producers of phonograms and broadcasting organizations. The three Organizations had worked in unison to ensure that the future international instrument should be a composite whole, reconciling as far as possible the various legitimate interests at stake, those of the intermediaries as well as those of the authors themselves and those of the general public

While broadcasters could be described as “intermediaries” between the authors and the general public, the same could be said of bookstores, newspaper delivery services, or other distributors of copyrighted content. What was special about broadcasting organizations that gave rise to an intellectual property right?

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<sup>5</sup> Records of the Diplomatic Conference on the International Protection of Performers, Producers of Phonograms and Broadcasting Organizations, Rome, 10 to 26 October 1961, page 37.

<sup>6</sup> As well as protection for recordings of “other” sounds not based upon a performance. “It has been suggested that bird songs and other nature sounds are examples of sounds not coming from a performance.” Records. Page 40.

<sup>7</sup> First plenary meeting, Tuesday, 10 October 1961. Records, pages 63-4.

In 1961, radio and television was primarily focused on free over the air (OTA) broadcasting activities, subject to various forms of public interest and public service regulatory obligations. Some argued that the costs of broadcasting television were significant, and the rights were needed to protect the high investments. Unlike a bookstore, the broadcast typically was freely available to the public without subscription.

The new rights in the Rome Convention permitted the broadcasting organizations to authorize or prohibit, and effectively charge money, for the rebroadcasting of broadcasts, as well as the fixation, reproduction of fixations, and “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.”<sup>8</sup> Ironically, in a treaty first conceived as an instrument to protect performers, the new rights for broadcasting organizations were available even when a broadcaster did not compensate performers or producers of phonograms.

The Rome Convention has been signed by 91 countries. In contrast, the Berne Convention has been signed by 167 countries.

The United States became a member of the Berne Convention in 1989, but never signed the Rome Convention. The United States does provide some rights to broadcasting organizations, including those in 47 USC 325, regarding “Consent to retransmission of broadcast station signals.” Broadcasting organizations in the United States are also both the subject and beneficiary of a variety of compulsory licenses in U.S. copyright law.

Some countries expanded the notion of a broadcasting organization to include new beneficiaries, including cable television and satellite television services that are only available to paying subscribers.

### **After the Rome Convention**

In 1996, WIPO convened a diplomatic conference to consider three new treaties that would expand copyright and related rights. Two treaties were adopted during the December 1996 diplomatic conference, one dealing with the rights of authors (the WCT), another dealing with the rights of performers and producers of phonograms (the WPPT). The third treaty proposal, which proposed a new *sui generis* protection for databases faced considerable opposition, and was not adopted.

The WCT and the WPPT expanded the rights of authors, performers and producers of phonograms. In 1997, broadcasting organizations lobbied WIPO and its member states to have the economic rights in the 1961 Rome Convention expanded.

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<sup>8</sup> Rome Convention. Article 13.

In November 1998, a report on Existing International, Regional And National Legislation Concerning The Protection Of The Rights Of Broadcasting. (SCCR/1/3) was presented at the first meeting of the new WIPO Standing Committee on Copyright and Related Rights (SCCR). The report stated:

The WIPO Performances and Phonograms Treaty (WPPT) harmonizes and updates international norms on the protection of performers (except for their "audiovisual performances") and producers of phonograms, but it does not cover the third traditional category of related rights beneficiaries, namely broadcasting organizations. During the preparatory work that led to the adoption of the WPPT and the WIPO Copyright Treaty (WCT), and at the September-October 1997 sessions of the Governing Bodies of WIPO, several delegations proposed that WIPO include in its program the issue of harmonization of the rights of broadcasting organizations. The WIPO World Symposium on Broadcasting, New Communication Technologies and Intellectual Property, held in Manila in April 1997, and the WIPO Symposium for Latin American and Caribbean Countries on Broadcasting, New Communication Technologies and Intellectual Property, held in Cancun, Mexico, in February 1998, identified several areas where international harmonization and updating of existing norms is necessary and indicated that this activity may have to extend to the rights of distributors of cable-originated programs.

