Protection of Broadcasters' Rights

Megumi Ogawa

INTELLECTUAL PROPERTY LAW LIBRARY VOLUME 2

MARTINUS NIJHOFF PUBLISHERS

Protection of Broadcasters' Rights

Intellectual Property Law Library

1. R.W. de Vrey, *Towards a European Unfair Competition Law*. A Clash Between Legal Families (2006)
2. M. Ogawa, *Protection of Broadcasters' Rights* (2006)

Protection of Broadcasters' Rights

by

Megumi Ogawa

MARTINUS NIJHOFF PUBLISHERS
LEIDEN/BOSTON

A CIP record for this book is available from the Library of Congress.

Printed on acid-free paper.

ISSN 1871-6725
ISBN 90-04-15028-5
© 2006 Koninklijke Brill NV, Leiden, The Netherlands.

Koninklijke Brill NV incorporates the imprints Brill Academic Publishers, Martinus Nijhoff Publishers and VSP.

http://www.brill.nl

All rights reserved. No part of this publication may be reproduced, translated, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical, photocopying, recording or otherwise, without prior written permission from the publisher.

Authorization to photocopy items for internal or personal use is granted by Brill provided that the appropriate fees are paid directly to The Copyright Clearance Center, 222 Rosewood Drive, Suite 910, Danvers, MA 01923, USA.
Fees are subject to change.

PRINTED AND BOUND IN THE NETHERLANDS

To Family and Friends

Table of Contents

Foreword xi

Preface xiii

Table of Abbreviations xv

Chapter 1 Preliminary Study 1

Introduction 1
Previous Research 3
Two Approaches to the Protection of the Rights of Broadcasting Organisations 4
Hypothesis 10
Scope 11
Materials 12
Structure 14

Chapter 2 Overview of the Rights of Broadcasting Organisations 21

Introduction 21
Rights of Broadcasting Organisations 22
‘Broadcasting’ 22
‘Broadcasting Organisations’ 26
‘The Rights of Broadcasting Organisations’ 27
Conclusion 30

Chapter 3 The Rome Convention and the Current Transnational Regime 31

Introduction 31
The Rome Convention 32
Background to the Rome Convention 32
Outline of the Rome Convention 43
Protection in Relation to Broadcasting 44
Evaluation of the Rome Convention 46
Other International Conventions 47
The Satellite Convention 47
TRIPS 51
Substantial Conventions Protecting Broadcasting 52
Transnational Legislation 53
The European Agreement on the Protection of Television Broadcasts 53
EC Directives 55
Cartagena Decision 351 58
NAFTA 59
Conclusion 59

Chapter 4 Broadcasting Technology-Analogues **61**

Introduction 61
The Technologies of Cable Distribution, Satellite Broadcasting, Teletext and Internet Broadcasting 62
Cable Distribution 62
Satellite Broadcasting 64
Teletext 66
Internet Broadcasting 66
Reasons Why Cable Distribution, Satellite Broadcasting, Teletext and Internet Broadcasting Are Not Considered 'Broadcasting' 67
Cable Distribution 67
Satellite Broadcasting 67
Teletext 68
Internet Broadcasting 69
The Real Problem of the Definition of 'Broadcasting' 69
The Mismatch between Recent Technologies and the Definition 69
Problems of Single Technology Based Definition 69
The Real Problem 71
Conclusion 71

Chapter 5 Ongoing Discussions for the Reform of the International Regime **73**

Introduction 73
Committee of Experts on Possible Protocol to the Berne Convention 75
WIPO World Symposium on Broadcasting, New Communication Technology and Intellectual Property 76
1st Panel Discussion: Broadcasters as Owners of Neighbouring Rights 77
2nd Panel Discussion: The Legal Status of Broadcast Programmes at the Borderline of Copyright and Neighbouring Rights 80
3rd Panel Discussion: Broadcasters as 'Users' 83
4th Panel Discussion: Convergence of Communication Technologies: Terrestrial Broadcasting and Communication to the Public by Cable 86
5th Panel Discussion: Digital Transmissions on the Internet and Similar Networks 88
6th Panel Discussion: Concluding Debate 91
Issues Raised at the WIPO World Symposium 91
WIPO Standing Committee on Copyright and Related Rights 92
The 1st Session (2–10 November, 1998) 92
The 2nd Session (2–11 May, 1999) 93
The 3rd Session (16–20 November, 1999) 94
The 5th Session (7–11 May, 2001) 95
The 6th Session (26–30 November, 2001) 97
The 7th Session (13–17 May, 2002) 99
The 8th Session (4–8 November, 2002) 102
The 9th Session (23–27 June, 2003) 105

The 10th Session (3–5 November, 2003) 108
The 11th Session (7–9 June 2004) 109
Issues to Be Resolved toward a New Treaty 111
WIPO General Assembly (September 2004 Session) 112
Conclusion 113

Chapter 6 Protection of Broadcasters' Rights in Australia 115

Introduction 115
Copyright Act 1968 in 1998 117
Definition of 'Broadcast' 117
Broadcasts in Which Copyright Subsists 120
Exclusive Rights in Broadcasts 122
Copyright Amendment (Digital Agenda) Act 2000 123
Objectives of the Digital Agenda Act 124
Amended Provisions in Relation to the Broadcasters' Rights 126
The Concept of the Digital Agenda Act 127
The Rationale for Copyright Protection by the Digital Agenda Act 128
Significance of the Digital Agenda Act 130
The Panel Case – *TCN Channel Nine Pty Ltd v Network Ten Pty Ltd* 130
Primary Decision 131
Full Court Decision 135
High Court Decision 140
Inconsistency between the Digital Agenda Act and the Decision in the *Panel Case* 141
Implications of the Panel Case 145
Conclusion 145

Chapter 7 Protection of Broadcasters' Rights in Japan 147

Introduction 147
Copyright Law in 1998 148
Protection of Broadcasters' Rights as Neighbouring Rights 149
Reasons Why Japan Does Not Recognise Copyright in Broadcasts 152
Needs and Difficulties in Upgrading the Protection of Broadcasters' Rights 155
Problems of Protection 155
Reasons for Non-Action 156
Difficulties in Upgrading 158
Copyright Law Amendment in 2002 159
Possibility of Copyright in Broadcasts 160
Reconsideration of the Reason Why Japan Does Not Recognise Copyright in Broadcasts 160
Possible Copyright in Broadcasts as Compilations 161
Potential Issues regarding Copyright in Broadcasts 163
Feasibility of Copyright in Broadcasts 165
Conclusion 166

Chapter 8 Rationale for the Protection of Broadcasters' Rights **167**

Introduction 167
Rationale for the Protection of Broadcasters' Rights in Australia 168
The Gregory Committee Report 168
The Spicer Committee Report 169
Misunderstanding concerning the Rationale for Protection in Australia 171
Rationale for the Protection of Broadcasters' Rights in Japan 172
Report of the Copyright Regime Committee 172
Professor Koji Abe's Article 173
Misunderstanding concerning the Rationale for Protection in Japan 175
Conclusion 176

Chapter 9 Future Directions **177**

From the Past 177
To the Future 178

Bibliography **181**

Index **197**

Foreword

The Honourable Sir Anthony Mason AC KBE CBE

This book is an invaluable contribution to our understanding of the issues relating to the protection of broadcasters' rights. The book provides a comprehensive analysis of the protection of broadcasters' rights based on the differing approaches adopted by the common law and civil law systems.

The author selects the Australian Copyright Act 1968 (Cth) as representative of the common law approach and subjects it to analytical scrutiny. The Japanese Copyright Law, which is selected as representative of the civil law approach, is likewise subjected to searching scrutiny.

The publication of the book is timely. It coincides with the work undertaken by the World Intellectual Property Organisation (WIPO) in drafting a new treaty. This work has reached its final stage.

The book examines the formation and subsequent development of the legislation for protecting broadcasters' rights and discusses the current legal issues arising out of current proposals at the international and domestic levels to upgrade that protection. The focus of the research is the international protection of broadcasters' rights, including the protection provided in Australia and Japan. The book provides a detailed account of the relevant international treaties and conventions as well as domestic legislation and provides penetrating arguments charting a positive approach to the future protection of broadcasters' rights.

Of particular interest is the author's review of the rationale for the protection of the rights of broadcasting organisations, including the protection given in Australia and Japan. This review will contribute to an understanding of

differences in approach and may assist in the upgrading of the protection of broadcasters' rights internationally and nationally. The final chapter contains a summary of the findings made by the author in earlier chapters and integrates those findings into the conclusions.

The author is an expert in the field of broadcasting law and has a close knowledge of copyright law as it applies to broadcasters' rights in Australia and Japan. The book is an exhibition of her knowledge and analytical skills. The subject is one which is in an important stage of transformation. The book enables the reader to comprehend the issues and the competing policy directions and to reach an informed view as to the way forward.

Preface

This book deals with the rationale for the protection of broadcasters' rights within the framework of copyright. This project was commenced in 1999 just after the first session of the World Intellectual Property Organisation Standing Committee on Copyright and Related Rights, where consideration began of a proposed new international convention for the protection of the rights of broadcasting organisations. During the lengthy period of this project, I incurred considerable debts of gratitude, the culmination of which is the foreword by the Honourable Sir Anthony Mason AC KBE CBE, the Chief Justice of the High Court of Australia between 1987–1995. I must confess my surprise at the book being privileged with such a great honour.

I am also most grateful to Associate Professor Clive Turner of the University of Queensland and Associate Professor Paul Ali of the University of New South Wales for their assistance in reviewing the draft. The book would not exist without them. I cannot express sufficient gratitude to Professor Katsuya Tamai of the University of Tokyo for his advice throughout this project. My heartfelt thanks also goes to Mr Tetsuhiro Hatakeyama, Copyright Organisations Advisory Unit, Japan Copyright Office, Agency for Cultural Affairs, Government of Japan and Mr Shinji Nakagawa, the then Manager, Business Management Section, Copyright Research and Information Centre (Japan) in relation to collecting materials and to Associate Professor Kohichi Sumikura of the Graduate Institute of Policy Studies and Ms Mary Wyburn of the University of Sydney for their comments on part of the draft. My deepest appreciation is directed to the Media Network Center at Waseda University, especially the Dean, Professor Takenobu Takizawa and the former Dean, Professor Yasunari

Harada for arranging various opportunities. Discussions with the following people are acknowledged: Professor Andrew Christie, Professor Jim Lahore, Dr David Brennan, Professor Cheryl Saunders AO and Professor Sam Ricketson.

Part of this project was supported by a Matsushita International Foundation Research Grant. It is my great pleasure to have been able to work with the skilful staff of Martinus Nijhoff Publishers.

The law is stated as known to the author as at July 2005.

MEGUMI OGAWA
Brisbane, Australia
August 2005

Table of Abbreviations

Abbreviation	Meaning
ABC	Australian Broadcasting Corporation
ABU	Asia-Pacific Broadcasting Union
ALAI	Congress of the International Literary and Artistic Association
BBC	British Broadcasting Corporation
Berne Convention	Berne Convention for the Protection of Literary and Artistic Works
BIRPI	United International Bureaux for the Protection of Intellectual Property
Brussels Convention	See Satellite Convention
Cable and Satellite Directive	Council Directive (EEC) No. 93/83/EEC of September 27, 1993, on the Co-ordination of Certain Rules Concerning Copyright and Cable Retransmission
Cartagena Decision 351	Decision No. 351 on Author's Right and Connected Rights (December 17, 1993) of the Commission of the Cartagena Agreement Decision No. 351 on Author's Right and Connected Rights (December 17, 1993) of the Commission of the Cartagena Agreement
CCG	Copyright Convergence Group (Australia)
CLEA	Collection of Laws for Electronic Access

Consolidated Text	World Intellectual Property Organisation, 'Standing Committee on Copyright and Related Rights, Eleventh Session, Consolidated Text for a Treaty on the Protection of Broadcasting Organizations' (2004) SCCR/11/3
DBS	direct broadcasting satellite
Digital Agenda Act	The *Copyright Amendment (Digital Agenda) Act* 2000 (Cth) (Australia)
EBU	European Broadcasting Union
FCC	Federal Communications Commission (US)
FSS	fixed service satellite
GATT	General Agreement on Tariffs and Trade
Gregory Committee Report	Report of the Copyright Committee, 1951 (Gregory Committee) Cmd 8662 (United Kingdom)
ILO	International Labour Office
ILO Draft	Proposed International Convention concerning the Protection of Performers, Manufacturers of Phonographic Records and Broadcasting Organisations
INTELSAT	International Telecommunications Satellite Organisation
ITU	International Telecommunication Union
Monaco Draft	Draft Agreement on the Protection of Certain Rights called Neighbouring on Copyright
NAFTA	North American Free-Trade Agreement between the governments of Canada, Mexico and the United States of America
NTSC	National Television System
PAL	Phase Alternating Lines
Rental Directive	Council Directive No.92/100/EEC of November 19,1992, on rental right and lending right and on certain rights related to copyright in the field of intellectual property
Rome Convention	International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations
RR	ITU Radio Regulations

Satellite Convention	Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite
SBS	Special Broadcasting Service
SECAM	Sequentiel Colour avec Memoire
SNG	satellite news gathering system
Spicer Committee Report	Report of the Copyright Law Review Committee, 1959 (Spicer Committee) (Australia)
Term Directive	Council Directive No. 93/98/EEC of October 29, 1993, harmonising the term of protection of copyright and certain related rights
The Hague Draft	Draft International Convention Protecting Performers, Phonogram Producers and Broadcasters
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
UCC	Universal Copyright Convention
UNESCO	United Nations Educational, Scientific and Cultural Organisation
WARC-BS	World Administrative Radio Conference
WCT	WIPO Copyright Treaty
WIPO	World Intellectual Property Organisation
WIPO Convention	Convention Establishing the World Intellectual Property Organisation
WPPT	WIPO Performances and Phonograms Treaty
WTO	World Trade Organisation

Chapter 1
Preliminary Study

1.1. Introduction

Broadcasting meets the digital age: digital broadcasting made multi-channelling possible, broadened the range of programme choices for audiences, and increased business opportunities for entrepreneurs. However, digital broadcasting has exposed a shortfall in the supply of programmes, and has also made possible the reproduction or retransmission of programmes without debasing their quality. It is easy to conjecture that this situation could lead to concerns about piracy, especially in the context of low-priced digital equipment,[1] the Internet and so on.

The International Convention which sets out the rights of broadcasting organisations is the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (Rome Convention). It was established in 1958. Since then, the world has witnessed rapid technological development. The first commercial communications satellite to become actively involved in broadcasting was the satellite of the International Telecommunications Satellite Organisation (INTELSAT) of the United States in

---

[1] For recording media, the distinction between professional use and public use has already disappeared. See, Suzuki T, 'Tayouka suru Minsei-you Kiroku Media no Genjou ni tsuite' [2000 nen 5 gatsu] *Kopiraito* 22 [trans: 'Current Situation of Diversifying Recording Media for the Public' [May 2000] *Copyright*].

1965.[2] Cable television became prevalent[3] after 1966 when the Federal Communications Commission (FCC) prepared regulations for cable television.[4] Teletext was started in 1976 by the British Broadcasting Corporation (BBC) and ITV[5] of the United Kingdom.[6] In 1978 the first broadcasting satellite, the 'Yuri' of Japan started direct broadcasting.[7] The style of broadcasting has changed. In view of these developments, it is not surprising that the Rome Convention can no longer adequately protect the rights of broadcasting organisations.

In November 1998, the World Intellectual Property Organisation (WIPO) commenced discussions on protecting the rights of broadcasting organisations at its Standing Committee.[8] According to the explanation by a Japanese Government official, this is the outcome of the bargain between the parties representing broadcasting organisations (the European Broadcasting Union (EBU) and the Asia-Pacific Broadcasting Union (ABU)) and WIPO.[9] It is known that WIPO promised to initiate discussions regarding the rights of broadcasting organisations in exchange for collaboration by EBU and ABU in establishing the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT).[10] It is apparent that establishment of the new instrument may largely depend upon political decisions. However, this does not justify abandoning legal analysis of this topic.

---

[2] Head S, *World Broadcasting System: A Comparative Analysis*, (California, Wadsworth Publishing Company, 1985) 37.

[3] Dizard W, *Old Media New Media: Mass Communications in the Information Age*, (3rd ed, New York, Longman, 2000) 109.

[4] Commercial cable television broadcasting started in 1950 in the United States. See, Schaumann N, 'Copyright Protection in the Cable Television Industry: Satellite Retransmission and the Passive Carrier Exemption' (1983) 51 *Fordham Law Review* 637.

[5] Commercial television services in the United Kingdom.

[6] Rogers E, *Communication Technology: The New Media in Society*, (New York, The Free Press, 1986) 47. Veith R, *Television's Teletext*, (New York, Elsevier Science Publishing, 1983) 14.

[7] Head S, *World Broadcasting System: A Comparative Analysis*, (California, Wadsworth Publishing Company, 1985) 44.

[8] Standing Committee on Copyright and Related Rights.

[9] Okamoto K, 'Housou Jigyousha no Kenri ni Kansuru Shin-jouyaku no Hitsuyousei wo Kentou suru WIPO Sekai Shimpojiumu ni tsuite: Dappi wo Semarareru Nihon no Housou-jigyousha' (1997) 37 *Kopiraito* 2, 2 [trans: 'WIPO World Symposium to Discuss the Necessity of a Possible New WIPO Treaty on the Rights of Broadcasting Organisations: Urgent Necessity for Japanese Broadcasters to Change Their Basic Attitude toward Copyright Issues as a Whole' *Copyright*]. Mr K Okamoto was the Director of the International Copyright Office, Copyright Division, Cultural Affairs Department, Agency for Cultural Affairs at the time.

[10] Okamoto K, 'Housou Jigyousha no Kenri ni Kansuru Shin-jouyaku no Hitsuyousei wo Kentou suru WIPO Sekai Shimpojiumu ni tsuite: Dappi wo Semarareru Nihon no Housou-jigyousha' (1997) 37 *Kopiraito* 2, 2 [trans: 'WIPO World Symposium to Discuss the Necessity of a Possible New WIPO Treaty on the Rights of Broadcasting Organisations: Urgent Necessity for Japanese Broadcasters to Change Their Basic Attitude toward Copyright Issues as a Whole' *Copyright*].

In relation to the three parties protected by the Rome Convention, that is, performers, phonogram producers and broadcasting organisations, WIPO has already established the WPPT which was adopted by the Diplomatic Conference on 20 December 1996. It appears to be a matter of time before a new treaty dealing with the rights of broadcasting organisations is concluded.[11]

Up until now, however, the issue as to the extent to which the rights of broadcasting organisations should be recognised has not yet been agreed by the WIPO member states.[12] More complexities are anticipated as WIPO seeks to accommodate the differences of view of the member states.[13]

The obstacle in gaining unanimous agreement by the WIPO members seems to be the lack of a common understanding of the rationale for protecting broadcasting organisations. What is the rationale for protecting broadcasting organisations? This is the question which this research examines.

1.2. Previous Research

The need for a comprehensive study of the rationale for protecting broadcasting organisations has been discussed in the context of the need to review the concept and role of neighbouring rights since the mid 1990s.[14] This need has been recognised in order to reconstruct the system of neighbouring rights. As a result, some research on the reasons for recognising neighbouring rights has

---

[11] For the opposite view, see, Okamoto K, 'Housou Jigyousha no Kenri ni Kansuru Shin-jouyaku no Hitsuyousei wo Kentou suru WIPO Sekai Shimpojiumu ni tsuite: Dappi wo Semarareru Nihon no Housou-jigyousha' (1997) 37 *Kopiraito* 2 [trans: 'WIPO World Symposium to Discuss the Necessity of a Possible New WIPO Treaty on the Rights of Broadcasting Organisations: Urgent Necessity for Japanese Broadcasters to Change Their Basic Attitude toward Copyright Issues as a Whole' *Copyright*].

[12] For the latest discussion at the WIPO Standing Committee on Copyright and Related Rights, see World Intellectual Property Organisation, 'Standing Committee on Copyright and Related Rights, Twelfth Session, Report' (2005), SCCR/12/4. This Report was published after the author completed the manuscript.

[13] Ogawa M, 'WIPO Housou Jigyousha Shin-jouyaku ni muketeno Giron to Nichi-gou Kokunaihou no Taiou' (2000) 41 *Jouhou-shori Gakkai Rombunshi* 3099 [trans: 'The WIPO Background Discussion of the Proposed 'Broadcasters' Treaty and Its Implications for the Domestic Law of Australia and Japan' in the *Transactions of Information Processing Society of Japan*].

[14] Jehoram H, 'The Nature of Neighbouring Rights of Performing Artists, Phonogram Producers and Broadcasting Orgranizations' (1990) 15 *Columbia-VLA Journal of Law and the Arts* 75. Yoshida D, 'Chosakuken Seido no Kanousei' (1996) 36 *Kopiraito* 2 [trans: 'Potentiality of the System of Neighbouring Rights' in *Copyright*]. See also, the comment of Ueno M, in the 'Disukasshon: Media no Tayouka to Chosakuken Housei' (1997) 6 *Juristo* 374, 392 [trans: 'Discussion: The Diversification of Media and Copyright Legislation' in *Jurist*].

been conducted. However, neighbouring rights are a nomenclature of convenience.[15] Neighbouring rights represent a number of rights and the nature of each right is different. Research targeting the rights of broadcasting organisations specifically is therefore needed.

Dr Werner Rumphorst, in an article pointing out the mismatches between the Rome Convention and modern technology, stated that 'it is necessary to identify the legislative purpose of the protection of broadcasting organisations'.[16] Nonetheless comprehensive research which clarifies the rationale for the protection of the rights of broadcasting organisations has not yet been undertaken.

1.3. Two Approaches to the Protection of the Rights of Broadcasting Organisations

According to the International Bureau of WIPO, all the WIPO member countries have protection for broadcasting organisations.[17] However, there are two different ways of protecting the rights of broadcasting organisations: one approach is to recognise copyright in broadcasts and the other is to recognise the rights of broadcasting organisations as neighbouring rights.[18] These two approaches correspond to the approaches of copyright protection. Therefore, in the following section, the approaches to the protection of copyright are explained, followed by an explanation of the two approaches to protecting the rights of broadcasting organisations.

1.3.1. *Two Approaches to Copyright Protection*

Copyright protection can be classified into two approaches by the difference in the rationale for protecting copyright.[19] Professor Sam Ricketson has

---

[15] Abe K, 'Rinsetsuken' (1965) 329 *Jurisuto* 29, 31 [trans: 'Neighbouring Rights' in *Jurist*].

[16] Rumphorst W, 'Protection of Broadcasting Organisations under the Rome Convention' (1993) XXVII *Copyright Bulletin* 10, 11.

[17] World Intellectual Property Organisation, 'Existing International, Regional and National Legislation concerning the Protection of the Rights of Broadcasting: Memorandum Prepared by the International Bureau' (1998) SCCR/1/3.