This report (SCCR/1/3) also described a long list of rights that broadcasters were seeking in a new treaty:

From April 28 to 30, 1997, WIPO organized, in cooperation with the Government of the Philippines and with the assistance of the Kapisanan ng mga Brodkaster ng Pilipinas (KBP) (National Association of Broadcasters of the Philippines) the WIPO World Symposium on Broadcasting, New Communication Technologies and Intellectual Property, in Manila. (The proceedings of the Symposium are published in WIPO publication No. 757 (E/F/S).) At this symposium, representatives of broadcasting organizations pointed out a number of issues which they proposed to be addressed at the international level. Some of these issues are listed in the following paragraph.

According to these proposals, broadcasters should be granted exclusive rights to authorize or prohibit the following acts:

- simultaneous or deferred rebroadcasting of their broadcasts, whether these are transmitted via satellite or by any other means;
- simultaneous and deferred retransmission of their broadcasts in cable systems;
- the making available to the public of their broadcasts, by any means, including interactive transmissions;

- the fixation of their broadcasts on any media, existing or future, including the making of photographs from television signals;
- the transmission to the public of programs, transmitted by cable;
- the decoding of encrypted signals; and
- the importation and distribution of fixations or copies of fixations of broadcasts, made without authorization.

In addition, broadcasters should be granted a right of remuneration for private copying, and it should be clarified that the protection applies to not only the sounds and/or images of broadcasts, but also to (digital) representations of such sounds and/or images.

In the WIPO Symposium for Latin American and Caribbean Countries on Broadcasting, New Communication Technologies and Intellectual Property, held in Cancun, Mexico, from February 16 to 18, 1998, the participating broadcasting organizations and cable program distributors, in the conclusions adopted by them, formulated similar requests for an international protection system. In addition, they requested the following exclusive rights:

- the right of broadcasters to authorize the communication to the public of their broadcasts, whether or not the communication is to a paying audience or is made in places accessible to the public against payment of an entrance fee;
- the right of broadcasters, cable distributors or other distributors to distribute to the public their own signals, transported by communications satellites or intended for them; and
- the right to authorize the rental of copies made from the fixation of broadcasts.

In both above-mentioned symposia, nearly all participating experts from WIPO Member States favored continuing discussions at international level on the need for a more up-to-date protection of broadcasters' rights, while reserving their respective governments' position on that need in general as well as on the extent to which new international norms may be necessary in this respect.

The report from SCCR/1 included 2,883 words devoted to the discussion of a new treaty for broadcasting organizations. By SCCR/2, in April of 1999, the Secretariat presented a draft treaty proposal.<sup>9</sup> The broadcasting treaty discussion continued for several years, but began to face resistance beginning in 2002, from a variety of civil society and consumer groups, including several with a particular interest in the Internet.

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<sup>9</sup> SCCR/2/5. Agenda Item 4: Protection Of The Rights Of Broadcasting Organizations Submissions Received from Member States of Wipo and The European Community By March 31, 1999.

Until 2002, WIPO was generally considered a venue to promote an ever expanding set of legal rights and privileges for various right holder lobby groups. Indeed, when WIPO considered holding a meeting in 2003 to discuss the role of new open collaborative projects to innovation and knowledge as a public goods, the USPTO objected, on the grounds that WIPO's mission was only to promote more expansive intellectual property rights.<sup>10</sup> But by 2004, a large number of civil society organizations, development NGOs and academics, several WIPO member states were calling for a more balanced work program.

As the discussions over the WIPO broadcast treaty progressed from 2004 to 2007, a great deal of attention was focused on proposals to extend the rights not only to cable and satellite operators, but also to webcasting entities. The rationale for extending rights to cable and satellite entities was non-existent, since both services only provided broadcasts to subscribers, and piracy of either satellite or cable services was considered both an infringement of the underlying copyright, and a violation of various theft of service and regulatory regimes. The webcasting lobby, led by Yahoo, under then CEO Terry Semel, and the Digital Media Association (DiMA), was primarily motivated to obtain regulatory and intellectual property protection parity with over the air and cable broadcasters, which they saw as their rivals. The proposals to extend the Rome Convention-type rights to the Internet alarmed many civil society and Internet rights groups, because it would create a new layer of intellectual property rights, potentially protecting even material in the public domain, or material subject to copyright exceptions, or material freely licensed under creative commons licenses. The new layer also increased the risks of being sued for infringement by entities that neither created nor owned the underlying content, and made it more difficult (and costly) to clear rights.