[18] World Intellectual Property Organisation, 'Existing International, Regional and National Legislation concerning the Protection of the Rights of Broadcasting: Memorandum Prepared by the International Bureau' (1998) SCCR/1/3. See, also: Sterling J, *World Copyright Law: Protection of Authors' Works, Performances, Phonograms, Films, Video, Broadcasts and Published Editions in National, International and Regional Law*, (2nd ed, London, Sweet & Maxwell, 2003) 15–18; and Goldstein P, *International Copyright: Principles, Law, and Practice*, (New York, Oxford University Press, 2001) 3.

[19] See for example: Spector H, 'An Outline of a Theory Justifying Intellectual Property Rights' [1989] *European Intellectual Property Review* 270; and Garnett K, Davies G & Harbottle G,

classified the rationale for copyright protection into the following two categories:

(a) those, which are economic or more broadly instrumentalist in character, in that they see the grant of rights as being a means of attaining certain desirable social ends; and
(b) those, which are non-economic in character, in that they focus on the entitlements of the creator and what is due to him or her, with less regard to broader social and economic considerations.[20]

The above rationale (a) is often called the incentive theory.[21] According to the incentive theory, copyright is 'to encourage creative activities and by doing so, to disseminate cultural and economic benefit to the general public other than creators'.[22] Copyright protection, under the incentive theory, is a tool to facilitate the dissemination of information to the public.[23] The concern of copyright protection according to this theory is society or the public.[24] The rationale by the incentive theory is social-oriented.

The above rationale (b) is usually called the natural rights theory.[25] Natural rights had earlier been considered in the writings of the ancient Greek sophists,[26]

Copinger and Skone James on Copyright, (15th ed, London, Sweet & Maxwell, 2005) 14, para 1–33. There are scholars who have classified the rationale for copyright protection into three or more categories. See, for example: Bently L & Sherman B, *Intellectual Property Law*, (Oxford, Oxford University Press, 2001) 32; and Stewart S, *International Copyright and Neighbouring Rights*, (2nd ed, London, Butterworths, 1989) 3–4, [1.02]–[1.05].

20 Ricketson S & Creswell C, *The Law of Intellectual Property: Copyright, Designs & Confidential Information*, (2nd ed, Sydney, Lawbook Co., 2001) [1.30].

21 Kitamura Y, 'Jouhou-ka Shakai to Chosakuken' [1999 nen 3 gatsu] *Kopiraito* 2, 15 [trans: 'The Information-Oriented Society and Copyright' [March, 1999] *Copyright*]. See, also, Bently L & Sherman B, *Intellectual Property Law*, (Oxford, Oxford University Press, 2001) 32.

22 Morimura S, *Rokku Shoyuu-ron no Saisei*, (Tokyo, Yuuhikaku, 1998) 255 [trans: *The Revival of Locke's Property Theory*].

23 Research on the effect of copyright protection on the public has been vigorously undertaken by using economic theory. These studies, from Plant to Landes and Posner, are well classified and presented in: Towse R, 'Copyright as an Economic Incentive' (1999) 17 *Copyright Reporter* 15; and Watt R, *Copyright and Economic Theory: Friends or Foes?*, (Cheltenham, U.K., Edward Elgar, 2000) 113–123.

24 Kitamura Y, 'Jouhou-ka Shakai to Chosakuken' [1999 nen 3 gatsu] *Kopiraito* 2, 15 [trans: 'The Information-Oriented Society and Copyright' [March, 1999] *Copyright*]. See, also, Bently L & Sherman B, *Intellectual Property Law*, (Oxford, Oxford University Press, 2001) 32.

25 Kitamura Y, 'Jouhou-ka Shakai to Chosakuken' [1999 nen 3 gatsu] *Kopiraito* 2, 15 [trans: 'The Information-Oriented Society and Copyright' [March, 1999] *Copyright*]. See, also, Bently L & Sherman B, *Intellectual Property Law*, (Oxford, Oxford University Press, 2001) 32.

26 Llompart J, *Houtetsugaku An'nai*, (Tokyo, Seibundou, 1997) 31 [trans: *Legal Philosophy Guide*].

however, property was first emphasised by Locke in the stream of the natural rights theory.[27] Therefore, discussions of the natural rights theory as the rationale for copyright protection are usually centred around Locke.[28] Locke's idea was summarised by Professor Peter Drahos as 'A person's labour belongs to him.'[29] The rationale for copyright protection by the natural rights theory is that creators can control their creation. The rationale is creator-oriented.

The different rationales for copyright protection, namely the incentive theory and the natural rights theory, underlie the two different approaches to copyright protection. In a presentation delivered in 1959, the distinction between the two approaches was expressed as follows:

> '[T]wo great conceptions of what has been agreed to call "copyright" face each other, namely, the Anglo-Saxon concept of copyright, and what I propose to call the French concept of droit d'auteur, which, however, is the basis not only of the French statute but also of the Swiss law and the German project, and to some greater or lesser extent the concept of nearly all the copyright statutes except the Anglo-Saxon ones.'[30]

Nowadays, the above mentioned 'Anglo-Saxon concept' is regarded as the incentive theory and the 'French concept of droit d'auteur' is regarded as the natural rights theory.[31]

The incentive theory is adopted principally by so-called common law countries and the natural rights theory is adopted mostly by the civil law countries.[32] Therefore, the approach of copyright protection by the incentive theory is often

---

[27] Llompart J, *Houtetsugaku An'nai*, (Tokyo, Seibundou, 1997) 87 [trans: *Legal Philosophy Guide*]. There are a number of studies on Locke's property theory and intellectual property. See, for example: Hughes J, 'The Philosophy of Intellectual Property' (1988) 77 *Georgetown Law Journal* 287; Yen A, 'Restoring the Natural Law: Copyright as Labor and Possession' 51 *Ohio State Law Journal* 517; Gordon W, 'A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property' (1993) 102 *Yale Law Journal* 1533; Morimura S, *Zaisan-ken no Riron*, (Tokyo, Koubundou, 1995) [trans: *Theory of Property*]; and Morimura S, *Rokku Shoyuu-ron no Saisei*, (Tokyo, Yuuhikaku, 1998) 255 [trans: *The Revival of Locke's Property Theory*].

[28] Dr Anne Fitzgerald and Professor Brian Fitzgerald listed 'Lockean natural rights' as one of the theories which justifies the protection of intellectual property: Fitzgerald A & Fitzgerald B, *Intellectual Property in Principle*, (Sydney, Lawbook Co., 2004) 10.

[29] Drahos P, *A Philosophy of Intellectual Property*, (Aldershot, U.K., Dartmouth, 1996) 43.

[30] Monta R, 'The Concept of "Copyright" versus the "Droit d'Auteur"' (1959) 32 *Southern California Law Review* 177.

[31] See, for the background to this conceptualization, McKeough J, Bowrey K & Griffith P, *Intellectual Property: Commentary and Materials*, (3rd ed, Sydney, Lawbook Co., 2002) 18–19.

[32] See, for the other analysis of the features of the two approaches, Koizumi N, *Amerika Chosakuken-seido: Genri to Seisaku*, (Koubundou, 1997) 3–4 [trans: *Copyright Regime in the United States of America: Principles and the Policy*].

called the common law approach, while the approach by the natural rights theory is called the civil law approach.[33] The common law approach is also called the copyright approach since the approach has the concept of copyright as opposed to droit d'auteur of the civil law approach.[34] The civil law approach is also called the continental law approach because the civil law is also called continental law.[35]

Whatever these two approaches are called, the common law approach to copyright protection is underlain by the incentive theory, that is the social-oriented rationale, and the civil law approach to copyright protection is underlain by the natural rights theory, that is the creator-oriented rationale.

1.3.2. *Two Approaches to Protecting Broadcasters' Rights*

The above two different approaches adopt different methods of protecting the rights of broadcasting organisations.

According to the common law approach, copyright is recognised in order to disseminate information to society. Therefore, the common law approach does not have any difficulty in recognising copyright for broadcasting organisations.[36] In fact, the countries that take the common law approach provide copyright in broadcasts.[37]

On the other hand, the civil law approach recognises copyright for creators. Broadcasting organisations disseminate works of others, which disseminating activity cannot be regarded as a creative contribution. Thus, copyright cannot be recognised for broadcasting organisations.[38] However, broadcasting contributes to the dissemination of creative works to society, so that the rights

[33] Saito H, *Chosakuken-hou*, (Tokyo, Yuuhikaku, 2000) 15 [trans: *Copyright Law*].

[34] Saito H, *Chosakuken-hou*, (Tokyo, Yuuhikaku, 2000) 15 [tarns: *Copyright Law*].

[35] Saito H, *Chosakuken-hou*, (Tokyo, Yuuhikaku, 2000) 15 [tarns: *Copyright Law*].

[36] According to WIPO's investigation, the countries which take this position include Australia, Ireland, New Zealand, Singapore, South Africa, Thailand and the United Kingdom. Attention should be drawn to the fact that the United States of America is not included. See, World Intellectual Property Organisation, 'Existing International, Regional and National Legislation Concerning the Protection of the Rights of Broadcasting: Memorandum Prepared by the International Bureau' (1998), SCCR/1/3.

[37] Sterling J, 'Harmonisation of Usage of the Terms "Copyright", "Author's Right" and "Neighbouring Rights"' [1989] *European Intellectual Property Review* 14, 14.

[38] According to WIPO's investigation, the countries which take this position include China, France, Germany, Italy, Japan, Sweden, Switzerland and also some common law countries such as India and Pakistan. See, World Intellectual Property Organisation, 'Existing International, Regional and National Legislation Concerning the Protection of the Rights of Broadcasting: Memorandum Prepared by the International Bureau' (1998), SCCR/1/3.

which neighbour on the copyright of authors'[39] are recognised for broadcasting organisations.[40]

Under the common law approach, the rationale for protecting the rights of broadcasting organisations is, as well as the rationale for copyright protection, social-oriented. However, the civil law approach, which recognises the creator-oriented rationale for copyright protection, denies the creator-oriented rationale for broadcasting organisations. The reason why the civil law approach grants protection for broadcasting organisations is to protect the dissemination of works to society. That is the idea of the incentive theory. It means that the civil law approach recognises the social-oriented rationale for protecting the rights of broadcasting organisations.

The common law and civil law approaches adopt different ways of protecting the rights of broadcasting organisations. However, the rationale for protection of broadcasting by both approaches is the same, that is the social-oriented rationale.

1.3.3. *Professor Jane Ginsburg's Argument*

The above understanding of the combination of the rationale for copyright protection and the approach to copyright protection, namely the copyright approach adopts the social-oriented rationale and the continental approach adopts the creator-oriented rationale, was questioned by Professor Jane Ginsburg in an article which examines the historical correctness of this apprehension.[41]

The article compares French and U.S. copyright law starting with an explanation of the origin of both copyright regimes. According to the article, French copyright originated as the privilege of publishing by the Crown as an offshoot of royal censorship.[42] U.S. copyright has its origin in English law, the Statute of Anne,[43] which proclaimed that 'copyright is an incentive to authors to create so that the public may have access to and be enriched by their

---

[39] See WIPO, *Guide to the Rome Convention and to the Phonograms Convention*, WIPO Publication No. 617 (E), (Geneva, WIPO, 1981) 7. See also, Stewart S, *International Copyright and Neighbouring Rights*, (2nd ed, London, Butterworths, 1989) 189, [7.09] and 222, [8.01].

[40] Professor Sterling investigated the legislation of civil law countries and concluded that broadcasting is protected under the heading of neighbouring rights in these countries. Sterling J, 'Harmonisation of Usage of the Terms "Copyright", "Author's Right" and "Neighbouring Rights"' [1989] *European Intellectual Property Review* 14, 16.

[41] Ginsburg J, 'A Tale of Two Copyrights: Literary Property in Revolutionary France and America' (1990) 64 *Tulane Law Review* 991.

[42] Ginsburg J, 'A Tale of Two Copyrights: Literary Property in Revolutionary France and America' (1990) 64 *Tulane Law Review* 991, 997.

[43] Statute of Anne, 1710.

works'.[44] Later, the United States' Constitution adopted the policy of the Statute of Anne by stating that 'Congress shall have Power… to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.'[45]

According to the article, this preamble does not mean the United States did not consider authors' rights. The United States equally weighed public interest and authors' property interests.[46] This equal weight idea appeared even before the Constitution.[47]

Notwithstanding this, the first U.S. copyright law, 'An Act for the encouragement of learning, by securing the copies of maps, charts and books, to the authors and proprietors of such copies during the times therein mentioned', focused on the public interest.[48] The article examines the American publications record in 1790–93 and 1798–99 and finds that most publications were 'instructive works that Congress had intended to encourage'.[49]

The article subsequently examined French copyright in the Revolutionary period. The article, in contrast to the traditional understanding that French copyright is creator-oriented, suggests that French copyright focused on the public.[50] The 1791 decree recognised authors' rights but the recognition was to abolish the monopoly of producing theatrical works by the *Comedie Français*.[51] Le Chapelier had been regarded as asserting author-oriented rationales for copyright, however, the article finds that his true idea stressed the public domain.[52]

The article continues to examine the 1792 decree.[53] The decree adopted formalities in order for the rights of dramatists to be recognised.[54] It then examines

[44] Statute of Anne, 1710, title and preamble.

[45] U.S. Constitution, Article 1, section 8, clause 8.

[46] Ginsburg J, 'A Tale of Two Copyrights: Literary Property in Revolutionary France and America' (1990) 64 *Tulane Law Review* 991, 999.

[47] Professor Ginsburg referred to several papers. Ginsburg J, 'A Tale of Two Copyrights: Literary Property in Revolutionary France and America' (1990) 64 *Tulane Law Review* 991, 999–1000.

[48] Ginsburg J, 'A Tale of Two Copyrights: Literary Property in Revolutionary France and America' (1990) 64 *Tulane Law Review* 991, 1001.

[49] Ginsburg J, 'A Tale of Two Copyrights: Literary Property in Revolutionary France and America' (1990) 64 *Tulane Law Review* 991, 1003.

[50] Ginsburg J, 'A Tale of Two Copyrights: Literary Property in Revolutionary France and America' (1990) 64 *Tulane Law Review* 991, 1006.

[51] Ginsburg J, 'A Tale of Two Copyrights: Literary Property in Revolutionary France and America' (1990) 64 *Tulane Law Review* 991, 1006.

[52] Ginsburg J, 'A Tale of Two Copyrights: Literary Property in Revolutionary France and America' (1990) 64 *Tulane Law Review* 991, 1007.

[53] Ginsburg J, 'A Tale of Two Copyrights: Literary Property in Revolutionary France and America' (1990) 64 *Tulane Law Review* 991, 1008.

[54] Ginsburg J, 'A Tale of Two Copyrights: Literary Property in Revolutionary France and America' (1990) 64 *Tulane Law Review* 991, 1008.

the 1793 decree and discovers that property rights of authors, which were first recognised at this time, still had a social-oriented character.[55] According to the article, French copyright was neither initiated as creators' self-evident rights nor developed as that.[56] French copyright had a social principle although it was not the only principle.[57]

The article reviewed the cases during the Revolutionary period in France.[58] French copyright covered broader subjects than U.S. copyright.[59] Litigants under both copyright laws, however, advocated the same rationale for copyright protection, that is the incentive for authors.[60] For some cases, the French court recognised the authors' property justification *a priori*.[61] However, other cases, which were probably the majority according to the article, were decided based on the social-oriented idea of copyright.[62]

From these investigations, the article concludes that the classification of the copyright approach as social-oriented and the continental approach as creator-oriented is historically not accurate.[63] If, as the article concludes, the concept of copyright from the continental approach (the civil law approach) is not creator-oriented, the rationale for neighbouring rights is also likely to be doubtful.

1.4. Hypothesis

If the notion of copyright from the civil law approach is not based on the creator-oriented rationale but the social-oriented rationale, and if there truly is a difference between copyright and neighbouring rights, neighbouring rights rather than copyright can be creator-oriented in the civil law approach.

---

[55] Ginsburg J, 'A Tale of Two Copyrights: Literary Property in Revolutionary France and America' (1990) 64 *Tulane Law Review* 991, 1009–1010.

[56] Ginsburg J, 'A Tale of Two Copyrights: Literary Property in Revolutionary France and America' (1990) 64 *Tulane Law Review* 991, 1012.

[57] Ginsburg J, 'A Tale of Two Copyrights: Literary Property in Revolutionary France and America' (1990) 64 *Tulane Law Review* 991, 1014.

[58] Ginsburg J, 'A Tale of Two Copyrights: Literary Property in Revolutionary France and America' (1990) 64 *Tulane Law Review* 991, 1015.

[59] Ginsburg J, 'A Tale of Two Copyrights: Literary Property in Revolutionary France and America' (1990) 64 *Tulane Law Review* 991, 1015.

[60] Ginsburg J, 'A Tale of Two Copyrights: Literary Property in Revolutionary France and America' (1990) 64 *Tulane Law Review* 991, 1015.

[61] Ginsburg J, 'A Tale of Two Copyrights: Literary Property in Revolutionary France and America' (1990) 64 *Tulane Law Review* 991, 1018.

[62] Ginsburg J, 'A Tale of Two Copyrights: Literary Property in Revolutionary France and America' (1990) 64 *Tulane Law Review* 991, 1017–1022.

[63] Ginsburg J, 'A Tale of Two Copyrights: Literary Property in Revolutionary France and America' (1990) 64 *Tulane Law Review* 991, 1023.

Broadcasting organisations' labour could belong to the broadcasting organisations. The rights of broadcasting organisations, that is one of neighbouring rights, may be creator-oriented rights.

On the above-mentioned assumption, this research aims at clarifying the rationale for the protection of the rights of broadcasting organisations in order to provide a theoretical basis for reforming the current regime. This research explores the formation and contents of legislation for protecting the rights of broadcasting organisations and discusses the current issues by means of a comparative study of Australian and Japanese law.

1.5. Scope

Since the research aims to clarify the rationale for broadcasters' rights as one of the neighbouring rights by utilising the rationale for broadcasters' rights as copyright as a clue, the methodology by which the research will be undertaken is naturally that of a comparative study between the continental and copyright approaches. As explained in the Introduction, most civil law countries have adopted the continental approach and a number of common law countries have adopted the copyright approach for copyright protection. Therefore, a considerable number of combinations of jurisdictions are possible for comparison.

Amongst this considerable number of combinations, the research focuses on Australian law as representative of the countries of the copyright approach and Japanese law as representative of the countries of the continental approach. This is because Australia and Japan have shown the following distinctive contrasts when WIPO initiated the discussions on protecting the rights of broadcasting organisations at the Standing Committee on Copyright and Related Rights in 1998.

Australia expressed at the meeting of the Standing Committee that its protection of the rights of broadcasting organisations had worked sufficiently but shortly afterwards amended its provisions for the protection of broadcasting organisations.[64] Japan eagerly advocated the necessity for amendments for raising the level of the protection for broadcasting organisations at the same meeting.[65] However, except for a minor amendment made in 2002, the fundamental upgrading of broadcasters' rights has not been implemented in Japan.

[64] See World Intellectual Property Organisation, 'Standing Committee on Copyright and Related Rights, 1st Session, Report' (1998), SCCR/1/9.

[65] See World Intellectual Property Organisation, 'Standing Committee on Copyright and Related Rights, 1st Session, Report' (1998), SCCR/1/9

This comparative approach to Australian and Japanese law also intends to counter the bias of intellectual property law research related to broadcasting, which tends to revolve around the European and American situation.[66]

1.6. Materials

Since the research deals with Australian and Japanese law, materials which are written in Japanese will be frequently used as well as those in English.[67]

---

[66] The major works of intellectual property law research in relation to broadcasting undertaken in Europe or the United States include: Freeman J, 'Towards the Free Flow of Information Direct Television Broadcasting via Satellite' (1979) 13 *Journal of International Law and Economics* 329; Szilágyi I, 'Question of Broadcasting by Satellite with Special Reference to Authors' Rights' (1981) *Copyright* 222; Schaumann N, 'Copyright Protection in the Cable Television Industry: Satellite Retransmission and the Passive Carrier Exemption' (1983) 51 *Fordham Law Review* 637; Burckhardt Y, 'Satellite Television and Performers' Right' (1985) *Copyright* 252; Dembert H, 'Securing Authors' Rights in Satellite Transmissions: U.S. Efforts to Extend Copyright Protection Abroad' (1985) 24 *Columbia Journal of Transnational Law* 73; Schricker G (Japanese translation by Doi K), *Keiburu-housou to Chosakuken-hou*, (Tokyo, Shinzan-sha, 1995) [trans: *Cable Distribution and Copyright Law* (German original is *Urheberrechtliche Probleme des Kabelrundfunks: Studie im Auftrag der Medienkommission der Länder zur wissenschaftlichen Begleifung der vier Kabelpilotprojecte*, (Baden-Baden, Nomos Verlagsgesellschaft, 1986)]; Ross D, 'Telecommunications: Satellite Regulation' (1985) *Annual Survey of American Law* 439; Dillenz W, 'Legal System Governing the Protection of Works Transmitted by Direct Broadcasting Satellite' (1986) *Copyright* 386; Schulze E, 'Protection against Cable Television and Earth Satellite' (1986) 13 *Copyright Law Journal* 1; Pichler M, *Copyright Problems of Satellite and Cable Television in Europe*, (London, Graham & Trotman, 1987); Cunard J, 'Broadcast Regulation in Turmoil: the North American Experience' (1987) 7(3/4) *Communications Law Bulletin* 2; Bate S, *Television by Satellite: Legal Aspects*, (London, ESC Publishing, 1987); Fabiani M, 'Copyright and Direct Broadcasting by Satellite' (1988) *Copyright* 17; Wineberg J, 'Cable Television and Copyright in the United States' (1988) 15 *Copyright Law Journal* 23; Abada S, 'Satellite Transmission, Cable Distribution and Copyright' (1989) *Copyright* 289; Dietz A, 'Copyright and Satellite Broadcasts' (1989) 20 *International Review of Industrial Property and Copyright Law* 144; Gendreau Y, *The Retransmission Right: Copyright and the Rediffusion of Works by Cable*, (Oxford, ESC Publishing, 1990); Krever A, 'Satellite Broadcasting and Copyright' (1990) XXIV *Copyright Bulletin* 6; Rumphorst W, 'Neighbouring Rights Protection of Broadcasting Organisations' [1992] *European Intellectual Property Review* 339; Kern P, 'The EC "Common Position" on Copyright Applicable to Satellite Broadcasting and Cable Retransmission' [1993] *European Intellectual Property Review* 276. Even apart from broadcasting, copyright research has tended to deal only with European and American law. See, Goldstein P, *International Copyright: Principles, Law, and Practice*, (New York, Oxford University Press, 2001) ix. Professor Goldstein explains that French, German, U.K. and U.S. laws are 'the most widely discussed.'

[67] See, for the sources of the Japanese law especially explained for English speakers by an English speaker, Dean M, *Japanese Legal System*, (2nd ed, London, Cavendish Publishing, 2002) 129. (Professor Dean's accounts regarding the sources of Japanese law seem to contain some differences from the relatively common perception of Japanese speakers.)

The Japanese materials used in the research have been translated into English basically by the author of this book. The following should be noted.

1.6.1. *Legislation*

There is no official English translation of Japanese law by the Japanese Government. Although WIPO's website includes the *Japanese Copyright Law* in the Collection of Laws for Electronic Access (CLEA),[68] it is not an official translation but merely an example. Furthermore, insofar as the *Copyright Law* is concerned, it is dated. Reasonably updated Copyright Law text can be found at the website of the Copyright Research and Information Center.[69] This text is, again, not an official government translation.

When translating Japanese law into English, the author of this book has referred to the translation appearing in these websites. However, the author did not necessarily follow that translation particularly in order to avoid the confusion which might be caused by the difference in terminology between the Australian legislation and the Japanese law translation.

1.6.2. *Cases*

All cases are written in Japanese in Japan. There is no official English translation. For some cases, an English translation by a private institution, the Institute of Intellectual Property, is available through its database.[70] Where needed, the author of this book has translated the relevant case.

A Japanese case, unlike an Australian case, does not have an official case name which represents the parties in the case, but instead has a case number which all Japanese databases and reports must cite. When referring to a case, this principle will be followed, namely citing its case number. However, a frequently cited case may have a commonly used unofficial name which usually represents the object of the case. If there is such a name, it will be referred to in addition to the case number. If more than one report includes the case, Japanese academic writing requires all the reports to be cited for reference. However, this custom will not be observed in this book.

1.6.3. *Government Documents*

Most documents are written in Japanese in Japan except those that are specifically intended to be presented to foreign countries or non-Japanese speakers. The

---

[68] 'The Collection of Laws for Electronic Access', <http://www.wipo.int/clea/en/index.jsp>.

[69] 'Copyright Law of Japan', <http://www.cric.or.jp/cric_e/clj/clj.html>.

[70] Institute of Intellectual Property, 'Japanese Cases in English', <http://220.99.110.43/cases/search.html>.

documents that the author has used in this book are primarily ones written solely in Japanese. Hence, translation was again made by the author where necessary. It should be noted that some of the government documents used in this research are quite difficult to obtain even in Japan.

1.6.4. *Books and Articles*

Japanese books or articles sometimes have an English title as well as a Japanese title given by the author of a book or an article although the body of such books or articles are usually written solely in Japanese. In that case, the English title given by the author of such a book or article is cited in its original form as much as possible. However, for some books or articles, the author of this book has altered part of the translation of the title or, in some cases, has undertaken original translation. For access to books or articles written in Japanese, the Japanese original title, which this book always refers to in its citation of those works, should be used.

1.7. Structure

This research will engage in a comparative Australian and Japanese law approach using the above-mentioned material and develop the argument in the order set out below.

1.7.1. *Chapter Two*

In Chapter Two, at the beginning of the discussion of this book, the rights of broadcasting organisations, which is the topic of the research, will be clearly defined.

The notion of broadcasting is, following technological developments, ambiguous. Therefore, first, an explanation of what broadcasting is will be given from both a legal and technological perspective.

Secondly, broadcasting organisations in many countries are, unlike most other corporations, usually subject to telecommunications law and broadcasting law. An overall explanation to enable an understanding of what broadcasting organisations are will be provided.

Thirdly, broadcasting organisations usually have rights in both public and private law, for example, freedom of speech and copyright in broadcasts. Accordingly, the rights that will be considered in this research will also be clarified.

By setting aside the areas of law adjacent to the focus of the research, this Chapter will draw a clear outline of the topic of the research.

1.7.2. *Chapter Three*

In Chapter Three, the international conventions and transnational legislation regarding protection for the rights of broadcasting organisations will be examined.

There are three international conventions that currently provide provisions for the protection of the rights of broadcasting organisations.[71] However, two out of the three, namely the conventions other than the Rome Convention, grant virtually no protection for broadcasting organisations.

As for transnational legislation, six agreements have been reported to WIPO.[72] These transnational agreements can generally be regarded as supplementary to the obligation to protect broadcasters' rights imposed by the Rome Convention.

In this Chapter, these international conventions and transnational agreements will be examined. The examination will provide an entire picture of the current situation of the protection for the rights of broadcasting organisations.

1.7.3. *Chapter Four*

In Chapter Four, new communication technologies, that have begun to thrive since the conclusion of the Rome Convention, and have analogous effects to broadcasting,[73] will be explored.

The explanation will provide evidence that the current protection imposed by the Rome Convention is no longer effective. The development of technology has made the current protection obsolete.

This Chapter will consider what is needed to construct an effective regime for protecting the rights of broadcasting organisations.

1.7.4. *Chapter Five*

In Chapter Five, the ongoing discussions for the reform of the current international protection of the rights of broadcasting organisations will be examined.

---

[71] World Intellectual Property Organisation, 'Existing International, Regional and National Legislation Concerning the Protection of the Rights of Broadcasting: Memorandum Prepared by the International Bureau' (1998), SCCR/1/3.

[72] World Intellectual Property Organisation, 'Existing International, Regional and National Legislation Concerning the Protection of the Rights of Broadcasting: Memorandum Prepared by the International Bureau' (1998), SCCR/1/3.

[73] As will be explained in Chapter Four, cable distribution, satellite broadcasting and Internet broadcasting are not 'broadcasting' within the meaning of that term in the Rome Convention.

These discussions originated from the statement by the delegates at the Committee of Experts on a Possible Protocol to the Berne Convention for the Protection of Literary and Artistic Works.[74] They were taken over by the WIPO Standing Committee on Copyright and Related Rights.[75] The WIPO Standing Committee on Copyright and Related Rights holds meetings once or twice a year to tackle this reform.

The purpose of the examination of these discussions is to understand the problems that broadcasting organisations are currently facing, to identify particular issues to be resolved towards the establishment of a new regime and to determine the reasons why these issues have not already been resolved.

1.7.5. *Chapter Six*

In Chapter Six, as a representative of the copyright approach, the Australian *Copyright Act* 1968 (Cth) will be analysed.

At the WIPO Standing Committee on Copyright and Related Rights, the Australian delegation stated that further work on the proposed treaty should be supported.[76] However, the Australian delegation also commented that sufficient protection was already provided in Australia and the piracy problem had not been raised.[77] Nonetheless, in Australia, the *Copyright Act* 1968 (Cth) was amended within two years after the above comments.[78]

The reasons for the amendments[79] will provide some useful insights when considering an effective amendment to upgrade the current protection of broadcasters' rights.

---

[74] World Intellectual Property Organisation, 'Committee of Experts on a Possible Protocol to the Berne Convention for the Protection of Literary and Artistic Works, First session' (1992) *Copyright* 30, 42 and 44.

[75] World Intellectual Property Organisation, 'Standing Committee on Copyright and Related Rights, 1st Session, Report' (1998), SCCR/1/9.

[76] World Intellectual Property Organisation, 'Standing Committee on Copyright and Related Rights, 1st Session, Report' (1998), SCCR/1/9.

[77] World Intellectual Property Organisation, 'Standing Committee on Copyright and Related Rights, 1st Session, Report' (1998), SCCR/1/9.

[78] *Copyright Amendment (Digital Agenda) Act* 2000 (Cth).

[79] See, for the details of amendment: Catanzariti T, 'If You Think Digital Watches Are a Pretty Neat Idea . . .' (1999) 18(1) *Communications Law Bulletin* 12; Davison M, 'Australian Proposals for Copyright Reform: Some Unresolved Issues and Some Lessons from America' (1999) *Digital Technology Law Journal*; Knight P, 'The Copyright Amendment (Digital Agenda) Bill 1999' (1999) 5 *Computerlaw Newsletter* 1; Middleton G, 'Copyright Beyond the Digital Frontier: Australia's Proposed Digital Agenda Reforms' (1999) 56 *Journal of Law and Information Science* 52; Weatherall K, 'An End to Private Communications in Copyright?: The Expansion of Rights to Communicate Works to the Public: Part 1' [1999] 21 *European Intellectual Property Review* 342; Aplin T, 'Contemplating Australia's Digital Future: The Copyright Amendment (Digital Agenda) Act 2000' [2001] *European Intellectual*

1.7.7. *Chapter Seven*

In Chapter Seven, the Japanese *Copyright Law* will be examined as a representative of the continental law approach.

The examination will focus on determining the reasons why Japan needs to strengthen its protection for broadcasts but has so far been unable to make an effective amendment to its law. In Japan, discussions to strengthen the rights of broadcasting organisations commenced in 1999.[80] Despite a minor amendment in 2002, Japan nonetheless has been unable to identify an effective way of updating the protection of the rights of broadcasting organisations. The discussions[81] seem to have hit a dead end without having reached a satisfactory conclusion of the review for the protection of the rights of broadcasting organisations.

Property Review 565; Costelloe R, 'The New Digital Copyright Law in the Media, Entertainment and Communications Industries' (2001) 12 *Australian Intellectual Property Journal* 19.

[80] Chosakuken Shingikai, 'Chosakuken Shingikai Maruchimedia Shou-iinkai Housou-jigyousha no Kenri ni kansuru Wahkingu Guruupu (Dai Ikkai Giji Youshi)' (1999) [trans: Copyright Committee, 'Working Group on the Rights of Broadcasting Organisations, Subcommittee of Multimedia, Copyright Committee (The First Session Minutes)'].

[81] Chosakuken Shingikai, 'Chosakuken Shingikai Maruchimedia Shou-iinkai Housou-jigyousha no Kenri ni kansuru Wahkingu Guruupu (Dai Nikai Giji Youshi)' (1999) [trans: Copyright Committee, 'Working Group on the Rights of Broadcasting Organisations, Sub-committee of Multimedia, Copyright Committee (The Second Session Minutes)']; Chosakuken Shingikai, 'Chosakuken Shingikai Maruchimedia Shou-iinkai Housou-jigyousha no Kenri ni kansuru Wahkingu Guruupu (Dai Sankai Giji Youshi)' (1999) [trans: Copyright Committee, 'Working Group on the Rights of Broadcasting Organisations, Sub-committee of Multimedia, Copyright Committee (The Third Session Minutes)']; Chosakuken Shingikai, 'Chosakuken Shingikai Maruchimedia Shou-iinkai Housou-jigyousha no Kenri ni kansuru Wahkingu Guruupu (Dai Yonkai Giji Youshi)' (1999) [trans: Copyright Committee, 'Working Group on the Rights of Broadcasting Organisations, Sub-committee of Multimedia, Copyright Committee (The Fourth Session Minutes)']; Chosakuken Shingikai, 'Chosakuken Shingikai Maruchimedia Shou-iinkai Housou-jigyousha no Kenri ni kansuru Wahkingu Guruupu (Dai Gokai Giji Youshi)' (1999) [trans: Copyright Committee, 'Working Group on the Rights of Broadcasting Organisations, Sub-committee of Multimedia, Copyright Committee (The Fifth Session Minutes)']; Chosakuken Shingikai, 'Chosakuken Shingikai Maruchimedia Shou-iinkai Housou-jigyousha no Kenri ni kansuru Wahkingu Guruupu (Dai Rokkai Giji Youshi)' (1999) [trans: Copyright Committee, 'Working Group on the Rights of Broadcasting Organisations, Sub-committee of Multimedia, Copyright Committee (The Sixth Session Minutes)']; Chosakuken Shingikai, 'Chosakuken Shingikai Maruchimedia Shou-iinkai Housou-jigyousha no Kenri ni kansuru Wahkingu Guruupu (Dai Nanakai Giji Youshi)' (2000) [trans: Copyright Committee, 'Working Group on the Rights of Broadcasting Organisations, Sub-committee of Multimedia, Copyright Committee (The Seventh Session Minutes)']; Chosakuken Shingikai, 'Chosakuken Shingikai Maruchimedia

The reasons why an amendment cannot be made in order to achieve the level of protection which Japan proposed at the WIPO Standing Committee on Copyright and Related Rights will be examined.

1.7.8. *Chapter Eight*

In Chapter Eight, the rationale for the protection of the rights of broadcasting organisations will be reviewed including the formation of the relevant legislation of Australia and Japan.

The review will reveal the answer to the research question and the hypothesis of this study explained in Chapter One. The review will also suggest the origins of the problem in understanding the rationale for the protection and subsequent developments in relation to the understanding of the rationale.

Appropriate understanding of the rationale for the protection of the rights of broadcasting organisations will remove the difficulties in considering the effective upgrading of the protection for broadcaster's rights at both the international and national level.

1.7.9. *Chapter Nine*

In Chapter Nine, the findings of each Chapter will be presented, followed by concluding remarks. The outcome of this research will result in a proposal for the desirable approach to protect the rights of broadcasting organisations.

Shou-iinkai Housou-jigyousha no Kenri ni kansuru Wahkingu Guruupu (Dai Hachikai Giji Youshi)' (2000) [trans: Copyright Committee, 'Working Group on the Rights of Broadcasting Organisations, Sub-committee of Multimedia, Copyright Committee (The Eighth Session Minutes)']; Chosakuken Shingikai, 'Chosakuken Shingikai Maruchimedia Shou-iinkai Housou-jigyousha no Kenri ni kansuru Wahkingu Guruupu (Dai Kyuukai Giji Youshi)' (2000) [trans: Copyright Committee, 'Working Group on the Rights of Broadcasting Organisations, Sub-committee of Multimedia, Copyright Committee (The Ninth Session Minutes)']; Chosakuken Shingikai, 'Chosakuken Shingikai Maruchimedia Shou-iinkai Housou-jigyousha no Kenri ni kansuru Wahkingu Guruupu (Dai Jikkai Giji Youshi)' (2000) [trans: Copyright Committee, 'Working Group on the Rights of Broadcasting Organisations, Sub-committee of Multimedia, Copyright Committee (The Tenth Session Minutes)']; Chosakuken Shingikai, 'Chosakuken Shingikai Maruchimedia Shou-iinkai Housou-jigyousha no Kenri ni kansuru Wahkingu Guruupu (Dai Juuikkai Giji Youshi)' (2000) [trans: Copyright Committee, 'Working Group on the Rights of Broadcasting Organisations, Sub-committee of Multimedia, Copyright Committee (The Eleventh Session Minutes)'].

Through these Chapters, this research will demonstrate:

- the current deficiencies of the legislation for protecting the rights of broadcasting organisations at both the international and national level;
- the current differences between the common law and civil law approaches in recognising the rights of broadcasting organisations;
- the positions taken in Australia and Japan, countries representative of the common law and civil law approaches respectively, to address the deficiencies in protection;
- the difficulties in establishing an effective instrument to upgrade the protection of the rights of broadcasting organisations which fits the rationale for protection;
- the cause of the difficulties in settling an international instrument for the protection of the rights of broadcasting organisations; and
- a desirable way of protecting broadcasters' rights which can overcome the above difficulties

Chapter 2
Overview of the Rights of Broadcasting Organisations

1. Introduction

Initially, the rights of broadcasting organisations, that is the topic of this research, will be defined. What is 'broadcasting'? What is a 'broadcasting organisation'? What are 'the rights of broadcasting organisations'? In this Chapter, these questions will be answered to provide a clear idea of what the rights of broadcasting organisations are.

'Broadcasting' is an ambiguous word. One may assume that broadcasting is cable television which a person subscribes to at home. Others may imagine the radio which they listen to every morning in their cars on the way to work. In order to clarify what 'broadcasting' is, it seems to be essential to understand the legislation which defines broadcasting and the technical application of that legislation, that is how broadcasting is actually made.

'Broadcasting organisations' also sounds obscure. In a literal sense, 'broadcasting organisations' are organisations that make broadcasts. It sounds as if any organisation that makes a broadcast is a broadcasting organisation. However, this is not the case. Broadcasting is made with electromagnetic waves of which the spectrum is limited, and thus broadcasting is usually allowed to be made only by a limited number of organisations. Even though technically any organisation is able to broadcast, only organisations that are authorised to broadcast are broadcasting organisations. In order to comprehend what broadcasting

organisations are, it is essential to understand the legislation which authorises and regulates broadcasting.

'The rights of broadcasting organisations' are also puzzling. 'The rights of broadcasting organisations' may be understood in two different senses. In order to understand what the rights of broadcasting organisations are, a distinction must be drawn between the regimes which govern the right to make a broadcast and the rights in what is broadcast.

In this Chapter, 'broadcasting', 'broadcasting organisations' and 'the rights of broadcasting organisations' that this research is going to take up will be clarified. These considerations will fully reveal the entire picture of the rights of broadcasting organisations as the focus of this research.

2. Rights of Broadcasting Organisations

'Broadcasting' is, needless to say, a technology of telecommunication. This technology is administered primarily by so-called telecommunications law. This technology is also subject to broadcasting law and copyright law. The former law, broadcasting law, is a public law which regulates the conduct of broadcasting organisations and the contents of broadcasting for the sake of the public. The latter law is a private law which grants intellectual property rights to broadcasting organisations.

2.1. 'Broadcasting'

2.1.1. *'Broadcasting' in Telecommunication Legislation*

Broadcasting is, at an international level, administered by the International Telecommunication Union (ITU)[1] as it is one of the forms of telecommunication.[2] ITU regulates telecommunication in order to develop consistent telecommunication systems between and within regions.[3]

For the above purpose, ITU classifies spectrum and allocates it to regions specifying the services for which the frequencies should be used under the ITU Radio Regulations (RR).[4] Each country assigns frequencies to stations

---

1 See, the International Telecommunication Union Convention.

2 Kawasaki M, 'Nihon ni okeru Housou-seisaku no Genjou to Kadai', Negishi T & Horibe M (eds), *Housou Tsuushin Shin-jidai no Seido Dezain*, (Tokyo, Nihon Hyouron-sha, 1994) 115 [trans: 'The Current State and Tasks of Broadcasting Policy in Japan' in *The System Design in the Broadcasting Communication New Age*].

3 Long C, *Telecommunications Law and Policy*, (2nd ed, London, Sweet & Maxwell, 1995) [15–01].

4 *Radio Regulations*, (Geneva, International Telecommunication Union, 1976).

and administers the stations following the RR. Accordingly, each country has similar regulations for broadcasting.[5]

The RR defines a broadcasting service as:

> 'A radiocommunication service in which the transmissions are intended for direct reception by the general public. This service may include sound transmissions, television transmissions or other types of transmissions.'

This definition is for the telecommunications regime. It is primarily for the allocation of frequencies,[6] not for the protection of broadcasters' rights. Accordingly, it is not the focus of this research.

2.1.2. *'Broadcasting' in Broadcasting Legislation*

The frequencies for broadcasting are limited. Therefore, selection criteria are mandatory to assign frequencies to broadcasters.[7] In order to select authorised broadcasters, each government has prepared broadcasting legislation and provided broadcasters with a norm for the conduct and programme contents of broadcasting.[8] The *Broadcasting Services Act* 1992 (Cth) in Australia and the *Broadcasting Law* (Housou-hou) in Japan are examples of this.

In broadcasting legislation, 'broadcasting' means in general the delivery of the contents of broadcast programmes by authorised broadcasters.[9] In this meaning of 'broadcasting', the authority to broadcast is an essential factor. A person who is not lawfully qualified to broadcast cannot undertake 'broadcasting'. Unauthorised 'broadcasting' is restricted and should not exist.

As explained below, broadcasting legislation is normally linked with intellectual property legislation. Notwithstanding this link, 'broadcasting' in broadcasting legislation is not the focus of this research as intellectual property legislation has its own meaning of 'broadcasting'.

---

[5] Kawasaki M, 'Nihon ni okeru Housou-seisaku no Genjou to Kadai', Negishi T & Horibe M (eds), *Housou Tsuushin Shin-jidai no Seido Dezain*, (Tokyo, Nihon Hyouron-sha, 1994) 115 [trans: 'The Current State and Tasks of Broadcasting Policy in Japan' in *The System Design in the Broadcasting Communication New Age*].

[6] The *Radiocommunications Act* 1992 (Cth) is devoted to this purpose in Australia and the *Radio Law* (Denpa-hou) in Japan.

[7] See, for an explanation of the UK, EU and US situation, McKenna A, 'Emerging Issues Surrounding the Convergence of the Telecommunications, Broadcasting and Information Technology Sectors' (2000) 9 *Information and Communications Technology Law* 98.

[8] For the rationale for this regulation, see below.

[9] See, for comprehensive research of this area in Japan, Hunada M & Hasebe Y, *Housou-seido no Gendai-teki Tenkai*, (Tokyo, Yuuhikaku, 2001) [trans: *Modern Development of the Broadcasting Regime*].

2.1.3. *'Broadcasting' in Intellectual Property Legislation*

As will be discussed in Chapter Three, the Rome Convention is to date effectively the only international convention that governs the rights of broadcasting organisations in the area of copyright. Therefore, the definition of 'broadcasting' in the Rome Convention is the one that represents 'broadcasting' under the copyright regime. This is the definition of 'broadcasting' which will be discussed in this research.

The Rome Convention provides that '"broadcasting" means the transmission by wireless means for public reception of sounds or of images and sounds' (Article 3(f) of the Rome Convention). Data broadcasting is not included within this definition since text data is not 'sounds or images and sounds'.[10] Cable distribution is also not included since it is not 'transmitted by wireless means'.[11] Transmission to a single person is not broadcasting because it is not intended to be broadcast 'for public reception'.[12]

Although there is no further definition of 'broadcasting' in the Rome Convention, the WPPT has a definition of 'broadcasting'. It states:

> '"broadcasting" means the transmission by wireless means for public reception of sounds or of images and sounds or of the representations thereof; such transmission by satellite is also "broadcasting"; transmission of encrypted signals is "broadcasting" where the means for decrypting are provided to the public by the broadcasting organisation or with its consent.' (Art. 2(f) of WPPT)

This definition is consistent with that in the Rome Convention and has clarified the position of satellite broadcasting and encrypted broadcasting. Although the WPPT does not affect the Rome Convention,[13] it seems reasonable that the definition in the WPPT is taken into account to understand 'broadcasting' in the copyright regime.

As is plain from the above, these definitions do not include the qualifications of a person who broadcasts. Accordingly, 'broadcasting' made by a person who is not assigned a frequency under the telecommunications legislation is 'broadcasting' although such 'broadcasting' is likely to be illegal. However, practically, every country accords protection under its copyright legislation only to 'broadcasting' by persons who have appropriately been allocated a frequency for broadcasting.

---

[10] See, for further discussion, Chapter Four.

[11] WIPO, *Guide to the Rome Convention and to the Phonograms Convention*, WIPO Publication No. 617 (E), (Geneva, WIPO, 1981) 24. See, for more discussion, Chapter Four.

[12] WIPO, *Guide to the Rome Convention and to the Phonograms Convention*, WIPO Publication No. 617 (E), (Geneva, WIPO, 1981) 24.

[13] Art. 1(3) of WPPT clarifies that the WPPT does not have any connection with any rights and obligations under any other treaties.

2.1.4. *The Technology of 'Broadcasting'*

Technically, broadcasting is made by the way that a transmitter emits high powered signals and a number of receivers tune, process and play sounds or display images. Broadcasting technology itself will not be dealt with in this research. However, to consider the piracy of television broadcasts, a basic knowledge of television broadcasting is useful. Accordingly, an explanation to the extent that is required to understand the discussions in this research will be provided below.[14]

For television broadcasting, two frequencies are used; one for transmitting sounds and the other for images. The signals for images are called video signals. There are three systems for video signals currently used in the world, namely NTSC (the National Television System), PAL (Phase Alternating Lines) and SECAM (Sequentiel Colour avec Memoire). The NTSC system has been mainly adopted in the United States and Japan, the PAL system in Germany, the United Kingdom and Australia,[15] and the SECAM in France and Russia.[16] The differences are as follows.