Technology was also changing rapidly, and the costs of both broadcasting and webcasting were rapidly falling, and the use of webcasting was now being extended to a plethora of new uses, including the webcasting of meetings, lectures, current events (including this Congressional hearing), breaking news, video game tournaments, dating services, dog shows, TED talks, conferences, and investor briefings, to mention a few (and not the most innovative). Most of the people attending this hearing have in their possession a smartphone capable of creating and distributing high definition video.

The notion that distributors of information should obtain intellectual property rights in content they did not create and do not own creates a potential nightmare of rent seeking and innovation stopping litigation, particularly if such rights continue to spread, and are extended more broadly to the countless parties now playing a role in the distribution and sharing of information goods.

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<sup>10</sup> Declan Butler, Drive for patent-free innovation gathers pace, *Nature*, Vol 424. Page 118. July 10, 2003. William New, Global Group's Shift On 'Open Source' Meeting Spurs Stir, *Technology Daily*, August 19, 2003. William New. U.S. Official Opposes 'Open Source' Talks At WIPO, *Technology Daily*. August 19, 2003. Jonathan Krim, The Quiet War Over Open-Source, *Washington Post*. August 21, 2003; Page E01. Declan Butler, Business backlash kills off software meeting, *Nature*, Vol 424. Page 984. August 28, 2003. Page 984. Lawrence Lessig, Open-Source, Closed Minds, *eWeek*, October 1, 2003.

There was also considerable opposition to new broadcaster rights by groups representing authors, performers and producers. Groups representing performers and phonogram producers found it appalling that a broadcasting organization would obtain new economic rights, even while they did not pay anything to the entities that performed or owned sound recordings. And, eventually some U.S. based technology companies began to pay attention to the WIPO negotiations, with IBM, Intel, AT&T and other companies eventually taking positions in opposition to a treaty that would extend Rome Convention type broadcaster rights to the Internet.

As the debate progressed at WIPO, the positions of member states were miles apart on nearly all important substantive issues, but there was growing support by several members to move away from the broad economic rights favored by the broadcasters, and toward a narrower “signal protection” approach, that did not give broadcasters rights in program content, and to narrow the treaty to “traditional” broadcasters, which, in some formulations, included cable and satellite services, but excluded webcasting. In 2006, the SCCR began to separate webcasting from “traditional” broadcasting and cablecasting.

### **The 2007 Decision at WIPO**

In 2007, WIPO’s General Assembly decided that it would “consider convening of a Diplomatic Conference only after agreement on objectives, specific scope and object of protection has been achieved.” (WO/GA/34/16). At that point, the proposal for a diplomatic conference for a broadcasting treaty was effectively blocked, pending some greater consensus on these issues.

### **The rebirth of the broadcast treaty negotiations**

In 2011, the WIPO Secretariat wanted new movement for a diplomatic conference on broadcasting rights, but as a lower priority than progress on two other treaties. In 2012, WIPO convened a diplomatic conference in Beijing for a new Treaty on Audiovisual Performances. The Beijing treaty was modest in its substantive provisions (neither the United States nor the EU changed their laws) but the fact that it was concluded at all was considered a major achievement for WIPO. In June 2013, WIPO concluded a more controversial and substantive treaty on copyright exceptions for persons who were blind or had other print disabilities. This gave WIPO two copyright treaties in two years. By the WIPO General Assembly in the fall of 2013, the WIPO broadcast treaty was highlighted as the next candidate for a diplomatic conference, possibility in 2015.

The WIPO Secretariat is aggressively pushing for a diplomatic treaty for a new broadcasting treaty, despite major differences in views regarding the beneficiaries and the nature of the rights and exceptions to rights.<sup>11</sup>

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<sup>11</sup> The WIPO secretariat describes the “outstanding issues” in the negotiation, in terms quite favorable to the broadcasters, in this web page.