A television screen is comprised of several hundred lines, that is 525 lines in NTSC and 625 in PAL and SECAM. Television images are emitted line by line. It is called a frame of an image when the signal of all the lines of a screen is emitted, received and displayed. It takes approximately a thirtieth of a second for NTSC and a twelfth of a second for PAL and SECAM to display a frame.

For the start of a frame, a synchronising signal called 'colour burst' is emitted. Television receivers use colour burst as a mark of the starting point of a frame and display an image. After a colour burst, colour signals are emitted every other line in order of the first line, the third line, the fifth line and so on until the end of the display. This half of a frame is called a field. Once the first field is filled, the remaining lines of the frame are transmitted. When the second field is completed, it is a frame. There is a blank between frames so that a colour burst can be inserted.

A still image of a frame is rapidly projected one after the other. This causes the phenomenon of persistence of vision and results in the perception of a moving image.[17]

---

[14] Succinct but readable explanations can be found at: 'Color Television, NTSC Tutorials', <http://www.ntsc-tv.com/ntsc-main-01.htm>; and 'NTSC Color Signal', <http://cnyack.homestead.com/files/modulation/ntsc_sig.htm>.

[15] This system was developed by a German manufacturer. See, Inglis A, *Behind the Tube: A History of Broadcasting Technology and Business*, (Boston, Focal Press, 1990) 265.

[16] This system was developed by a French engineer. See, Inglis A, *Behind the Tube: A History of Broadcasting Technology and Business*, (Boston, Focal Press, 1990) 276 and 504.

[17] See, Hybels S & Vlloth D, *Broadcasting: Radio and Television*, (New York, D.Van Nostrand Company, 1978) 28.

2.2. 'Broadcasting Organisations'

2.2.1. *'Broadcasting Organisations' in Telecommunication Legislation*

'Broadcasting organisations' in telecommunication legislation can be found in RR as: 'broadcasting station: A station in the broadcasting service'.[18] A 'station' is defined as 'One or more transmitters or receivers or a combination of transmitters and receivers, including the accessory equipment necessary at one location for carrying on a *radiocommunicatio*n *service*.'[19] They are stations to which frequencies have been assigned to use for broadcasting.

It is often observed particularly in the case of satellite broadcasting or cable broadcasting that an organisation which produces or purchases broadcasting programmes and makes a decision to broadcast them is different from an organisation which transmits the signal of the broadcasting programme. In this case, the latter organisation is 'a broadcasting organisation' in the telecommunication legislation.

'Broadcasting organisations' in this meaning only administer the transmission of signals. They do not directly control the 'sounds' or 'images and sounds' which constitute the 'broadcasting' that will be examined in this research.

2.2.2. *'Broadcasting Organisations' in Broadcasting Legislation*

'Broadcasting organisations' in broadcasting legislation means organisations that have been authorised by a government to make broadcasts.[20] As explained above, broadcasts can be made legitimately only in circumstances where the frequencies for broadcasting have been assigned and the broadcasting has been authorised subject to satisfying certain conditions including standards for programme content.

Where an organisation which transmits the broadcasting signal is different from the organisation which produces or purchases broadcasting programmes and makes a decision to broadcast them, the latter organisation is the 'broadcasting organisation' in the broadcasting legislation. Even though the latter organisation is not the organisation to which frequencies have been assigned, it exercises some control, usually in the form of a licence, over broadcasting using certain frequencies. It should be noted that the latter organisation is entirely different from a broadcasting programme producer. Although a broadcasting programme producer produces programmes, it does not have the power to make the decision to broadcast the programme.

---

[18] *Radio Regulations*, (Geneva, International Telecommunication Union, 1976).

[19] *Radio Regulations*, (Geneva, International Telecommunication Union, 1976).

[20] See for the framework of Australian law regarding licensing and ownership of broadcasting organisations, Freehills, *Media in Australia: A Regulatory Guide*, (2002) 19.

'Broadcasting organisations' in this meaning are not the primary subject of this research. However, as described above, only the broadcasting made by 'broadcasting organisations' in this meaning is protected under intellectual property legislation. Therefore, 'broadcasting organisations' in broadcasting legislation can virtually be said to be the 'broadcasting organisations' which will be dealt with in this research.

2.2.3. *'Broadcasting Organisations' in Intellectual Property Legislation*

The Rome Convention does not contain a definition of 'broadcasting organisations'. Hence, it is not completely clear what 'broadcasting organisations' in intellectual property legislation mean. They are usually construed simply as organisations that make broadcasts.

When the organisation which produces or purchases broadcasting programmes and makes a decision to broadcast them is different from the organisation which transmits the signal of the broadcast programme, the former is a 'broadcasting organisation' in intellectual property legislation. The former organisation is the one that retains control over the 'sounds' or 'images and sounds' which constitute 'broadcasting' in this research after the 'sounds' or 'images and sounds' have been transmitted. The latter organisation simply controls the transmission of the 'sounds' or 'images and sounds'.

'Broadcasting organisations' in intellectual property legislation mean organisations that produce or purchase a broadcasting programme and make a decision to broadcast it. These are the 'broadcasting organisations' that will be discussed in this research.

2.3. 'The Rights of Broadcasting Organisations'

2.3.1. *The Rights of Broadcasting Organisations in Telecommunication Legislation*

Broadcasting organisations which have been assigned frequencies for broadcasting by their countries are eligible to use those frequencies for broadcasting. In this sense, broadcasting organisations have rights to broadcast.

These 'rights of broadcasting organisations' could simply mean that the broadcasters can transmit signals of certain frequencies which they have been allocated by their governments for direct reception by the general public. These rights are not the focus of the research.

2.3.2. *The Rights of Broadcasting Organisations in Broadcasting Legislation*

The meaning of 'the rights of broadcasting organisations' in telecommunications legislation is usually associated with some different meaning of 'the

rights of broadcasting organisations'. 'The rights of broadcasting organisations' in this meaning are often called freedom of broadcasting. It is derived from freedom of speech. Where a broadcasting organisation has obtained the right to use frequencies to broadcast, the broadcasting organisation has the right to broadcast what it wants to broadcast.[21]

However, this meaning of 'the rights of broadcasting organisations', which means freedom of broadcasting, is usually subject to regulation. As explained above, the frequencies are allocated to broadcasters by their governments.

---

[21] A number of studies of this meaning of 'the rights of broadcasting organisations' have already been undertaken. See, for example: Potts D & Matthews C, 'Procedural Concerns in Broadcast Libel' (1990) 11 *Journal of Media Law and Practice* 124; Mrsnik A, 'Shopping Centres and the Investigative Way: Unbalanced and Partial, But Not in Contempt' (1992) 12(3) *Communications Law Bulletin* 9; Brown G, 'When the Screen Becomes a Billboard' (1992) 12(2) *Communications Law Bulletin* 5; Blais J, 'The Protection of Exclusive Television Rights to Sporting Events Held in Public Venues: An Overview of the Law in Australia and Canada' (1992) 18 *Melbourne University Law Review* 503; Hamada J, *Jouhou-hou*, (Tokyo, Yuuhikaku, 1993) [trans: *The Law of Information*]; Hamer D, 'Thomson v Australian Capital Television Pty Ltd' (1996) 3 *Australian Media Law Reporter* 136; Flint D, 'Defamation Law Revised' (1997) 9 *Australian Press Council News* 8; Hogan J, 'The News Is Shocking: But Is There Anyone Responsible?' (1998) 142 *Communications Update* 20; Cheer U, 'Recent Developments in Australian Defamation Law' (1998) 6 *Tort Law Review* 15; Ishimura Z & Horibe M, *Jouhou-hou Nyuumon*, (Kyoto, Houritsu-bunka-sha, 1999) [trans: *Introduction to the Law of Information*]; Cheer U, 'Recent Developments in Suppression, Pre-trial Publicity and Privacy Law' (2000) 5 *Media and Arts Law Review* 277; Fairbairn J, 'Hitchcock v TCN Channel Nine Pty Limited' (2000) 3 *Telemedia* 153; Stone A & Williams G, 'Freedom of Speech and Defamation: Developments in the Common Law World' (2000) 26 *Monash University Law Review* 362; Cockburn T, 'Interlocutory Injunctions: Restraining Publication of Unlawfully Obtained Information' (2002) 23 *Queensland Lawyer* 40; Heath W, 'Possum Processing, Picture Pilfering, Publication and Privacy: Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd' (2002) 28 *Monash University Law Review* 162; Hodge M 'Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd' (2002) 22 *University of Queensland Law Journal* 138; Lindsay D, 'Playing Possum? Privacy, Freedom of Speech and the Media Following *ABC v Lenah Game Meats Pty Ltd* Part I' (2002) 7 *Media and Arts Law Review* 1; Sauer G, 'Where Possums Fear to Tread: Invasion of Privacy and Information Obtained Illegally' (2002) 21(1) *Communications Law Bulletin* 5; Campbell E & Lee H, 'Criticism of Judges and Freedom of Expression' (2003) 8 *Media and Arts Law Review* 77; Chisholm H, 'The Stuff of Which Political Debate Is Made' (2003) 31 *Federal Law Review* 225; Kirby M, '25 Years of Evolving Information Privacy Law' (2003) 105 *Freedom of Information Review* 34; O'Dwyer E, 'Qualified Privilege and Public Leaders in Political Debate: Diverging Defamation Law After Lange, Reynolds and Atkinson' (2003) 8 *Media and Arts Law Review* 91; Sauer G, 'Malice, Qualified Privilege and Lange' (2003) 22(1) *Communications Law Bulletin* 5; and Usaki M, 'Yuuji-hosei to Houdou no Jiyuu' (2003) 386 *Gekkan Minpou* 5 [trans: 'Legislation for the National Emergency and Freedom of the Press' in *Monthly Commercial Broadcasting*].

Usually, when a government assigns frequencies, it imposes some conditions upon the contents that are to be broadcast.[22] The rationale for this regulation can ultimately be found in the limit of frequencies.[23] It is said that the government has to ensure that a balanced range of contents is broadcast since only a limited number of broadcasting organisations can broadcast.[24] It has also been said that the government is allowed to ensure that desirable contents are broadcast since frequencies are limited public resources.[25]

In any event, freedom of broadcasting, which is the right of broadcasting organisations to determine the contents to be broadcast, is not the focus of the research.

2.3.3. *The Rights of Broadcasting Organisations in Intellectual Property Legislation*

'The rights of broadcasting organisations' which will be examined in this research are the rights other than those recognised in the telecommunications or broadcasting legislation. They are the rights that are recognised, at the international level, by the Rome Convention and, at the domestic level, by

[22] See, for the study of regulation regarding broadcasting contents: Westerway P, 'Regulation of Pay TV' (1990) 10 *Communications Law Bulletin* 25; Brown G, 'Rhetoric v Reality in Regulation of Pay TV Content in Australia' (1993) 3 *Arts and Entertainment Law Review* 1; Corker J, 'Sharing the Burden of Providing Local Content in Regional Television' (2002) 21(3) *Communications Law Bulletin* 4; Leiboff M, 'TV and Radio Standards' (2003) 8 *Media and Arts Law Review* 127. See also, McKenna A, 'Emerging Issues Surrounding the Convergence of the Telecommunications, Broadcasting and Information Technology Sectors', (2000) 9 *Information and Communications Technology Law* 93.

[23] There is an excellent article which reconstructed the rationale for this regulation based on human rights theories. See, Hasebe Y, 'Jouhou-ka to Kenpou-riron: Houkoku' (1994) 1043 *Jurrisuto* 89 [trans: 'Information Age and Constitutional Theories: Presentation' in *Jurist*]. See also: Inoue T, 'Jouhou-ka to Kenpou-riron: Komento' (1994) 1043 *Jurisuto* 94 [trans: 'Information Age and Constitutional Theories: Comments on Professor Hasebe's Presentation' in *Jurist*]; and Hamada J, 'Jouhou-ka to Kenpou-riron: Touron no Gaiyou to Kansou' (1994) 1043 *Jurisuto* 97 [trans: 'Information Age and Constitutional Theories: Summary of Discussions and Comments' in *Jurist*].

[24] For further discussion, see: Walker S, *Media Law Commentary and Materials*, (Sydney, LBC Information Services, 2000) 970; and Butler D & Rodrick S, *Australian Media Law*, (2nd ed, NSW, Lawbook Co, 2004) 486. For discussions about ownership of broadcasting organisations, see, Costelloe R, 'Median Ownership Bill Jumps First Hurdle' (2002) 6 *Telemedia* 85; Given J, 'Foreign Ownership of Media and Telecommunications: An Australian Story' (2002) 7 *Media and Arts Law Review* 253.

[25] See, for further discussion: Walker S, *Media Law Commentary and Materials*, (Sydney, LBC Information Services, 2000) 970; and Butler D & Rodrick S, *Australian Media Law*, (2nd ed, NSW, Lawbook Co, 2004) 487.

copyright laws. They are intellectual property rights over broadcasting owned by broadcasting organisations as will be clarified in subsequent Chapters.

3. Conclusion

The rights of broadcasting organisations can be viewed as a number of different notions. The relevant regimes are telecommunication, broadcasting and intellectual property. Understanding broadcasting also requires some understanding of the technology itself.

As explained above, the 'broadcasting' which will be discussed in this research is in the area of intellectual property legislation and is defined by the Rome Convention. 'Broadcasting organisations' are not defined in the Rome Convention but are understood as organisations that make broadcasts. The 'rights of broadcasting organisations' are intellectual property which are recognised for organisations that make broadcasts under the Rome Convention and copyright laws.

Unlike other notions of the 'rights of broadcasting organisations', the 'rights of broadcasting organisations' within the meaning of the present research have not been fully explored to date. This research examines the above meaning of the rights of broadcasting organisations in order to consider the desirable means of and the rationale for the protection of the rights of broadcasting organisations.

In the next Chapter, the rights of broadcasting organisations that were first recognised by the Rome Convention and by subsequent transnational legislation will be analysed.

Chapter 3
The Rome Convention and the Current Transnational Regime

1. Introduction

As set out in the previous Chapter, the rights of broadcasting organisations are protected internationally under the Rome Convention. The Rome Convention is the basis for the protection of broadcasters' rights throughout most of the world including Australia and Japan. In this Chapter, first, the Rome Convention will be analysed.

In relation to the protection of broadcasters' rights, there are two further international conventions at present, the so-called Satellite Convention and TRIPS.[1] Despite the existence of these two conventions, the Rome Convention is still the only substantive basis for the protection of the rights of broadcasting organisations. Therefore, secondly, the reasons why the Rome Convention remains the basis for the protection of broadcasters' rights will be examined.

[1] World Intellectual Property Organisation, 'Existing International, Regional and National Legislation Concerning the Protection of the Rights of Broadcasting: Memorandum Prepared by the International Bureau' (1998), SCCR/1/3. Sterling J, *World Copyright Law: Protection of Authors' Works, Performances, Phonograms, Films, Video, Broadcasts and Published Editions in National, International and Regional Law*, (2nd ed, London, Sweet & Maxwell, 2003) 206, [5.10].

According to WIPO, there are six transnational agreements[2] in relation to the protection of the rights of broadcasting organisations that are known in the world so far.[3] If the protection under the Rome Convention was sufficient, these transnational agreements would not be needed. Accordingly, the existence of these agreements can be regarded as evidence that demonstrates the insufficient protection of the rights of broadcasting organisations under the Rome Convention. Therefore, thirdly, the six transnational agreements will be examined.

In this Chapter, through the examination of these international conventions and transnational legislation, the current situation which requires a new international instrument regarding the protection of the rights of broadcasting organisations will be clarified.

2. The Rome Convention

As the official title indicates, the Rome Convention makes provision for the rights of performers and phonogram producers and the rights of broadcasting organisations. The Convention was established in October 1961 and came into force in May 1964 after a long history of discussion originating in 1903 as explained below.

2.1. Background to the Rome Convention

2.1.1. *Three Origins of the Rome Convention*

It is often said that there were three streams of discussion that became sources of the Rome Convention.[4] The first stream was discussions by various performers'

---

[2] They are the European Agreement on the Protection of Television Broadcasts (1961); three EC Directives (Council Directive No. 92/100/EEC of November 19, 1992, on rental right and lending right and on certain rights related to copyright in the field of intellectual property (the Rental Directive), Council Directive (EEC) No. 93/83/EEC of September 27, 1993, on the Co-ordination of Certain Rules Concerning Copyright and Cable Retransmission (the Cable and Satellite Directive) and Council Directive No. 93/98/EEC of October 29, 1993, harmonising the term of protection of copyright and certain related rights (the Term Directive)); the Decision No. 351 on Author's Right and Connected Rights (December 17, 1993) of the Commission of the Cartagena Agreement (Cartagena Decision 351); and the North American Free-Trade Agreement between the governments of Canada, the United Mexican States and the United States of America (NAFTA, 1993).

[3] World Intellectual Property Organisation, 'Existing International, Regional and National Legislation Concerning the Protection of the Rights of Broadcasting: Memorandum Prepared by the International Bureau' (1998), SCCR/1/3.

[4] See, for example, WIPO, *Guide to the Rome Convention and to the Phonograms Convention,* WIPO Publication No. 617 (E), (Geneva, WIPO, 1981) 7.

associations that were commenced at the Congress of the International Literary and Artistic Association (ALAI) in 1903.[5] After recordings or broadcasting appeared, performers could lose their work opportunities unless the rights of performers were recognised.[6] Therefore, the International Labour Office (ILO) took the initiative in discussing this problem.[7]

The second stream was the discussions initiated by the Berne Union in 1928 at the Berne Convention Revision Conference in Rome.[8] At the Conference, whether or not performers' rights should be protected by copyright was discussed.[9] However, as for broadcasting, the right of broadcasting, that is one of the authors' rights, was discussed and the rights of broadcasting organisations were not taken up.[10]

The third stream was the discussions headed by the United Nations Educational, Scientific and Cultural Organisation (UNESCO).[11] After establishing the Universal Copyright Convention in 1952,[12] UNESCO proposed a project for protecting neighbouring rights at the second session of the Interim

---

[5] WIPO, *Guide to the Rome Convention and to the Phonograms Convention,* WIPO Publication No. 617 (E), (Geneva, WIPO, 1981) 7.

[6] International Labour Organisation, United Nations Educational, Scientific and Cultural Organization, and the United International Bureaux for the Protection of Intellectual Property, 'Summary Records of the Proceedings', *Records of the Diplomatic Conference on the International Protection of Performers, Producers of Phonograms and Broadcasting Organizations*, (Ceuterick, Louvain, 1968), 65. WIPO, *Guide to the Rome Convention and to the Phonograms Convention,* WIPO Publication No. 617 (E), (Geneva, WIPO, 1981) 7.

[7] WIPO, *Guide to the Rome Convention and to the Phonograms Convention,* WIPO Publication No. 617 (E), (Geneva, WIPO, 1981) 7.

[8] International Labour Organisation, United Nations Educational, Scientific and Cultural Organization, and the United International Bureaux for the Protection of Intellectual Property, 'Summary Records of the Proceedings', *Records of the Diplomatic Conference on the International Protection of Performers, Producers of Phonograms and Broadcasting Organizations*, (Ceuterick, Louvain, 1968), 65. WIPO, *Guide to the Rome Convention and to the Phonograms Convention,* WIPO Publication No. 617 (E), (Geneva, WIPO, 1981) 8.

[9] WIPO, *Guide to the Rome Convention and to the Phonograms Convention,* WIPO Publication No. 617 (E), (Geneva, WIPO, 1981) 8.

[10] Monbu-sho, *Chosakuken Kankei Shiryou (C-dai 5 gou) Bungaku-teki oyobi Bijutsu-teki Hogo-jouyaku Kaitei Rohma-kaigi Houkokusho, Shouwa 26 nen 10gatsu*. [trans: *Ministry of Education, Materials regarding Neighbouring Rights No. C(5), Report of the Berne Convention Revision Conference in Rome in 1928*, (Reprint, October 1951)] The author has not obtained the Report in the original language.

[11] WIPO, *Guide to the Rome Convention and to the Phonograms Convention,* WIPO Publication No. 617 (E), (Geneva, WIPO, 1981) 9.

[12] See, Sterling J, *World Copyright Law: Protection of Authors' Works, Performances, Phonograms, Films, Video, Broadcasts and Published Editions in National, International and Regional Law* (2nd ed, London, Sweet & Maxwell, 2003) 633–634, [19.01].

Copyright Committee in 1955.[13] The Executive Board of UNESCO resolved that the project should be pursued because neighbouring rights were closely related to copyright and presented similar problems to copyright.[14]

From these three streams, the Berne Union and the ILO established the Joint Committee of Experts and generated the Draft Convention in 1951 in Rome.[15] They, together with UNESCO, which had decided to take up neighbouring rights as a project,[16] commenced preparation for a committee of these three.

However, the ILO and the Berne Union disagreed over the composition of the committee.[17] They ended up drafting the Convention separately. The ILO's draft appeared in 1956.[18] The Berne Union and UNESCO published their draft in 1957.[19]

2.1.2. *Proposed International Convention concerning the Protection of Performers, Manufacturers of Phonographic Records and Broadcasting Organisations (ILO Draft)*[20]

The Director-General of the ILO convened a Committee of Experts in Geneva in 1956.[21] The Committee drew up the Draft International Convention

[13] 'Work of the Interim Committee' (1955) VIII *Copyright Bulletin* 145. Bogsch A, 'Report of the Study Group on Neighbouring Rights' (1956) IX *Copyright Bulletin* 151, 151.

[14] Bogsch A, 'Report of the Study Group on Neighbouring Rights' (1956) IX *Copyright Bulletin* 151, 152.

[15] 'La session du comite mixte d'experts pour la protection internationale de certains droits voisins ou derives de droit d'auteur (Rome, 12–17 novembre 1951)' (1951) *Le droit d'auteur* 137. This Draft Convention is the so-called Rome Draft. See, International Labour Organisation, United Nations Educational, Scientific and Cultural Organization, and the United International Bureaux for the Protection of Intellectual Property, 'Summary Records of the Proceedings', *Records of the Diplomatic Conference on the International Protection of Performers, Producers of Phonograms and Broadcasting Organizations*, (Ceuterick, Louvain, 1968) 65.

[16] It was based on the recommendation by the Interim Copyright Committee. See, Fisher A, 'Work of the Interim Copyright Committee: Report' (1955) VIII *Copyright Bulletin* 147, 150.

[17] 'Report of the Committee on Industrial Committees' (1955) XXXVIII *International Labour Office Bulletin* 332, 332.

[18] 'Report of the Committee on Industrial Committees' (1955) XXXVIII *International Labour Office Bulletin* 332, 332.

[19] 'Report of the Committee on Industrial Committees' (1955) XXXVIII *International Labour Office Bulletin* 332, 332.

[20] 'Annex: Draft Convention of the Committee of Experts of ILO' (1957) X *Copyright Bulletin* 32.

[21] International Labour Organisation, United Nations Educational, Scientific and Cultural Organization, and the United International Bureaux for the Protection of Intellectual Property, 'Summary Records of the Proceedings', *Records of the Diplomatic Conference on the International Protection of Performers, Producers of Phonograms and Broadcasting Organizations*, (Ceuterick, Louvain, 1968) 65.

concerning the Protection of Performers, Manufacturers of Phonographic Records and Broadcasting Organisations.[22]

In relation to broadcasts that should be protected, the proposal stated that a country where the head office of a broadcaster existed was the country of origin (Art. 2) and a contracting country must protect broadcasting organisations where the contracting country is the country of origin for a broadcasting organisation (Art. 1(1)).[23] The rights decided by the Proposed Convention must be protected by the domestic legislation of the contracting country (Art. 3).[24]

The rights recognised for broadcasting organisations were the right of: re-emission (Art. 7(1)(a)); fixation for commercial purposes or communication to the public (Art. 7(1)(b)); and communication to the public by means of any instrument transmitting or projecting images of all or part of their images including deferred communication to the public (Art. 7(1)(c)).[25] It was left to domestic legislation whether or not to recognise the right of communication to the public of their sounds (Art. 7(2)).[26] Fixation or re-emission made outside member countries of broadcasts that were to be protected under the proposed Convention and imported into a contracting country would be seized (Art. 7(3)).[27] Domestic law might decide the application of the Article 7(1)(c).[28]

The rights proposed for broadcasting organisations under this Proposed International Convention were, as will be discussed in Chapter Five, analogous to the rights being considered for a new treaty at the WIPO Standing Committee. This Proposed International Convention, however, did not gain sufficient support by countries – this will be discussed below – and did not form the basis of the Rome Convention.

---

22 'Annex: Draft Convention of the Committee of Experts of ILO' (1957) X *Copyright Bulletin*, 32. 'Summary Records of the Proceedings', International Labour Organisation, United Nations Educational, Scientific and Cultural Organization, and the United International Bureaux for the Protection of Intellectual Property, *Records of the Diplomatic Conference on the International Protection of Performers, Producers of Phonograms and Broadcasting Organizations*, (Ceuterick, Louvain, 1968) 65.

23 'Annex: Draft Convention of the Committee of Experts of ILO' (1957) X *Copyright Bulletin* 32, 32.

24 'Annex: Draft Convention of the Committee of Experts of ILO' (1957) X *Copyright Bulletin* 32, 32.

25 'Annex: Draft Convention of the Committee of Experts of ILO' (1957) X *Copyright Bulletin* 32, 35.

26 'Annex: Draft Convention of the Committee of Experts of ILO' (1957) X *Copyright Bulletin* 32, 35.

27 'Annex: Draft Convention of the Committee of Experts of ILO' (1957) X *Copyright Bulletin* 32, 35.

28 'Annex: Draft Convention of the Committee of Experts of ILO' (1957) X *Copyright Bulletin* 32, 35.

2.1.3. *Draft Agreement on the Protection of Certain Rights called Neighbouring on Copyrights (Monaco Draft)*[29]

UNESCO and the Berne Union convened the Committee of Experts on the International Protection of Performers, Recorders and Broadcasters in Monaco in 1957.[30] The Committee formulated the Draft Agreement on the Protection of Certain Rights called Neighbouring on Copyrights[31] accompanied by an Explanatory Statement.[32]

At the beginning of the Statement, the Committee stated that the international agreement for protecting broadcasting organisations (and others) was to 'encourage creative activity and the dissemination of artistic works in the public interest'.[33] The Committee's basic principles were to promote the creation and dissemination of the creation which benefits society's interests. The protection of broadcasters' rights can be regarded as designed to achieve these social objectives.

The rights that the Monaco Draft proposed for broadcasting organisations were the rights of: rebroadcasting; fixation and public exhibition of television broadcasts.[34] It was proposed that these rights would be recognised for broadcasters originating broadcasts in another member state of the proposed Agreement.[35]

The Monaco Draft also made it clear that copyright should be protected before neighbouring rights because neighbouring rights could only exist by using the works in which copyright is recognised.[36] This seems to be another representation of the committee's recognition of drawing the line between copyright which was recognised by the creator-oriented rationale and neighbouring rights which were social-oriented rights.

---

[29] 'Draft Agreement on the Protection of Certain Rights called Neighbouring on Copyrights' (1957) X *Copyright Bulletin* 12.

[30] 'Committee of Experts on the International Protection of Performers, Recorders and Broadcasters' (1957) X *Copyright Bulletin* 11.

[31] 'Draft Agreement on the Protection of Certain Rights called Neighbouring on Copyrights' (1957) X *Copyright Bulletin* 12.

[32] 'Explanatory Statement accompanying the Draft Agreement' (1957) X *Copyright Bulletin* 16.

[33] 'Explanatory Statement accompanying the Draft Agreement' (1957) X *Copyright Bulletin* 16, 16.

[34] See, Article 5(2) in the 'Draft Agreement on the Protection of Certain Rights called Neighbouring on Copyrights' (1957) X *Copyright Bulletin* 12, 14.

[35] See, Article 5(1) of the 'Draft Agreement on the Protection of Certain Rights called Neighbouring on Copyrights' (1957) X *Copyright Bulletin* 12, 14.

[36] 'Explanatory Statement accompanying the Draft Agreement' (1957) X *Copyright Bulletin* 16, 18.

However, the Monaco Draft suggested that it be left to domestic law to decide whether the rights of broadcasting organisations were recognised where a broadcast was based upon a phonogram.[37] This meant that the primary scope of the broadcasters' rights in the Draft was to protect broadcasting programmes that broadcasting organisations created. Although the Draft Agreement was intended to protect broadcasting organisations and the other two parties based on the social-oriented rationale, the focus of the provisions providing for the protection of broadcasters' rights was strangely based on the production created by broadcasters.

In 1960, the three streams of the source of the Rome Convention were merged into one at the Committee of Experts on Neighbouring Rights at The Hague.[38] This continued up to the diplomatic conference in Rome in 1960 and eventually resulted in the Rome Convention in 1961.[39]

2.1.4. *A Draft International Convention Protecting Performers, Phonogram Producers and Broadcasters (The Hague Draft)*

The Committee of Experts on Neighbouring Rights was convened at The Hague in 1960 by the ILO, UNESCO and the Berne Union.[40] The Committee aimed at drafting the sole proposal for an international convention protecting performers, phonogram producers and broadcasters[41] after a discussion based on

[37] Art. 5(3)(a) of the Draft Agreement on the Protection of Certain Rights called Neighbouring on Copyrights. See, 'Explanatory Statement accompanying the Draft Agreement' (1957) X *Copyright Bulletin* 16, 22.

[38] 'Document submitted jointly by the International Labour Office, the Unesco Secretariat and the Bureau of the Berne Union' (1960) XIII *Copyright Bulletin* 51.

[39] WIPO, *Guide to the Rome Convention and to the Phonograms Convention,* WIPO Publication No. 617 (E), (Geneva, WIPO, 1981) 9.

[40] 'Document submitted jointly by the International Labour Office, the Unesco Secretariat and the Bureau of the Berne Union' (1960) XIII *Copyright Bulletin* 51. The Report of the Committee of Experts on Neighbouring Rights was written by Wallace W, the translation of which together with appendices were published in: Monbu-sho, *Chosakuken Kankei Shiryou (No. 14) Jitsuenka, Rekohdo Seizousha oyobi Housoujigyousha no Kokusaiteki Hogo ni kansuru Senmonka-iinkai Houkoku: Heigu, 1960nen 5gatsu* [trans: Ministry of Education, *Materials regarding Neighbouring Rights (No. 14) Report of the Committee of Experts concerning International Protection of Performers, Phonogram Producers and Broadcasting Organisations: The Hague, May 1960*]. The author has not obtained the Report in the original language.

[41] Monbu-sho, *Chosakuken Kankei Shiryou (No. 14) Jitsuenka, Rekohdo Seizousha oyobi Housoujigyousha no Kokusaiteki Hogo ni kansuru Senmonka-iinkai Houkoku: Heigu, 1960nen 5gatsu*, 1 [trans: Ministry of Education, *Materials regarding Neighbouring Rights (No. 14) Report of the Committee of Experts concerning International Protection of Performers, Phonogram Producers and Broadcasting Organisations: The Hague, May 1960*].

the Document Submitted Jointly by the ILO, the UNESCO Secretariat and the Bureau of the Berne Union.[42] The document included a comparison between the above-mentioned ILO Draft and the Monaco Draft and comments submitted by a number of countries.[43] In the document, the majority expressed their support for the Monaco Draft stating that the ILO draft provided too strong a protection to attract more member countries.[44] The following issues discussed at the Committee of Experts were concerned with broadcasters' rights.

The first issue concerned the general extent of protection. The difference in nature between the rights of performers and those of phonogram producers and broadcasters was discussed.[45] There was an opinion that performers' rights were close to authors' rights although phonogram producers' rights and broadcasters' rights were special types of property.[46] Hence, the rights of these three parties should not be dealt with together in a convention.[47]

The committee dismissed this opinion simply because the aim of the committee was to draft a convention for those three parties.[48] This discussion concerning the difference in nature suggested that the committee considered that

42 'Document Submitted Jointly by the International Labour Office, the Unesco Secretariat and the Berne Union' (1960) XIII *Copyright Bulletin* 51.

43 'Document Submitted Jointly by the International Labour Office, the Unesco Secretariat and the Berne Union' (1960) XIII *Copyright Bulletin* 51, 52.

44 See, for example, the remark of the expert of Sweden in the 'Document Submitted Jointly by the International Labour Office, the Unesco Secretariat and the Berne Union' (1960) XIII *Copyright Bulletin* 51, 57.

45 Monbu-sho, *Chosakuken Kankei Shiryou (No. 14) Jitsuenka, Rekohdo Seizousha oyobi Housoujigyousha no Kokusaiteki Hogo ni kansuru Senmonka-iinkai Houkoku: Heigu, 1960nen 5gatsu*, 1 [trans: Ministry of Education, *Materials regarding Neighbouring Rights (No. 14) Report of the Committee of Experts concerning International Protection of Performers, Phonogram Producers and Broadcasting Organisations: The Hague, May 1960*].

46 Monbu-sho, *Chosakuken Kankei Shiryou (No. 14) Jitsuenka, Rekohdo Seizousha oyobi Housoujigyousha no Kokusaiteki Hogo ni kansuru Senmonka-iinkai Houkoku: Heigu, 1960nen 5gatsu*, 1 [trans: Ministry of Education, *Materials regarding Neighbouring Rights (No. 14) Report of the Committee of Experts concerning International Protection of Performers, Phonogram Producers and Broadcasting Organisations: The Hague, May 1960*].

47 Monbu-sho, *Chosakuken Kankei Shiryou (No. 14) Jitsuenka, Rekohdo Seizousha oyobi Housoujigyousha no Kokusaiteki Hogo ni kansuru Senmonka-iinkai Houkoku: Heigu, 1960nen 5gatsu* [trans: Ministry of Education, *Materials regarding Neighbouring Rights (No. 14) Report of the Committee of Experts concerning International Protection of Performers, Phonogram Producers and Broadcasting Organisations: The Hague, May 1960*].

48 Monbu-sho, *Chosakuken Kankei Shiryou (No. 14) Jitsuenka, Rekohdo Seizousha oyobi Housoujigyousha no Kokusaiteki Hogo ni kansuru Senmonka-iinkai Houkoku: Heigu, 1960nen 5gatsu* [trans: Ministry of Education, *Materials regarding Neighbouring Rights (No. 14) Report of the Committee of Experts concerning International Protection of Performers, Phonogram Producers and Broadcasting Organisations: The Hague, May 1960*].

the rights of broadcasting organisations be recognised by the social-oriented rationale along the general principle of the Monaco Draft.

A further issue which was confirmed was that the proposed convention would not prejudice copyright, and be valid for member countries of the Universal Copyright Convention (UCC) and the Berne Union.[49] Although it was decided not to state in the convention that neighbouring rights would not encompass greater protection than copyright,[50] this restriction of participation to the proposed convention also seems to suggest that the committee's view was in line with the explanation of the Monaco Draft. As explained earlier, the Monaco Draft recommended that copyright should be recognised before neighbouring rights and maintained a clear demarcation between copyright as creator-oriented rights and neighbouring rights as social-oriented rights.

As for the rights of broadcasting organisations, first, the Committee of Experts gave attention to the draft of the European Agreement on the Protection of Television Broadcasts.[51] The European Agreement on the Protection of Television Broadcasts was a transnational agreement which the Council of Europe was considering in order to protect television broadcasting almost at the same time as the Committee of Experts was discussing the proposed Rome Convention. The Council of Europe was aware that television broadcasting organisations needed protection urgently owing to the Olympic Games of 1960 in Rome.[52] Although the draft of the European Agreement on the Protection of Television Broadcasts was mentioned at the Committee, the Committee does not seem to have been affected by the draft.

---

49 Monbu-sho, *Chosakuken Kankei Shiryou (No. 14) Jitsuenka, Rekohdo Seizousha oyobi Housoujigyousha no Kokusaiteki Hogo ni kansuru Senmonka-iinkai Houkoku: Heigu, 1960nen 5gatsu* [trans: Ministry of Education, *Materials regarding Neighbouring Rights (No. 14) Report of the Committee of Experts concerning International Protection of Performers, Phonogram Producers and Broadcasting Organisations: The Hague, May 1960*].

50 Monbu-sho, *Chosakuken Kankei Shiryou (No. 14) Jitsuenka, Rekohdo Seizousha oyobi Housoujigyousha no Kokusaiteki Hogo ni kansuru Senmonka-iinkai Houkoku: Heigu, 1960nen 5gatsu* [trans: Ministry of Education, *Materials regarding Neighbouring Rights (No. 14) Report of the Committee of Experts concerning International Protection of Performers, Phonogram Producers and Broadcasting Organisations: The Hague, May 1960*].

51 Monbu-sho, *Chosakuken Kankei Shiryou (No. 14) Jitsuenka, Rekohdo Seizousha oyobi Housoujigyousha no Kokusaiteki Hogo ni kansuru Senmonka-iinkai Houkoku: Heigu, 1960nen 5gatsu* [trans: Ministry of Education, Materials regarding Neighbouring Rights (No. 14) Report of the Committee of Experts concerning International Protection of Performers, Phonogram Producers and Broadcasting Organisations: The Hague, May 1960].

52 Nordemann W, Vinck K & Hertin P (English Version by Meyer G based on the translation of Livingston R), *International Copyright and Neighbouring Rights Law: Commentary with Special Emphasis on the European Community*, (VCH Verlagsgesellschaft, Weinheim with VCH Publishers, New York, 1990) 463. Stewart S, *International Copyright and Neighbouring Rights*, (2nd ed, London, Butterworths, 1989) 286, [11.04].

Secondly, there was discussion whether or not reservation of the application of the convention in relation to broadcasters' rights should be allowed to member countries.[53] Because broadcasting was mainly a public utility in Europe, the need for unreserved protection of broadcasting was suggested.[54] However, the reservation provision was finally agreed to at the suggestion of countries where the mainstream of broadcasting was commercial broadcasting.[55] The reservation of protection seems to be associated with protection according to the social-oriented rationale.

It was decided that the rights to be recognised for broadcasting organisations were the rights of: rebroadcasting (Art. 12(a)), fixation and reproduction (Art. 12(b)(c)) and communication to the public of television broadcasts (Art. 12(d)).[56] The right of cable distribution was also discussed, but was denied.[57] The Report recorded that the opinion that a complicated convention would not be able to attract enough participants was frequently expressed.[58]

---

53 Monbu-sho, *Chosakuken Kankei Shiryou (No. 14) Jitsuenka, Rekohdo Seizousha oyobi Housoujigyousha no Kokusaiteki Hogo ni kansuru Senmonka-iinkai Houkoku: Heigu, 1960nen 5gatsu*, 1 [trans: Ministry of Education, *Materials regarding Neighbouring Rights (No. 14) Report of the Committee of Experts concerning International Protection of Performers, Phonogram Producers and Broadcasting Organisations: The Hague, May 1960*].

54 Monbu-sho, *Chosakuken Kankei Shiryou (No. 14) Jitsuenka, Rekohdo Seizousha oyobi Housoujigyousha no Kokusaiteki Hogo ni kansuru Senmonka-iinkai Houkoku: Heigu, 1960nen 5gatsu*, 1 [trans: Ministry of Education, *Materials regarding Neighbouring Rights (No. 14) Report of the Committee of Experts concerning International Protection of Performers, Phonogram Producers and Broadcasting Organisations: The Hague, May 1960*].

55 Monbu-sho, *Chosakuken Kankei Shiryou (No. 14) Jitsuenka, Rekohdo Seizousha oyobi Housoujigyousha no Kokusaiteki Hogo ni kansuru Senmonka-iinkai Houkoku: Heigu, 1960nen 5gatsu*, 1 [trans: Ministry of Education, *Materials regarding Neighbouring Rights (No. 14) Report of the Committee of Experts concerning International Protection of Performers, Phonogram Producers and Broadcasting Organisations: The Hague, May 1960*].

56 Monbu-sho, *Chosakuken Kankei Shiryou (No. 14) Jitsuenka, Rekohdo Seizousha oyobi Housoujigyousha no Kokusaiteki Hogo ni kansuru Senmonka-iinkai Houkoku: Heigu, 1960nen 5gatsu* [trans: Ministry of Education, *Materials regarding Neighbouring Rights (No. 14) Report of the Committee of Experts concerning International Protection of Performers, Phonogram Producers and Broadcasting Organisations: The Hague, May 1960*].

57 Monbu-sho, *Chosakuken Kankei Shiryou (No. 14) Jitsuenka, Rekohdo Seizousha oyobi Housoujigyousha no Kokusaiteki Hogo ni kansuru Senmonka-iinkai Houkoku: Heigu, 1960nen 5gatsu* [trans: Ministry of Education, *Materials regarding Neighbouring Rights (No. 14) Report of the Committee of Experts concerning International Protection of Performers, Phonogram Producers and Broadcasting Organisations: The Hague, May 1960*].

58 Monbu-sho, *Chosakuken Kankei Shiryou (No. 14) Jitsuenka, Rekohdo Seizousha oyobi Housoujigyousha no Kokusaiteki Hogo ni kansuru Senmonka-iinkai Houkoku: Heigu, 1960nen 5gatsu* [trans: Ministry of Education, *Materials regarding Neighbouring Rights (No. 14) Report of the Committee of Experts concerning International Protection of Performers, Phonogram Producers and Broadcasting Organisations: The Hague, May 1960*].

Although the Monaco Draft allowed member states to exclude broadcasts using phonograms from broadcasts that should be protected, the Committee of Experts did not adopt the provision regarding the exclusion of broadcasts using phonograms. This suggested the committee's intention to adopt the social-oriented rationale even for the rights of broadcasting organisations.

While the Monaco Draft adopted the social-oriented rationale for the protection as a general principle, it seems to have recognised broadcasters' rights as creator-oriented. The Hague Draft, which resulted from this Committee of Experts, appears to have altered this recognition of the rights of broadcasting organisations and adopted the social-oriented rationale for the protection throughout.

2.1.5. *The Diplomatic Conference for the Rome Convention*

The Diplomatic Conference on the International Protection of Performers, Producers of Phonograms and Broadcasting Organisations was held in Rome from 10 to 26 October 1961, jointly convened by the ILO, UNESCO and the Berne Union.[59] The Conference discussed the provisions of the proposed convention based on The Hague Draft except for the clauses of non-retroactive effect and the revision of the Convention which were drafted by the Secretariat.[60]

The general position of The Hague Draft regarding the rationale for the protection, which was the social-oriented rationale, was maintained at the Conference.[61] The Convention was not to affect the existing authors' rights (Art. 1);[62]

---

[59] Kaminstein A, 'Report of the Rapporteur-General', International Labour Organisation, United Nations Educational, Scientific and Cultural Organization, and the United International Bureaux for the Protection of Intellectual Property, *Records of the Diplomatic Conference on the International Protection of Performers, Producers of Phonograms and Broadcasting Organisations*, (Ceuterick, Louvain, 1968) 5.

[60] Kaminstein A, 'Report of the Rapporteur-General', International Labour Organisation, United Nations Educational, Scientific and Cultural Organization, and the United International Bureaux for the Protection of Intellectual Property, *Records of the Diplomatic Conference on the International Protection of Performers, Producers of Phonograms and Broadcasting Organisations*, (Ceuterick, Louvain, 1968) 7.

[61] See para 2.4 of the 'Summary records of the proceedings: First plenary meeting', International Labour Organisation, United Nations Educational, Scientific and Cultural Organization, and the United International Bureaux for the Protection of Intellectual Property, *Records of the Diplomatic Conference on the International Protection of Performers, Producers of Phonograms and Broadcasting Organizations*, (Ceuterick, Louvain, 1968) 63–64.

[62] Kaminstein A, 'Report of the Rapporteur-General', International Labour Organisation, United Nations Educational, Scientific and Cultural Organization, and the United International Bureaux for the Protection of Intellectual Property, *Records of the Diplomatic Conference on the International Protection of Performers, Producers of Phonograms and Broadcasting Organizations*, (Ceuterick, Louvain, 1968) 3.

reservations are permitted (Art. 16).[63] A signatory must be a party to the UCC or the Berne Union (Art. 23).[64] As already explained regarding The Hague Draft, all these were indications of the social-oriented rationale for protection.

'Broadcasting' is defined as 'the transmission of sounds, or of images and sounds, by wireless means for public reception' (Art. 3). There was a proposal that wireless transmission should be included but this was rejected by the Conference.[65] The reason was not specified in the Report of the Conference. However, it can be assumed from the discussions of The Hague Draft that the Conference might have avoided making too strong a convention in order to attract more participants.

The rights of broadcasting organisations (Art. 13) were the rights of: rebroadcasting, fixation, and communication to the public of television broadcasts if the communication is made in places accessible to the public. There was a proposal that the right to authorise the putting of copies of a fixation of broadcasts into circulation should be granted.[66] However, this was rejected for the same reason as the Conference denied such rights for phonogram producers,[67]

---

[63] Kaminstein A, 'Report of the Rapporteur-General', International Labour Organisation, United Nations Educational, Scientific and Cultural Organization, and the United International Bureaux for the Protection of Intellectual Property, *Records of the Diplomatic Conference on the International Protection of Performers, Producers of Phonograms and Broadcasting Organizations*, (Ceuterick, Louvain, 1968) 52.

[64] Kaminstein A, 'Report of the Rapporteur-General', International Labour Organisation, United Nations Educational, Scientific and Cultural Organization, and the United International Bureaux for the Protection of Intellectual Property, *Records of the Diplomatic Conference on the International Protection of Performers, Producers of Phonograms and Broadcasting Organizations*, (Ceuterick, Louvain, 1968) 55.

[65] Kaminstein A, 'Report of the Rapporteur-General', International Labour Organisation, United Nations Educational, Scientific and Cultural Organization, and the United International Bureaux for the Protection of Intellectual Property, *Records of the Diplomatic Conference on the International Protection of Performers, Producers of Phonograms and Broadcasting Organizations*, (Ceuterick, Louvain, 1968) 40.