<http://www.wipo.int/pressroom/en/briefs/broadcasting.html>



In December 2013, at SCCR 26, WIPO held the first major talks on the broadcast treaty since 2007. During these talks, Japan and the EU both made proposals for a treaty with extensive new rights for broadcast organizations, defined to include cable television and satellite services that require paid subscriptions.

The USPTO, on behalf of the United States, made a proposal for a much less ambitious treaty, for "Broadcasting Organizations." There would be a single right "to authorize the simultaneous or near-simultaneous retransmission of their broadcast or pre-broadcast signal over any medium," including delivery of the broadcast over the Internet. The USPTO proposal would only extend the right to the broadcast signal, and not to the content, and would not include any post fixation rights. The USPTO also offered the following definitions:

- A "near-simultaneous" retransmission is one that is delayed only to the extent necessary to accommodate time differences or to facilitate the technical transmission of the signal.
- A "pre-broadcast signal" is a signal transmitted to the broadcasting organization for the purpose of subsequent transmission to the public.

During the debate at the SCCR, no country voiced support for the USPTO proposal. India objected to the proposal to extend the right to Internet transmissions. Japan, the EU and several other countries pressed for more expansive economic rights for broadcasting entities.

The next round of talks on this proposal will be 2.5 days during the meeting on SCCR 27, from April 28 to May 2, 2014.

### **KEI views on the WIPO negotiations**

The WIPO negotiations over the broadcast treaty highlight a number of complex issues.

KEI is concerned that the treaty negotiation process itself is driven by industry lobbies, and lacks basic information regarding a definition of the problem(s) to be solved, and an explanation of why any of the countless possible versions of the treaty are needed.

### **Do broadcasters care about signal piracy?**

Most of the industry messaging concerns signal piracy, but the broadcast industry lobbying is really over the new economic rights that broadcasters are seeking in the treaty.

In the period from 2006 to 2007, broadcasters could have had a diplomatic conference for a simple anti-piracy treaty, along lines similar to the 2013 proposal by the United States for a thin signal-only, no post-fixation rights approach.

The 2013 USPTO proposal addresses the putative rationale for the treaty -- to prevent piracy of broadcast signals, without undermining the rights of copyright holders, performers and consumers, as regards post-fixation uses of works, and it would be a reasonable conclusion to this long negotiation. But the fact that the USPTO proposal received so little support during the December 2013 SCCR meeting is reminiscent of earlier rejections of this approach by the politically active European broadcasters who are quite influential among EU and Baltic state policy makers.

### **Are there gaps in copyright or related rights?**

In the past, a variety of explanations have been offered as to why broadcasters need any new rights to deal with signal piracy, since in almost all cases, an unauthorized use would be infringement of the copyright or related rights held by authors, performers and producers of program content. One story sometimes offered concerns sports broadcasting, which may have less protection in some non-US markets than it has here. However, when asked, broadcasters are not able to identify countries where the broadcasting rights are not already protected by some type of legal regime. To the extent that there is a plausible issue with sports broadcasting, one can imagine a narrow agreement that addresses this alleged problem, but there appears to be no real interest in such a narrow agreement at WIPO.

### **Why extend the treaty to cable and satellite operators?**

Cable and satellite services are made available to subscribers who pay fees. There is no economy of any significance where it is not already illegal to use these services without paying. What is the rationale for providing cable operators with an intellectual property right in content they are paid to deliver to their subscribers?

The fact that broadcast and cable television are in a similar business is obvious, but what is not obvious is why policy makers at WIPO cannot make reasonable distinctions between the services, based upon differences (as is the case with the highly differentiated US laws).

The WIPO treaty would be more manageable and reasonable if it was narrowed to only benefit free over-the-air broadcasting to the public, without subscriptions.

### **Why provide rights to broadcasters that don't pay performers?**

Performers are right to complain about a treaty that gives broadcasters more rights than they have, in their own performances.

## **Use caution when introducing new intellectual property regimes to the Internet**

It is already very challenging to implement new Internet based services and uses of information, under existing rules regarding copyright and/or related rights. The WIPO proposals present large risks to a dynamic and innovative industry.