[66] Kaminstein A, 'Report of the Rapporteur-General', International Labour Organisation, United Nations Educational, Scientific and Cultural Organization, and the United International Bureaux for the Protection of Intellectual Property, *Records of the Diplomatic Conference on the International Protection of Performers, Producers of Phonograms and Broadcasting Organizations*, (Ceuterick, Louvain, 1968) 50.

[67] Kaminstein A, 'Report of the Rapporteur-General', International Labour Organisation, United Nations Educational, Scientific and Cultural Organization, and the United International Bureaux for the Protection of Intellectual Property, *Records of the Diplomatic Conference on the International Protection of Performers, Producers of Phonograms and Broadcasting Organizations*, (Ceuterick, Louvain, 1968) 50.

namely because even copyright conventions did not recognise similar rights for copyright owners.[68]

The above discussion regarding the protection of broadcasters' rights did not seem to suggest any alteration of the position of the Conference concerning its recognition of the rationale for the protection of broadcasters' rights. The social-oriented rationale for the protection appears to have been maintained.

2.2. Outline of the Rome Convention

As explained above, the Rome Convention established in 1961 was based on the recognition that:

(i) the rationale for the protection of performers, phonogram producers and broadcasting organisations were different from that for authors which is the creator-oriented rationale; and
(ii) protection for broadcasting organisations would be granted based on the social-oriented rationale.

The Rome Convention commenced in 1964 with some twenty contracting countries.[69] By November 2004, 79 countries had acceded to the Convention.[70] Although there has been a gradual increase in the number of countries which have become members of the Rome Convention, the 79 participants of the Convention can hardly be said to be many compared with the 159 members of the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention).[71]

The Rome Convention is administered by WIPO.[72] However, the Convention is only open to the member countries of the Berne Convention or the UCC

---

[68] Kaminstein A, 'Report of the Rapporteur-General', International Labour Organisation, United Nations Educational, Scientific and Cultural Organization, and the United International Bureaux for the Protection of Intellectual Property, *Records of the Diplomatic Conference on the International Protection of Performers, Producers of Phonograms and Broadcasting Organizations*, (Ceuterick, Louvain, 1968) 47.

[69] WIPO, *Guide to the Rome Convention and to the Phonograms Convention*, World Intellectual Property Organisation, (WIPO Publication No. 617(E), Geneva, WIPO, 1981).

[70] 'Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations', <http://www.wipo.int/treaties/en/ip/rome/index.html>.

[71] 'Berne Convention for the Protection of Literary and Artistic Works, Status on January 19, 2005', <http://www.wipo.int/treaties/en/ip/berne/index.html>.

[72] Although the basic function of WIPO is to promote the protection of intellectual property and to administer the Berne Convention, Paris Convention and their protocols, WIPO can administer other conventions such as the Rome Convention or the Satellite Convention by individual agreements. See, Takakura S, *Chiteki Zaisan Housei to Kokusai Seisaku*, (Tokyo, Yuuhikaku, 2001) 97 [trans: *Recent Development of Multilateral Agreement on Intellectual Property Rights*]. See, for further information on WIPO, Chapter Five.

(Art. 23).[73] Therefore, the Convention can be said to contain a built-in limitation for broadening the protection geographically.

The Convention adopts the principle of national treatment,[74] which requires the member countries to treat the rights owners of the other member countries equally with the rights owners of their own countries (Art. 2). The only two exceptions to the application of national treatment (reciprocity) in the Convention appear in case of secondary use with respect to phonograms (Art. 12) and the case of reservation (Art. 16).[75] The Rome Convention is known as a convention with a great number of reservations.

2.3. Protection in Relation to Broadcasting

2.3.1. *Protection*

The Rome Convention provides protection only for wireless broadcasting organisations (Art. 3(f)).[76]

For broadcasting organisations, the Convention recognises the exclusive rights of:

- re-broadcasting (Art. 13(a));
- fixation (Art. 13(b));
- reproduction of the fixation (Art. 13(c)); and
- communication to the public where people can gain access by paying an entrance fee (only for television broadcasting) (Art. 13(d)).

In the Rome Convention, the interpretation of the meaning of 'rebroadcasting' and 'fixation' requires attention.

'Rebroadcasting' is made by receiving a broadcast and simultaneously retransmitting it.[77] Article 3(g) of the Rome Convention defines 'rebroadcasting' as 'the simultaneous broadcasting by one broadcasting organisation of the

---

[73] See, for further information, WIPO, *Guide to the Rome Convention and to the Phonograms Convention*, World Intellectual Property Organisation, (WIPO Publication No. 617(E), Geneva, WIPO, 1981) 72.

[74] National treatment is a principle in copyright related conventions to extend protection to foreign rights owners by recognising the same rights as enjoyed by nationals and citizens. See, Nygh P & Butt P (eds), *Australian Legal Dictionary*, (Sydney, Butterworths, 1997).

[75] See, for further explanation, WIPO, *Guide to the Rome Convention and to the Phonograms Convention*, World Intellectual Property Organisation, (WIPO Publication No. 617(E), Geneva, WIPO, 1981) 19 and 60.

[76] Sterling J, *World Copyright Law: Protection of Authors' Works, Performances, Phonograms, Films, Video, Broadcasts and Published Editions in National, International and Regional Law*, (2nd ed, London, Sweet & Maxwell, 2003) 211, [5.13].

[77] 'Rebroadcasting' is equivalent to 'retransmission' in section 10(1) of the Australian *Copyright Act* 1968.

broadcast of another broadcasting organisation.' Broadcasting a fixation of a broadcast is so-called deferred broadcasting.[78] Deferred broadcasting is distinct from 'rebroadcasting'. The Rome Convention only recognises 'rebroadcasting'.[79] The exclusive right of deferred broadcasting was left to domestic law.

Whether or not a 'fixation' includes a still photograph is not determined by the Rome Convention. The Rome Convention leaves this decision to domestic law. However, the Rome Convention recognises the fixation of a part of a broadcast as a fixation of a broadcast.[80] Accordingly, if the right of making a still photograph is recognised, 'fixation' of any part of a broadcast will be subject to the authorisation of a broadcasting organisation.[81]

2.3.2. *Reservation*

The Rome Convention allows member countries to declare a reservation in respect of the application of Article 13(d).[82] When a country makes a reservation, which means that the country does not apply Article 13(d) to its domestic law, the other countries do not have to recognise the right under Article 13(d) in relation to broadcasting organisations whose headquarters are in that member country (Art. 16(1)(b)).

2.3.3. *Exceptions*

The Convention allows member countries to provide an exception to protection with respect to: (a) private use (Art. 15(a)); (b) use of short excerpts in connection with the reporting of current events (Art. 15(b)); (c) ephemeral fixation by a broadcasting organisation by its own facilities and for its own broadcasts (Art. 15(c)); and (d) use solely for teaching and scientific research purposes (Art. 15(d)). Unless member countries make explicit provision for exceptions in their legislation, Article 15 does not apply.[83]

---

[78] Stewart S, *International Copyright and Neighbouring Rights*, (2nd ed, London, Butterworths, 1989) 220, [7.69].

[79] WIPO, *Guide to the Rome Convention and to the Phonograms Convention*, World Intellectual Property Organisation, (WIPO Publication No. 617(E), Geneva, WIPO, 1981).

[80] Stewart S, *International Copyright and Neighbouring Rights*, (2nd ed, London, Butterworths, 1989) 247, [8.33].

[81] 'Substantiality', which the Australian *Copyright Act* 1968 considers, is not taken into account. See further Chapter Six.

[82] This is one of the two exceptions for the application of national treatment in the Rome Convention. See, for further explanation, WIPO, *Guide to the Rome Convention and to the Phonograms Convention*, World Intellectual Property Organisation, (WIPO Publication No. 617(E), Geneva, WIPO, 1981) 19 and 60.

[83] Stewart S, *International Copyright and Neighbouring Rights*, (2nd ed, London, Butterworths, 1989) 230, [8.40].

2.3.4. *Limitation*

The Convention also allows domestic law to provide for any limitation on the rights of broadcasting organisations where a member country provides the same kind of limitation on the protection of copyright in literary and artistic works (Art. 15).

2.3.5. *National Treatment*

The Rome Convention provides that foreign broadcasting organisations are to be treated equally with domestic broadcasting organisations[84] where either: (a) the principal office of the broadcasting organisation is located in a contracting state (Art. 6.1(a)); or (b) the broadcasts are transmitted from a transmitter situated in another contracting state (Art. 6.1(b)).

2.3.6. *Term of Protection*

The term of protection of these rights is not to be less than 20 years from the end of the year in which the broadcast was made (Art. 14(c)). Because the Rome Convention has a provision of non-retroactivity (Art. 20), broadcasts made before the date of coming into force of this Convention are not protected.

2.4. Evaluation of the Rome Convention

Historically, the Rome Convention granted protection to broadcasting organisations based on the social-oriented rationale. Because of this, the Rome Convention does not recognise certain rights that must have been granted if the Convention had adopted the creator-oriented rationale for protection of broadcasting organisations. For example, it was reasonably likely that the right of cable distribution would have been recognised if the Rome Convention had adopted the creator-oriented rationale. In addition, as is evident from the frequently appearing discussions in the process of establishing the Rome Convention that the Convention should not be complicated to facilitate participation of more countries, the Rome Convention compromised the extent and the level of protection in order to attract more countries to participate. For these reasons, protection under the Rome Convention has been very confined. It was not confined due to some positive reasons but rather simply resulted from passive reasons.

[84] This is one of the provisions of national treatment. See, for further explanation, WIPO, *Guide to the Rome Convention and to the Phonograms Convention*, World Intellectual Property Organisation, (WIPO Publication No. 617(E), Geneva, WIPO, 1981) 19 and 60.

Despite the fact that the Rome Convention compromised the extent and the level of protection in order to encourage more countries to join, the number of participants of the Rome Convention is still limited. One of the objectives of establishing a new instrument for the protection of broadcasting organisations is to extend the protection to more countries. If the new instrument is established as a WIPO treaty, protection will be granted not only to broadcasters of countries acceding to the new treaty but also to broadcasters of all WIPO member countries.[85] Since WIPO currently has 182 member states,[86] the coverage of the new instrument will become more than twice as many countries as the Rome Convention if the new instrument is established as a WIPO treaty.

If the new instrument is established as a WIPO treaty, considerations for acquiring participants are not required. Therefore, if this is the case, the extent and level of protection can be decided more positively for the new instrument.

3. Other International Conventions

There are two international conventions that are relevant to the protection of the rights of broadcasting organisations other than the Rome Convention.[87] They are, chronologically, the Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite (the Satellite Convention, also known as the Brussels Convention) and Annex IC of the Marrakesh Agreement Establishing the World Trade Organisation 1994 (WTO), that is, the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).

3.1. The Satellite Convention

3.1.1. *Outline*

The Satellite Convention was established in May 1974[88] in order to protect programme-carrying signals via satellite and came into force in

---

[85] The WCT and WPPT use this way to secure participating countries. See, for example, Article 3 of the WPPT.

[86] ‘Convention Establishing the World Intellectual Property Organization, Status on January 3, 2005’, <http://www.wipo.int/treaties/en/convention/index.html>.

[87] See, Sterling J, *World Copyright Law: Protection of Authors’ Works, Performances, Phonograms, Films, Video, Broadcasts and Published Editions in National, International and Regional Law* (2nd ed, London, Sweet & Maxwell, 2003) 211, [5.13].

[88] Ringer B, ‘Report, Brussels Diplomatic Conference on the Distribution of Programme-Carrying Signals Transmitted by Satellite’ (1974) *Copyright* 267.

September 1979.[89] This Convention is known as the first international convention to introduce the concept of a programme-carrying signal. Although satellite transmission was to be covered under the Rome Convention, protection under the Rome Convention is solely for transmissions for public reception.[90] Transmission between broadcasting organisations or from a broadcasting organisation to a cable distributor is not designed to be protected.[91] The Satellite Convention is, therefore, established to encompass this type of transmission.[92]

The Satellite Convention was first drafted to require its member countries to provide a private right (copyright or neighbouring rights) for a broadcasting organisation which is a programme-carrying signal originator.[93] However, due to opposition to the draft by authors and performers,[94] the final proposal was

---

[89] 'Brussels Convention relating to the Distribution of Programme-Carrying Signals Transmission by Satellite', <http://www.wipo.int/treaties/en/ip/brussels/index.html>. Sakka H, *Shoukai Chosakuken-hou*, (Dai-2han, Tokyo, Gyousei, 2002), 547 [trans: *Copyright Law Explication (2nd ed)*].

[90] See, for the implications of the Rome Convention for satellite broadcasting, Chapter Four.

[91] There is an opinion that this type of transmission can be protected by an interpretation of the Rome Convention. See, Nordemann W, Vinck K & Hertin P (English Version by Meyer G based on the translation of Livingston R), *International Copyright and Neighbouring Rights Law: Commentary with Special Emphasis on the European Community,* (VCH Verlagsgesellschaft, Weinheim with VCH Publishers, New York, 1990) 370.

[92] See, for the discussions towards the establishment of the Satellite Convention, Nomura Y, 'Uchuu-tsuushin no Bunya ni okeru Kokusai-torikime ni kansuru Seihu-senmonka-kaigi ni Shusseki shite' [1970nen 3gatsu] *Denpa Jiho* 2 [trans: 'From an Attendant of the Government Expert Committee concerning the International Agreement in the Area of Space Communication' [March 1970] in the *Radio Wave Report*]; Nomura Y, 'Eisei-tsushin no Chosakuken, Rinsetsuken Mondai ni kansuru Seihu-senmonka-kaigi ni Shusseki shite (1)' [1971nen 7gatsu] *Denpa Jihou* 6 [trans: 'From an Attendant of the Government Expert Committee in Relation to Copyright and the Neighbouring Rights regarding Satellite Communication' [July 1971] in the *Radio Wave Report*] ; and Nomura Y, 'Eisei-tsuushin no Chosakuken, Rinsetsuken Mondai ni kansuru Seihu-senmonka-kaigi ni Shusseki shite (2)' (1971nen 8gatsu) *Denpa Jihou* 6 [trans: 'From an Attendant of the Government Expert Committee in Relation to Copyright and the Neighbouring Rights regarding Satellite Communication' [August 1971] in the *Radio Wave Report*].

[93] The draft convention was adopted by the intergovernmental committee held at Paris in 1972. See, Nomura Y, 'Eisei-housou Hogo no tame no Kokusai-chiteki-kyouryoku no Seisei to Hatten' [1974nen 2gatsu] *Denpa Jiho* 17, 20 [trans: 'The Formation and Development of International Intellectual Co-operation for Protecting Satellite Broadcasting' [February 1974] in the *Radio Wave Report*].

[94] See, for the content of the opposition, Nomura Y, 'Eisei-housou to Chosaku-ken-mondai' [1978nen 1gatsu] *Housou Bunka* 60 [trans: 'Satellite Broadcasting and the Issues of Copyright' [January 1978] in the *Culture of Broadcasting*].

totally different from the draft.[95] As explained below, it directly obliges member countries to prevent piracy of programme-carrying signals. Hence, the Satellite Convention is rather a public law convention than a copyright one.[96] Notwithstanding this, the Satellite Convention is administered by WIPO.[97]

3.1.2. *Protection in Relation to Broadcasting*

The Satellite Convention provides protection for broadcasting by way of giving protection to programme-carrying signals. Although there is no direct definition of 'programme-carrying signals', the Satellite Convention provides relevant definitions in its Article 1 as follows:

For the purpose of this Convention:

(i) 'signal' is an electronically-generated carrier capable of transmitting programmes;
(ii) 'programme' is a body of live or recorded material consisting of images, sounds or both, embodied in signals emitted for the purpose of ultimate distribution;[98]
(iii) 'satellite' is any device in extraterrestrial space capable of transmitting signals; and
(iv) 'emitted signal' or 'signal emitted' is any programme-carrying signal that goes to or passes through a satellite.

The Convention imposes on its member countries an obligation to provide measures to prevent the distribution of a programme-carrying signal by any

---

95 Nomura Y, 'Eisei ni yoru Housou-bangumi no Kokusai-kouryuu to Sono Touyou no Boushi narabini Chosakuken-mondai', Chosakuken Shiryo Kyokai (ed), *Hoso ni kansuru Chosakuken Seido no Sho-mondai no Kenkyuu* (Chosakuken Shiriizu 57, Tokyo, Chosakuken Shiryou Kyoukai, 1979) 56, 61 [trans: 'International Exchange of Broadcasts by Satellites, the Prevention of Its Piracy and Copyright Issues' in *Study on Issues of Copyright Regime in relation to Broadcasting* (Copyright Series 57)].

96 Because the Convention did not intend to grant any copyright or neighbouring rights to any interested parties, the Convention successfully avoided considering the balance of rights between the interested parties. See, for the changes and the reasons for the changes, Nomura Y, 'Seiritsu Chikaki Eisei-housou Shingou Hogo Jouyaku (ge)' [1973nen 11gatsu] *Denpa Jihou* 2, 2–3 [trans: 'The Proposed Convention for Protecting Satellite Broadcasting Signal' [November 1973] in the *Radio Wave Report*].

97 'WIPO-Administered Treaties' <http://www.wipo.int/treaties/en/>.

98 Although Algeria and Morocco advocated that a programme be limited to a television programme, the majority of participants agreed to include a radio programme. See, Nomura Y, 'Eisei ni yori Soushin sareru Bangumi-densou-shingou no Hanpu ni kansuru Kokka-kan Kokusai-kaigi ni Shusseki shite' [1974nen 3gatsu] *Denpa Jiho* 20, 23 [trans: 'From an Attendant of the International Conference of States on the Distribution of Programme-Carrying Signals Transmitted by Satellite' [March 1974] in the *Radio Wave Report*].

distributor who was not intended to receive the signal (Art. 2(1)). This obligation is applied to any programme-carrying signal in or from member countries and also by an originating organisation which is a national of a member country (Art. 2(1)). The measures which a member country is to provide are not specified. Therefore, a member country can decide whether to grant a right to an originating organisation or provide a penalty for a distributor for whom the programme-carrying signal is not intended, and whether the measures are provided by copyright law or by telecommunications law, and so on.[99] The 'originating organisation' means the person or legal entity that decides what programme the emitted signals will carry (Art. 1(vi)).

The obligation to protect the programme-carrying signal by a member country does not encompass signals once received by a distributor for whom the programme-carrying signal is intended and subsequently distributed by the intended distributor (Art. 2(3)). The Convention provides exceptions to the protection of a programme-carrying signal where:

(a) the signal is a short excerpt of a programme consisting of a report of a current event and is used for the purpose of providing information (Art. 4(i));
(b) the signal is a short excerpt of a programme and is used as a quotation by fair practice and for the purpose of providing information (Art. 4(ii)); and
(c) the signal is distributed in a member country regarded as a developing country[100] for the purposes of teaching and scientific research (Art. 4(iii)).

3.1.3. *Evaluation of the Satellite Convention*

Since the Convention does not apply to direct broadcasting (Art. 3), which is satellite broadcasting intended for direct reception by the public, and the number of member states is limited to twenty four,[101] the Satellite Convention, up to the present time, has not played a significant role.

---

[99] See, for more information, Sakka H, *Shoukai Chosakuken-hou*, (Dai-2han, Tokyo, Gyousei, 2002) 547 [trans: *Copyright Law Explication (2nd ed)*].

[100] It conforms with the established practice of the General Assembly of the United Nations as to whether or not a country is a developing country (Art. 4(iii) of the Satellite Convention).

[101] The first member countries that became parties to the Satellite Convention are Germany, Kenya, Mexico and Nicaragua since August 1979. In the 1980s, Italy, Austria, Morocco, the United States of America, Peru, Panama, Portugal and the Soviet Union became parties. See, for all of the current member states and other information, 'Brussels Convention Relating of the Distribution of Programme-Carrying Signals Transmitted by Satellite', <http://www.wipo.int/treaties/en/ip/brussels/index.html>.

3.2. TRIPS

3.2.1. *Outline*

TRIPS was established in April 1994 at the Uruguay Round of the General Agreement on Tariffs and Trade (GATT)[102] and came into effect in January 1995.[103] The current market in which technological products or products related to invention have more share than ever tightly combines with intellectual property so that international protection for intellectual property is regarded as mandatory to promote international trade.[104] TRIPS deals with copyright and related rights, trademarks, geographical indications, industrial designs, patents, layout-designs of integrated circuits, undisclosed information and anti-competitive practices in contractual licences[105] and provides international standards for the protection of intellectual property.[106]

Since it binds 144 countries which participate in the WTO,[107] TRIPS generally can be said to have a role in geographically expanding the protection of the existing conventions. For instance, TRIPS requires member countries to recognise the same level of protection as the Berne Convention even though they are not members of the Berne Convention (Art. 9). TRIPS is also known for its comprehensive enforcement scheme which member countries are obliged to reinforce.[108]

---

[102] Blakeney M, *Trade Related Aspect of Intellectual Property Rights: A Concise Guide to the TRIPS Agreement*, (London, Sweet & Maxwell, 1996) v.

[103] 'TRIPS: A More Detailed Overview of the TRIPS Agreement', <http://www.wto.org/english/tratop_e/trips_e/intel2_e.htm#generalprovisions>.

[104] Demiray D, 'The Effort at Harmonisation', D'Amato A & Long D (eds), *International Intellectual Property Law*, (London, Kluwer Law, 1997) 268. For the Japan and the United States positions toward TRIPS, see, Ishiguro K, 'Chiteki-zaisan-ken no Kokusai-mondai' (No. 918, 1998) *Jurisuto* 43 [trans: 'International Issues on Intellectual Property Rights' in *Jurist*].

[105] See, for the concluding history of TRIPS: Bradley J, 'Intellectual Property Rights, Investment and Trade in Services in the Uruguay Round: Laying the Foundation' (1987) 23 *Stanford Journal of International Law* 57; Hartridge D & Subramanian A, 'Intellectual Property Rights: The Issues in Gatt' (1989) 22 *Vanderbilt Journal of Transnational Law* 893; and Stewart T, *The GATT Uruguay Round: A Negotiating History* (Netherlands, Kluwer Law and Taxation Publishers, 1993).

[106] See, Sterling J, *World Copyright Law: Protection of Authors' Works, Performances, Phonograms, Films, Video, Broadcasts and Published Editions in National, International and Regional Law* (2nd ed, London, Sweet & Maxwell, 2003) 694, [22.09].

[107] 1 January 2002. See 'The Organisation, Trading into the Future: The Introduction to the WTO' at <http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm>.

[108] Part III of TRIPS is entitled 'Enforcement of Intellectual Property Rights'. See, for the concrete obligations regarding enforcement by TRIPS, Blakeney M, *Trade Related Aspect of Intellectual Property Rights: A Concise Guide to the TRIPS Agreement*, (London, Sweet & Maxwell, 1996) 123–132.

However, as regards the rights of broadcasting organisations as explained below, TRIPS does not provide a higher level of protection than the Rome Convention.

3.2.2. *Protection in Relation to Broadcasting*

TRIPS recognises the right of fixation, reproduction and rebroadcast, and also the right of communication to the public for television broadcasts in the earlier part of Article 14(3). However, the latter part of Article 14(3) provides an alternative where the member states do not recognise the rights of broadcasting organisations:[109] it states that 'Where Members do not grant such rights to broadcasting organisations, they shall provide owners of copyright in the subject matter of broadcasts with the possibility of preventing the above acts'. By this clause, TRIPS effectively ignored broadcasters' rights and only recognises broadcasting rights for copyright owners.[110]

3.2.3. *Evaluation of TRIPS*

The purpose of TRIPS is to compel WTO countries to protect intellectual property rights with comprehensive enforcement mechanisms even though they are not members of any intellectual property related conventions. However, as explained above, TRIPS allows member countries not to recognise the rights of broadcasting organisations.

3.3. Substantial Conventions Protecting Broadcasting

As explained above, the Satellite Convention and TRIPS were established after the Rome Convention. The Satellite Convention was meant to be an instrument protecting the signal which the Rome Convention did not cover. However, this Convention has not worked effectively. TRIPS did not add anything to the Rome Convention in relation to the protection of broadcasting. Accordingly, the Rome Convention is the only one that actually retains the function which requires member countries to recognise the rights of broadcasting organisations.

---

[109] For the overall contents of the TRIPS Agreement, see: Tamai K, Chiteki-Zaisanken ni kansuru Aratana Kokusaiteki Wakugumi no Hossoku' (1995) 1071 *Jurisuto* 44 [trans: 'Setting Afloat of the New International Framework on Intellectual Property: TRIPS Agreement' in *Jurist*]; and Watanabe H, 'Chosakuken-tou wo meguru Kokusaiteki na Ugoki: WIPO Shin-Jouyaku-tou' (1998) 1132 *Jurisuto* 58 [trans: 'International Movement around Copyright: WIPO New Treaties' in *Jurist*].

[110] Blakeney M, *Trade Related Aspect of Intellectual Property Rights: A Concise Guide to the TRIPS Agreement*, (London, Sweet & Maxwell, 1996) 49.

4. Transnational Legislation

In addition to these international conventions, there is transnational legislation relating to the protection of the rights of broadcasting organisations. This transnational legislation includes the European Agreement on the Protection of Television Broadcasts (1961); three EC Directives (Council Directive No. 92/100/EEC of November 19,1992, on rental right and lending right and on certain rights related to copyright in the field of intellectual property (the Rental Directive), Council Directive (EEC) No. 93/83/EEC of September 27, 1993, on the Co-ordination of Certain Rules Concerning Copyright and Cable Retransmission (the Cable and Satellite Directive) and Council Directive No. 93/98/EEC of October 29, 1993, harmonising the term of protection of copyright and certain related rights (the Term Directive)); the Decision No. 351 on Author's Right and Connected Rights (December 17, 1993) of the Commission of the Cartagena Agreement (Cartagena Decision 351); and the North American Free-Trade Agreement between the governments of Canada, Mexico and the United States of America (NAFTA). Among these, the European Agreement on the Protection of Television Broadcasts was referred to in the discussions on establishing the Rome Convention. This agreement, as well as the Rome Convention, is an early model regarding the protection of broadcasters' rights.

In contrast with the European Agreement on the Protection of Television Broadcasts, the other legislation was established in 1992 or 1993. The legislation other than the European Agreement on the Protection of Television Broadcasts can be regarded as an agreement to supplement the protection under the Rome Convention. Hence, the legislation provides a clue to determining the problem, namely the deficiencies of the Rome Convention in providing sufficient protection for the rights of broadcasting organisations.

4.1. The European Agreement on the Protection of Television Broadcasts

The European Agreement on the Protection of Television Broadcasts came into force in 1961 in France, Sweden and the United Kingdom in order to protect television signals from retransmission or public presentation.[111] The discussions to establish the Rome Convention were going on at that time.

In the Agreement, broadcasting organisations constituted in the member countries under the law of the member countries or transmitting broadcasts

[111] Nordemann W, Vinck K & Hertin P (English Version by Meyer G based on the translation of Livingston R), *International Copyright and Neighbouring Rights Law: Commentary with Special Emphasis on the European Community*, (VCH Verlagsgesellschaft, Weinheim with VCH Publishers, New York, 1990) 463.

from the member countries are protected in respect of their television broadcasts (Art. 1). The Agreement adopts the principle of national treatment (Subparagraph 2, Art. 1).

The Agreement provides a broadcasting organisation with the rights to prohibit or authorise:

(a) rebroadcasting;
(b) wire diffusion;
(c) communication to the public;
(d) fixation or reproduction of a fixation including making a photograph of a broadcast; and
(e) rebroadcasting, wire diffusion or public performance with the aid of fixations or reproductions of its television broadcasts (Art. 1.1).

Countries are allowed to make reservations in relation to the protection regarding:

- communication to the public where the communication is not to a paying audience within the meaning of their domestic law (Art.3 (1)(b)); and
- fixation, reproduction or rebroadcasting of still photographs or reproductions of them (Art. 3 (1)(c)).

Article 3(1)(a) allowed the withholding of protection for wire diffusion until it was amended by the Protocol in 1965.[112] Under the Protocol, protection of wire diffusion can be restricted if broadcasts by broadcasting organisations constituted in the territory of another country which is not a party to the Agreement or transmitting from such territory, and a percentage of the transmission is not less than 50% of the average weekly duration of the broadcasts (Art. 2 of the Protocol of 1965). The Protocol was signed by Denmark, France, Germany, Luxembourg, Sweden, Belgium and the United Kingdom in 1965.[113]

The Agreement also allows for exceptions to be made with respect to: (a) using a short extract of a broadcast for reporting current events (Art. 3(2)(a)); and (b) the making of ephemeral fixations of a television broadcast by a broadcasting organisation by means of its own facilities and for its own broadcasts (Art. 3(2)(b)).

---

[112] Protocol to the European Agreement on the Protection of Television Broadcasts.

[113] Nordemann W, Vinck K & Hertin P (English Version by Meyer G based on the translation of Livingston R), *International Copyright and Neighbouring Rights Law: Commentary with Special Emphasis on the European Community*, (VCH Verlagsgesellschaft, Weinheim with VCH Publishers, New York, 1990) 498.

The term of protection is not to be less than twenty years (Art. 2(1) of the Protocol).

The difference between the Rome Convention and the European Agreement on the Protection of Television Broadcasts is:

- the European Agreement on the Protection of Television Broadcasts recognises wire diffusion which the Rome Convention does not recognise.

4.2. EC Directives

EC Directives bind twenty five member countries, namely Austria, Belgium, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden and the United Kingdom.[114] The EC Directives are also taken into account by Iceland, Liechtenstein and Norway.[115] As demonstrated by the fact that the first copyright convention, that is the Berne Convention, was established at Berne, Switzerland, European countries are generally said to have carried considerable weight at international conferences on copyright.

4.2.1. *The Rental Directive*

The Rental Directive was established in order to provide adequate protection for authors, performers and producers of phonograms and films in accordance with the new forms of exploitation of copyright works and subject matter of related rights.[116] The Rental Directive is concerned with securing an adequate income for authors and performers.[117]

The Rental Directive recognises the right of fixation including both direct and indirect reproduction for broadcasting organisations and cable distributors (Art. 6(2), Art. 7(1)). Cable distributors do not have rights if they merely transmit the broadcasts of broadcasting organisations (Art. 6(3)). The Directive also recognises the right of rebroadcasting (Art. 8(3)) and the right of distribution (Art. 9(2)). The right of communication to the public is recognised if the

---

[114] 'Europa: Gateway to the European Union', <http://europa.eu.int/index_en.htm>. See also, Sterling J, *World Copyright Law: Protection of Authors' Works, Performances, Phonograms, Films, Video, Broadcasts and Published Editions in National, International and Regional Law*, (2nd ed, London, Sweet & Maxwell, 2003) 758, [26.01].

[115] Sterling J, *World Copyright Law: Protection of Authors' Works, Performances, Phonograms, Films, Video, Broadcasts and Published Editions in National, International and Regional Law*, (2nd ed, London, Sweet & Maxwell, 2003) 759, [26.04].

[116] See the Recital of the Rental Directive.

[117] See the Recital of the Rental Directive.

communication is made in places accessible to the public on payment of an entrance fee (Art. 8(3)).

The right of distribution for broadcasting organisations is that the fixation of their broadcasts must not be available to the public by sale or otherwise. The characteristic of the distribution right of the Directive is that the right is not exhausted within the Community unless the first sale of the fixation in the Community is made by the right holder or the party with the consent of the right holder (Art. 9(2)).[118] This means that the right holder in the Community can prevent the fixation of the broadcast which was legitimately made outside the Community from being sold in the Community.[119] The right of distribution can be equivalent to the right of importation which is not recognised in the Rome Convention.

The Directive allows member countries to provide limitations on rights referred to in the Directive with regards to: (a) private use; (b) use of short excerpts for reporting current events; (c) ephemeral fixation by a broadcasting organisation by using its own facilities and for its own broadcasts; and (d) use solely for teaching and scientific research (Art. 10). The Directive also allows member countries to provide the same kinds of limitations on the rights of broadcasting organisations and others as apply to authors of literary and artistic works (Art. 10(2)).

The differences between the Rome Convention and the Rental Directive are:

- the Rental Directive recognises the rights of cable distributors which the Rome Convention does not recognise; and
- the Rental Directive recognises the right of distribution which is the right to control over broadcasts even after the broadcasts are received while the Rome Convention only recognises the rights that cover the first reception of broadcasts.

4.2.2. *The Cable and Satellite Directive*

The Cable and Satellite Directive was established in order to create a market of borderless free competition in relation to broadcasting, in particular by cable and satellite.[120] The Cable and Satellite Directive, as is evident from its title and objective, sets out provisions concerning satellite broadcasting and cable distribution.

---

[118] Reinbothe J & von Lewinski S, *The E.C. Directive on Rental and Lending Rights and on Piracy*, (London, Sweet & Maxwell, 1993) 105.

[119] Yamanaka S, 'Taiyo-ken, Kashidashi-ken, Rinsetsu-ken ni kansuru EC Shirei ni tsuite' (1994) 33/12 *Kopiraito* 2 [trans: 'EC Directive on rental right and lending right and on certain rights related to copyright' in *Copyright*].

[120] See the Recital of the Cable and Satellite Directive.

Under this Directive (Art. 4), satellite broadcasting has to be protected as broadcasting according to the Rental Directive. The Directive also provides the guidelines for the applicable law. Satellite broadcasting is considered to occur in the member states if the programme-carrying signals are introduced into an uninterrupted chain of communication towards and from the satellite under the control and responsibility of the broadcasting organisation (Art. 1(2)(b)). However, when the satellite broadcasting occurs in non-member states where the protection level of satellite broadcasting is below that of the Directive, the satellite broadcasting is deemed to have occurred in the member states if:

(1) the programme-carrying signal is transmitted to the satellite from an uplink station in a member state (Art. 1(2)(d)(i)); or
(2) a broadcasting organisation established in a member state has commissioned satellite broadcasting (Art. 1(2)(d)(ii)).

As for cable distribution, the Directive requires that the copyright and neighbouring rights existing in the programmes which were originated in other member states have to be recognised in each member state (Art. 8).[121] The Directive allows member states to provide for copyright clearance through collective administration (Art. 9), probably because of the difficulty of specifying the rights owners in other countries.[122] A mediation procedure is also provided in case of the failure of voluntary copyright clearances (Art. 11).

The term of protection under the Cable and Satellite Directive follows the Term Directive.[123]

The differences between the Rome Convention and the Cable and Satellite Directive are:

- the Cable and Satellite Directive recognises cable distribution, which was denied when the Rome Convention was established; and
- the Cable and Satellite Directive recognises satellite broadcasting, which did not exist when the Rome Convention was established.

---

[121] This provision is contradictory to the provision of satellite broadcasting. See, for further discussion, McKnight E, 'Exclusive Licensing of Television Programmes: The Cable and Satellite Directive' (1995) 7 *Entertainment Law Review* 287, 288.

[122] Tagaya K, 'Kokkyou wo Koeru Eisei-Densou Keiburu-Densou to Chosakuken-Housei' [September, 1996] *Kopiraito* 13, 19 [trans: 'Satellite and Cable Transmission over National Boundaries and the Copyright Regime' in *Copyright*].

[123] Sterling J, *World Copyright Law: Protection of Authors' Works, Performances, Phonograms, Films, Video, Broadcasts and Published Editions in National, International and Regional Law*, (2nd ed, London, Sweet & Maxwell, 2003) 826, [26C.11].

4.2.3. *The Term Directive*

The Term Directive contains provisions concerning the term of protection and does not deal with protection itself.[124] The rights of broadcasting organisations expire fifty years after the first transmission of their broadcasts. This includes cable distribution and satellite broadcasting (Art. 3(4)).

The difference between the Rome Convention and the Term Directive is:

- the Term Directive extends the term of protection from twenty years in the Rome Convention to fifty years.[125]

4.3. Cartagena Decision 351

The Cartagena Agreement was established in 1969 between Bolivia, Colombia, Ecuador, Peru and Venezuela to accomplish harmonisation of economic and social policies and the approximation of national laws of the member countries.[126] To implement the Agreement, Decision 351 was concluded in 1993.[127]

In relation to broadcasting, Decision 351 sets out the rights of retransmission, fixation and reproduction (Art. 39). 'Retransmission' is defined as 'a relaying of a signal both by wire and by wireless means' (Art. 3). Decision 351 protects programme-carrying signals both to and from a satellite (Art. 40). The term of protection is no less than 50 years (Art. 41).

The differences between the Rome Convention and the Cartagena Decision 351 are:

- the Cartagena Decision 351 recognises cable distribution, which the Rome Convention does not recognise;
- the Cartagena Decision 351 recognises satellite broadcasting and communication, which the Rome Convention does not recognise; and
- the Cartagena Decision 351 extends the term of protection from twenty years in the Rome Convention to fifty years.

---

[124] See, for further information: Sterling J, *World Copyright Law: Protection of Authors' Works, Performances, Phonograms, Films, Video, Broadcasts and Published Editions in National, International and Regional Law*, (2nd ed, London, Sweet & Maxwell, 2003) 828–842, [26D.01]–[26D.15]; and Lea G, 'The Term Directive and Its Implementation', Barendt E.M & Firth A (eds), *The Year Book of Copyright and Media Law 1999*, (Oxford, Oxford University Press, 1999) 177.

[125] See, Recital 1 of the Term Directive.

[126] Sterling J, *World Copyright Law: Protection of Authors' Works, Performances, Phonograms, Films, Video, Broadcasts and Published Editions in National, International and Regional Law*, (2nd ed, London, Sweet & Maxwell, 2003) 752, [25.08].

[127] Sterling J, *World Copyright Law: Protection of Authors' Works, Performances, Phonograms, Films, Video, Broadcasts and Published Editions in National, International and Regional Law*, (2nd ed, London, Sweet & Maxwell, 2003) 752, [25.08].

4.4. NAFTA

NAFTA was concluded in 1993 and came into force in 1994[128] among the governments of the United States, Mexico and Canada.[129] Its aim is to establish a free trade area between those countries.[130]

In relation to broadcasting, NAFTA tries to protect an encrypted satellite broadcast by Article 1707. NAFTA requires member countries to provide criminal offences for the manufacture, import, sale, lease or otherwise making available a device which assists in decoding an encrypted programme-carrying satellite signal without the authorisation of the lawful distributor (Art. 1707(a)).

NAFTA also requires member countries to provide a civil offence where any person receives an encrypted programme-carrying satellite signal which has been decoded without the authorisation of the lawful distributor in order to make a commercial use or further distribution (Art. 1707(b)). Engaging in any activity set out in subparagraph (a) of Article 1707 also constitutes a civil offence (Art. 1707 (b)). NAFTA requires that the civil offence should be actionable by any person who has an interest in the content of the signal (Art. 1707).

The difference of recognition of broadcasters' rights between the Rome Convention and NAFTA is:

- NAFTA protects an encrypted programmed-carrying satellite signal, which the Rome Convention does not recognise.

5. Conclusion

As discussed above, there are three international conventions in relation to the protection of broadcasters' rights. However, the Rome Convention is the only convention that substantially protects the rights of broadcasting organisations. There are several transnational agreements protecting the rights of broadcasting

---

[128] See for the history of negotiation, McKinney J, *Created from NAFTA: The Structure, Function, and Significance of the Treaty's Related Institutions*, (New York, M.E. Sharpe, 2000) 3–13.

[129] North American Free Trade Agreement Between the Government of the United States of America, the Government of Canada and the Government of the United Mexican States. Chapter 17 of the Agreement regulates intellectual property. See, for the background to establishing NAFTA, Grace R, *The Protection of Intellectual Property under the NAFTA: A Model for the Future*, (The Customs Intellectual Property Information Center) 85, 86–80.

[130] D'Amato A & Long D, *International Intellectual Property Law* (Kluwer Law International, London, 1997) 282.

organisations. However, these transnational agreements only cover a limited number of contracting countries in a limited region and do not affect the interpretation of international conventions.[131]

The Rome Convention depends upon the social-oriented rationale for its protection. Due to its rationale for protection, the Rome Convention does not grant a right which allows broadcasting organisations to exercise control over their broadcasts that the creator-oriented rationale, namely that labour by a broadcasting organisation belongs to the broadcasting organisation, might have supported. Furthermore, since the Rome Convention aimed to be a simple convention in order to encourage more countries to become a party, the protection which the Rome Convention grants was never sufficiently comprehensive.

Consequently, the Rome Convention did not provide satisfactory protection even at the then standard of technology. This is plain from the comparison between the European Agreement on the Protection of Television Broadcasts and the Rome Convention. It seems that the insufficiency of protection under the Rome Convention can no longer be overlooked following technological developments. The existence of transnational agreements can be regarded as evidence of this.

This is the current global situation concerning the protection of the rights of broadcasting organisations. In these circumstances, it is not surprising that the Rome Convention is increasingly unable to cope with communications technologies. But how does the Rome Convention demonstrate its deficiencies in dealing with the current communications technology? This is the theme of the next Chapter.

---

[131] See, Reinbothe J & Von Lewinski S, *The E.C. Directive on Rental and Lending Rights and on Piracy*, (Sweet & Maxwell, London, 1993) 205–210.

Chapter 4
Broadcasting Technology-Analogues

1. Introduction

As examined in the previous Chapter, the protection for broadcasting organisations under the Rome Convention, which is virtually the only international convention that provides protection for broadcasters, is limited. The fact that regional agreements have provided protection which the Rome Convention does not grant indicates a lack of adequate protection by the Rome Convention. When examining the protection that regional agreements provide, it is noticeable that satellite and cable distributions are often included.

The definition of 'broadcasting' in the Rome Convention is 'the transmission by wireless means for public reception of sounds or of images and sounds' (Article 3(f)). It does not state anything about cable or satellite distribution. This is because when the Rome Convention was concluded, cable distribution was not prevalent and satellite broadcasting did not exist.[1] In establishing a new international instrument for protecting broadcasting organisations, these new communication technologies must be considered.

In this Chapter, in addition to satellite and cable distribution, the new communication technologies that have appeared since the conclusion of the Rome Convention and have analogous effects to broadcasting will be analysed. These technologies do not fall within the definition of 'broadcasting' under

[1] See Chapter One.

the Rome Convention but they are commonly perceived as broadcasting in a general sense.

In the following discussion, first, the mechanism of cable distribution, satellite broadcasting, teletext and Internet broadcasting will be explained. Secondly, the reason why these new technologies do not fall within the definition of 'broadcasting' under the Rome Convention will be reviewed. Finally, the real problem of the definition of 'broadcasting' under the Rome Convention will be analysed.

Attention should be drawn to:

(1) Although satellite broadcasting and Internet broadcasting are called such, they may not be broadcasting in a legal sense as discussed below. 'Satellite broadcasting' and 'Internet broadcasting' in this Chapter should be understood as general terms representing those technologies.

(2) The order of explanation of the technologies in this Chapter does not have significance. Until relatively recently, these technologies were almost always classified into two groups, namely, wireless technology and wired technology when they were explained.[2] Nowadays, however, the distinction between wireless and wired technologies is hardly possible because, for instance, cable television, that was included in the group of wired technology, as described below, could use wireless transmission for part of its path.

Also, it is not meaningful to discuss these technologies in the chronological order of their invention since these technologies are often combined in practice. For example, satellites have helped to promote the cable television industry by delivering broadcasts to cable television systems.[3]

2. The Technologies of Cable Distribution, Satellite Broadcasting, Teletext and Internet Broadcasting

2.1. Cable Distribution

2.1.1. *Structure*

A cable distribution system is typically structured with a headend, cables and set-top boxes. The signal flows in this order.

[2] See, for example: Bittner J, *Broadcasting: An Introduction*, (New Jersey, Prentice-Hall, 1980); and Nihon Minkan Housou Renmei, *Housou Hando Bukku*, (Tokyo, Touyou Keizai Shinpou-sha, 1991) 181–211 [trans: *Broadcasting Handbook*]; and, Bureau of Transport and Communications Economics, *Communications Futures Project, Work in Progress Paper No. 2, Delivery Technologies in the New Communications World*, (Canberra, Australian Government Publishing Service, 1994) 19–60.

[3] Elbert B, *The Satellite Communication Applications Handbook*, (Boston, Artech House, 1997) 125.

Cable distributors are usually supplied with some or all of their programmes by free-to-air broadcasting organisations[4] and cable programme suppliers use satellites to distribute programmes to cable distributors.[5] Cable distributors receive these programmes with headends, which are receiving antennas and equipment for distributing broadcasting signals.[6] When cable distributors distribute their own programmes, they use modulators, which are miniature transmitters, to generate signals and receive them with headends.[7]

Signals received by headends are transferred to trunk cables. Trunk cables bring broadcasting signals to a particular neighbourhood. A trunk cable can be a coaxial cable or a fibre optic cable. However, sometimes, particularly for long distances, a microwave link (wireless) is used.[8] Where cables are coaxial, amplifiers are installed at appropriate distances to make up for signal loss. At terminating points, trunk cables branch out into distribution cables that bring signals to each home. Drop cables lead signals to homes from distribution cables. Some cable systems (wireless cable)[9] use microwaves to broadcast locally. The signal is received by small dish antennas installed at homes.

The signal drawn into a home by a drop cable is brought to a set-top box. A set-top box is an electronic unit which converts signals and passes them on to standard television equipment.[10]

2.1.2. *Feature*

The merit of a cable distribution system is the quality of its signal.[11] Since cables are used to carry the signals, the signals of a cable distribution system

---

[4] This is because cable distribution was originally developed for improving reception of free-to-air television. See: Nihon Minkan Housou Renmei, *Housou Hando Bukku*, (Tokyo, Touyou Keizai Shinpou-sha, 1991) 196 [trans: *Broadcasting Handbook*]; Verna E, *Global Television: How to Create Effective Television for the Future*, (Boston, Focal Press, 1993) 174; and Elbert B, *The Satellite Communication Applications Handbook*, (Boston, Artech House, 1997) 125.

[5] Baldwin T & McVoy D, *Cable Communication*, (2nd ed, New Jersey, Prentice Hall, 1988) 13.

[6] See, for more details about antennas and distribution equipment: Baldwin T & McVoy D, *Cable Communication*, (2nd ed, New Jersey, Prentice Hall, 1988) 8-; and Elbert B, *The Satellite Communication Applications Handbook*, (Boston, Artech House, 1997) 126.

[7] See, for more details about a modulator, Baldwin T & McVoy D.S, *Cable Communication*, (2nd ed, New Jersey, Prentice Hall, 1988) 11.

[8] See, for reasons of the choice, Bittner J, *Broadcasting: An Introduction*, (New Jersey, Prentice-Hall, 1980) 116.

[9] Wireless cable system is used in South America. See, Elbert B, *The Satellite Communication Applications Handbook*, (Boston, Artech House, 1997) 19.

[10] See, for details of a set-top box (a converter), Baldwin T & McVoy D.S, *Cable Communication*, (2nd ed, New Jersey, Prentice Hall, 1988) 51–57.

[11] See, for further explanation, Nihon Minkan Housou Renmei, *Housou Hando Bukku*, (Tokyo, Touyou Keizai Shinpou-sha, 1991) 196 [trans: *Broadcasting Handbook*].

are, unlike that of terrestrial broadcasting, neither interfered with nor deflected by intervening objects such as mountains, buildings or trees.[12]

2.2. Satellite Broadcasting

2.2.1. *Structure*

A satellite broadcasting system is usually comprised of a transmitter located on earth, a satellite in space, a control station on earth and receiving equipment composed of dish antennas and set-top boxes on earth.[13] A signal is transmitted by a transmitter to a satellite, which is controlled by a control station, received, processed and amplified by a satellite, transmitted to earth, received by dish antennas and introduced to set-top boxes at a home.[14] A signal transmission from earth to a satellite is called an uplink. Transmission from a satellite to earth is called a downlink. The coverage area is called a footprint.

An uplink station, that is a transmitter, can be a building or a truck which carries a satellite news gathering system (SNG).[15] When an uplink station is other than a SNG truck, a programme has to be conveyed somehow to an uplink station. The method of conveyance may be by the transport of a tape, microwave transmission or cable transmission of a programme.

The signal from a transmitter reaches the receiving antennas of a satellite. A satellite, the altitude of which ranges from 500–36,000 kilometres, moves on an orbit relative to the surface of the earth.[16] There are two kinds of satellite that are used for broadcasting.[17] A satellite with the sole function of broadcasting for direct reception by the public is called a direct broadcasting satellite (DBS). A satellite for general communication purposes is called a fixed service satellite (FSS).

Originally, DBS and FSS in the 1970s were distinguishable by their power (200–230w for DBS and 12–20w for FSS).[18] Since FSS has low power and

---

12 See, for further explanation, Nihon Minkan Housou Renmei, *Housou Hando Bukku*, (Tokyo, Touyou Keizai Shinpou-sha, 1991) 196 [trans: *Broadcasting Handbook*].

13 See, for more information, Nihon Housou Kyoukai, *Kaitei-ban Eisei Housou no Jushin Nyuumon*, (Tokyo, Nihon Housou Shuppan Kyokai, 1994) [Trans: NHK (ed), *Introduction to Satellite Broadcasting Reception*, (revised ed)].

14 See, for further details, for example, Elbert B, *The Satellite Communication Applications Handbook*, (Boston, Artech House, 1997) 29–253.

15 See, for further information on SNG, Mirabito M, *The New Communications Technologies*, (2nd ed, Boston, Focal Press, 1994) 97.

16 Elbert B, *The Satellite Communication Applications Handbook*, (Boston, Artech House, 1997) 8–9.

17 Long C, *Telecommunications Law and Practice*, (2nd ed, London, Sweet & Maxwell, 1995) 138, [9–27].

18 Ogawa M, *Eisei-housou ni kakaru Chosakuken Shori,* (master's thesis submitted to Yokohama National University, 1999) [trans: *Copyright Clearance for Satellite Broadcasting*].

requires a large dish antenna for reception, FSS was used for distributing programmes to cable distributors or broadcasters to re-distribute to the public. The technical reasons for the distinction between DBS and FSS disappeared because of medium power satellites. Technical advancement now enables FSS to be used for direct broadcasting. The only remaining distinction is administrative as described below.

In order to place a satellite in the right orbit, there needs to be international negotiation for the allocation of an orbit position, a channel and so on. For DBS, ITU[19] organised the World Administrative Radio Conference (WARC-BS) in Geneva in 1997 to gather delegations of nations and assign orbit positions, channels and footprints for all countries in the world.[20] Every country develops broadcasting by DBS using this allocation. Footprints are comprised of a circle or an oval, or for large countries, combinations of these. Because of this technical reason, footprints cannot be identical with national borders.[21]

For FSS, orbit positions, channels and footprints are allocated in accordance with the process provided by the Radio Regulations (RR) of ITU. First, an administrative authority of a country which has a plan to place a FSS discloses the plan (Art. 9 of RR). If there is a possibility of interference with another FSS communication already in operation, negotiations are to be conducted with the authority administering the FSS which would be interfered with (Art. 9 of RR). When the negotiation is successfully concluded, the allocation is admitted (Art. 11 of RR). However, effectively, the assignment of an FSS orbit is on a first come first served basis.

A signal which reaches the receiving antennas of a satellite is led to transponders. Transponders shift the frequency of the signal to prevent interference between the uplink signal and downlink signal and amplifies the signal. Then, the signal is sent to transmitting antennas. Transmitting antennas beam the signal to earth.

The signal is received by a dish antenna and drawn to a set-top box.[22] A set-top box converts the signal and passes it on to standard television equipment.

---

[19] See Chapter Two.

[20] The allocation for North and South America (Region 2) took time and was formulated at WARC 1983. See, for information about WORC-BS 1997: Williamson M, 'Broadcasting by Satellite: Some Technical Considerations', Negrine R (ed), *Satellite Broadcasting*, (London, Routledge, 1988) 23, 38–41; and Jipguep J, 'The International Telecommunication Union and the Regulation of Satellite Broadcasting', Bate B (ed), *Television by Satellite: Legal Aspects* (Oxford, ESC publishing, 1987) 7. See, for information about WARC 1983, Jipguep J, 'The International Telecommunication Union and the Regulation of Satellite Broadcasting', Bate B (ed), *Television by Satellite: Legal Aspects* (Oxford, ESC publishing, 1987) 8.

[21] This caused a problem of spilled-over signals, with which the EC Cable and Satellite Directive deals. See Chapter Three.

[22] See the section on Cable Distribution.

2.2.2. *Feature*

The advantages of satellite broadcasting are its wide area coverage, potential to carry more information and independence of terrestrial infrastructure.[23] However, signals from satellites, like those of terrestrial broadcasting, can be interfered with or deflected by intervening objects such as mountains, buildings or trees.[24]

2.3. Teletext

2.3.1. *Structure*

Teletext comprises text and graphics transmitted by television, cable broadcasting or FM radio signals. A television picture on a screen is composed of 625 lines in Australia and 525 lines in Japan.[25] Out of 625 or 525, approximately 20 lines are out of the viewable area of a screen.[26] Teletext by television uses those lines to convey digital data of text and graphics.

Teletext by cable broadcasting uses a character generator at a headend. Digital data received by a headend is subsequently converted into a video signal by a character generator.

FM teletext uses different channels that a conventional FM receiver cannot detect.[27]

2.3.2. *Feature*

Teletext is transmitted on signals of television, cable broadcasting or FM radio that are already commonly used so that it does not require radio spectrum or cable facilities especially for it. Anyone who can access these signals can receive teletext by using a decoder.[28]

2.4. Internet Broadcasting

2.4.1. *Structure*

The term 'Internet broadcasting' or 'web-casting' refers to a technology that delivers an audio data file and video data file over the Internet, using a

---

[23] Elbert B, *The Satellite Communication Applications Handbook*, (Boston, Artech House, 1997) 10, 16.

[24] Verna T, *Global Television: How to Create Effective Television for the Future*, (Boston, Focal Press, 1993) 27.

[25] See further Chapter One.

[26] Veith R, *Television's Teletext*, (New York, Elsevier Science Publishing, 1983) 3; Roger E, *Communication Technology: The New Media in Society*, (New York, The Free Press, 1986) 45.

[27] Alber A, *Videotex/Teletext: Principles and Practices*, (New York, McGraw-Hill Book, 1985) 168–170.

[28] Alber A, *Videotex/Teletext: Principles and Practices*, (New York, McGraw-Hill Book, 1985) 137.

technology called 'streaming'. In streaming, audio and video data is played out as it is being downloaded from the Internet.[29] Streaming is activated at the request of a user.

Streaming involves three components: an encoder which prepares data suitable for transmission; a streaming server which distributes audio or video data over the Internet; and a player which receives and decodes the data for presentation.

There are two types of streaming, on-demand transmission and real-time streaming. In on-demand transmission, an encoder encodes data and stores it in a file of a transmitter beforehand. Stored data then is retrieved and distributed by a server. In real-time streaming, data is distributed by the server as soon as it is encoded without creating an intermediate file.

2.4.2. *Feature*

Internet broadcasting is one way of using the Internet. The features of Internet broadcasting are hence the same as the Internet generally: anyone who can connect his or her personal computer to the Internet is able to enjoy receiving, processing and sending never exhausting information at any time at a reasonably cheap cost without particular specialist knowledge or skills. Because the Internet is simply an interconnected network of computers and other computer networks,[30] the means of connecting computers can be by cable or wireless transmission.

3. Reasons Why Cable Distribution, Satellite Broadcasting, Teletext and Internet Broadcasting Are Not Considered 'Broadcasting'

3.1. Cable Distribution

Cable distribution uses cables to convey signals. Because the Rome Convention defines 'broadcasting' as 'the transmission by wireless means', cable distribution, which is not wireless but cable transmission, cannot be regarded as 'broadcasting'.

3.2. Satellite Broadcasting

Satellite broadcasting uses a satellite to distribute signals to the public. As Dr André Kerever explains in his article, at an early stage of discussions

---

[29] See for a succinct explanation of the technology of streaming, 'Asukii Dejitaru Yougo Jiten', <http://yougo.ascii24.com/gh/77/007784.html> [trans: 'Ascii Digital Glossary'].

[30] Choi S & Whinston A, *The Internet Economy: Technology and Practice*, (Austin, SmartEcon Publishing, 2000) 31.

regarding satellite broadcasting there had been comments such as '[u]nlike traditional broadcasting, the starting-point for satellite communication to the public is the satellite itself, since the signals are accessible to the public only in their down-link phase (coming from the satellite) and not in their up-link phase.'[31] Because the Rome Conventions defines 'broadcasting' as 'the transmission . . . for public reception', satellite broadcasting, where signals are first transmitted to a satellite for reception by the satellite, cannot immediately be regarded as 'broadcasting'.

The interpretation of 'broadcasting' with respect to satellite broadcasting was included in the commentary of the model law for the implementation of the Rome Convention by the national law of member countries adopted by the Intergovernmental Committee of the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations at its Second Extraordinary Session in May 1974.[32] It states that 'programme-carrying signals transmitted via space satellites, . . . for the ultimate purpose of the reception by the public, constitutes "broadcasting" within the meaning of Article 3 of the Rome Convention'.[33]

The model law, together with the commentary, was prepared to facilitate ratification and implementation of the Rome Convention.[34] The aim of the model law and the commentary was to 'provide the simplest possible legislative framework for the implementation of the Rome Convention'[35] and thus they can be considered a direct interpretation of the Rome Convention. Hence, satellite broadcasting can now be assumed to be 'broadcasting' under the Rome Convention. Nevertheless, a unanimous interpretation has not yet been established.[36]

3.3. Teletext

Teletext comprises text and graphics. Because the Rome Convention defines 'broadcasting' as 'the transmission . . . of sounds or of images and sounds', teletext, which is neither sounds nor images and sounds, cannot be considered 'broadcasting'.

---

[31] Kerever A, 'Satellite Broadcasting and Copyright' (1990) XXIV *Copyright Bulletin* 6, 12.

[32] 'Model Law Concerning the Protection of Performers, Producers of Phonograms and Broadcasting Organisations' [1974] *Copyright* 163, 170.

[33] 'Model Law Concerning the Protection of Performers, Producers of Phonograms and Broadcasting Organisations' [1974] *Copyright* 163, 170.

[34] 'Model Law Concerning the Protection of Performers, Producers of Phonograms and Broadcasting Organisations' [1974] *Copyright* 163, 163.

[35] 'Model Law Concerning the Protection of Performers, Producers of Phonograms and Broadcasting Organisations' [1974] *Copyright* 163, 163.

[36] Szilágyi I, 'Question of Broadcasting by Satellite with Special Reference to Authors' Rights' [1981] *Copyright* 222, 223.

3.4. Internet Broadcasting

Internet broadcasting is activated upon a user's request. Because the Rome Convention defines 'broadcasting' as 'the transmission ... for public reception', Internet broadcasting, which transmits signals only for the user who requests it, cannot be considered 'broadcasting'.

4. The Real Problem of the Definition of 'Broadcasting'

4.1. The Mismatch between Recent Technologies and the Definition

When recent technologies are closely examined, the reasons discussed in the previous section are not persuasive. Nowadays, all these new communication technologies are often used in combination. However, the definition in the Rome Convention does not take combined use into account.

4.2. Problems of Single Technology Based Definition

If the definition of 'broadcasting' under the Rome Convention, which is based on a single technology, is retained, it becomes a problem as to which individual technology should be referred to when technologies are jointly used. There are three possible choices of technology to be referred to:

(1) a technology which is used for originating the signal by a distributor;
(2) a technology which is used at the phase of the reception of the signal by the public; and
(3) a technology which is used in between the above two.

4.2.1. *Technology Used between Originating and Receiving the Signal*

Amongst these three possibilities, possibility (3) does not seem to be applicable to broadcasting. As explained in the previous section, public accessibility to satellite broadcasting was once the focus of discussion. The argument was that satellite broadcasting might not be broadcasting because the transmission was to a satellite and was not to the public. However, as explained above, the commentary[37] denied the idea of including intermediate means, namely, reception and transmission by a satellite. For broadcasting, the more important factors are the originating transmission and reception which is the ultimate purpose.

[37] 'Model Law Concerning the Protection of Performers, Producers of Phonograms and Broadcasting Organisations' [1974] *Copyright* 163, 170.

In order to consider possibility (3), terrestrial broadcasting using a relay station should also be kept in view. When terrestrial broadcasting uses a relay station, the signal is first transmitted to a relay station. Although it is the relay station that transmits the signal to the public, there seems to be no argument that terrestrial broadcasting using a relay station is not broadcasting because 'it is not a transmission to the public'. This appears to be further evidenced by the fact that what happens between transmission and reception is usually not taken into account when broadcasting is considered. Therefore, possibility (3) should not be adopted.

4.2.2. *Technology Used for Originating the Signal*

What would the position be if reference is made to where the signal originated in determining whether or not it falls within the definition of 'broadcasting'? If such reference is made, cable distribution which a cable distributor made by using a modulator to transmit a programme, would fall within the definition of 'broadcasting'. However, when the same cable distributor transmits a signal by receiving a satellite transmission or terrestrial broadcasting and the same audience receives the signal, that transmission would not be broadcasting but cable distribution.

For satellite broadcasting, if a programme is transmitted to an uplink station by cable, the satellite broadcasting becomes cable broadcasting. If the same programme is conveyed to the uplink station with a tape or transmitted by microwaves, that is broadcasting. Reference to the technology when the signal originated is, in this way, inappropriate for determining whether or not the signal transmission is broadcasting.

4.2.3. *Technology Used When the Signal Is Received*

Because reference to a technology used to originate the signal is not appropriate, there is no way other than referring to the technology used when the public receives the signal. However, this method of determination also causes a problem.

If the technology which is used to deliver a signal at the stage when the general public receives the signal is considered, wireless cable distribution becomes broadcasting. If a trunk cable branches into a distribution cable and wireless cable, transmission by a cable distributor is both cable distribution and broadcasting. Furthermore, if the reference to the technology used when the public receives the signal is used as a test of broadcasting, the question of whether or not the transmission of the signal is broadcasting cannot be determined until someone actually receives the signal.

4.3. The Real Problem

In view of these considerations, a definition based on a single technology, which the Rome Convention adopts, is no longer workable. However, if a definition based on a combination of the new technologies is attempted, it will be found that there are too many possible combinations. Further, the number of combinations is expected to keep on increasing as technology advances. If so, trying to keep basing a definition of broadcasting by reference to communication technologies seems to be unrealistic from the outset.

In fact, it is only teletext and Internet broadcasting, which are defined without referring to communication technology, that have not caused confusion with respect to their definitions. The reasons why these are not broadcasting are because teletext is not sounds or images and sounds and Internet broadcasting is not transmitted for public reception. For teletext and Internet broadcasting, reference to the definition of 'broadcasting' is made not to the part of the technical measure which is used for communication but to aspects as to what is to be communicated or to whom it is to be communicated. Perhaps 'broadcasting' should be defined in this way.

In any event, the definition of 'broadcasting' in the Rome Convention can be said to be of no practical use anymore.

5. Conclusion

As discussed above, it is generally considered that cable distribution, satellite broadcasting, teletext and Internet broadcasting are examples of communication technologies which were developed or become prevalent after the Rome Convention and have effects analogous to broadcasting. However, when they are closely examined, it is impossible to classify them simplistically into cable television, satellite broadcasting, teletext or Internet broadcasting since they are usually a combination of each other in reality.

The Rome Convention, as analysed in the previous Chapter, limits the extent and level of the protection it provides because of its rationale for protection and policy considerations to induce more participants. Due to this position, the Rome Convention has been regarded as providing insufficient protection. However, the matter no longer seems to be whether or not the protection is sufficient because the Rome Convention has already become incapable of determining the extent and level of protection. Where the signal is delivered by means of some combination of communication technologies, the Rome Convention cannot answer whether or not it is broadcasting. Despite having not been perceived clearly, this is the core of the matter

often expressed that the Rome Convention cannot cope with the advance in technologies.

Since the Rome Convention cannot cope with current technologies, WIPO commenced discussions to establish a new international convention to take over the role of protecting broadcasters' rights from the Rome Convention. In the following Chapter, the discussions held at WIPO for establishing a new instrument for protecting the rights of broadcasting organisations will be examined.

Chapter 5

Ongoing Discussions for the Reform of the International Regime

1. Introduction

As analysed in the previous Chapter, the Rome Convention can no longer work effectively in relation to the protection of the rights of broadcasting organisations. In light of this situation, a proposal to consider establishing a new convention was raised at WIPO and subsequently, discussions were commenced towards a new international instrument.

WIPO is the international organisation that administers intellectual property whose objectives are to promote the protection of intellectual property and administer international conventions relating to intellectual property.[1] WIPO was established by the Convention Establishing the World Intellectual

[1] Cordray M, 'WIPO and UNESCO', D'Amato A & Long D (eds), *International Intellectual Property Law*, (London, Kluwer Law, 1997) 222. See also Article 3 of the WIPO Convention. Professor Blakeney categorised the WIPO's activities into four kinds: registration; the promotion of inter-governmental co-operation in the administration of intellectual property rights; specialised programme activities; and dispute resolution facilities. See, Blakeney M, *Trade Related Aspects of Intellectual Property Rights: A Concise Guide to the TRIPS Agreement*, (London, Sweet & Maxwell, 1996) 25, [2.42].

Property Organisation (WIPO Convention),[2] which was concluded in 1967 and came into force in 1970. Although WIPO was established as an individual international organisation succeeding the United International Bureaux for the Protection of Intellectual Property (BIRPI), it later became a specialised agency of the United Nations by concluding an agreement for co-operation with the United Nations in 1974.[3]

The first occasion that the above proposal to consider the establishment of a new convention was raised, was the Committee of Experts on a Possible Protocol to the Berne Convention for the Protection of Literary and Artistic Works.[4] The proposal was accepted and resulted in the convening of the WIPO World Symposium on Broadcasting, New Communication Technology and Intellectual Property.[5] This Symposium is said to have played a decisive role in getting the review of the rights of broadcasting organisations put on the agenda to be discussed at the WIPO Standing Committee on Copyright and Related Rights,[6] which is working, inter alia, for the conclusion of a new international convention for the protection of the rights of broadcasting organisations.[7]

In this Chapter, discussions held at the foregoing Committee of Experts on a Possible Protocol to the Berne Convention for the Protection of Literary and Artistic Works, the WIPO World Symposium on Broadcasting, New Communication Technology and Intellectual Property and the WIPO Standing Committee on Copyright and Related Rights will be examined. Through the examination, the issues to be resolved to conclude a new convention for the protection of the broadcasters' rights will be clarified.

---

[2] See, 'Convention Establishing the World Intellectual Property Organisation', <http://www.wipo.int/treaties/en/convention/index.html>.

[3] Having become an organisation of the United Nations, WIPO can be financed through the United Nations Development Plan. See, Takakura S, *Chitekizaisan-housei to Kokusai-seisaku*, (Tokyo, Yuuhikaku, 2001) 99 [trans: *Recent Development of Multilateral Agreement on Intellectual Property Rights*]. However, 85% of WIPO's budget is self-financing. See, *WIPO General Information Brochure* at <http://www.wipo.int/about-wipo/en/gib.htm>.

[4] 'Committee of Experts on a Possible Protocol to the Berne Convention for the Protection of Literary and Artistic Works, First Session' (1992) *Copyright* 30, 42 and 44.

[5] WIPO, *WIPO World Symposium on Broadcasting, New Communication Technologies and Intellectual Property (Manila, 1997),* (WIPO Publication No. 757(E), Geneva, WIPO, 1998).

[6] See the statement of Mihály Ficsor, WIPO, *WIPO World Symposium on Broadcasting, New Communication Technologies and Intellectual Property (Manila, 1997)*, (WIPO Publication No. 757(E), Geneva, WIPO, 1998) 114–115.

[7] World Intellectual Property Organisations, 'Standing Committee on Copyright and Related Rights, First Session, Report' (1998), SCCR/1/9.

2. Committee of Experts on a Possible Protocol to the Berne Convention

As mentioned above, establishing a new convention for protecting the rights of broadcasting organisations was first proposed at the Committee of Experts on a Possible Protocol to the Berne Convention for the Protection of Literary and Artistic Works by several delegations.[8] The Committee of Experts on a Possible Protocol to the Berne Convention for the Protection of Literary and Artistic Works was convened to consider updating the Berne Convention.

The Berne Convention had been upgraded approximately every twenty years and Consideration of upgrading the Convention by the Committee was consistent with this ordinary practice. What made the Committee fall outside this normal practice was that the upgrade was not supposed to be made by means of revising the Berne Convention but by way of creating a separate instrument[9] apart from the Berne Convention. This was because revision of the Berne Convention requires unanimous agreement by all member countries and this seemed to be infeasible because of conflicts between developed and developing countries.[10]

Although the Committee's initial intention was to update the rights in works in order to accord with modern practice,[11] the countries that took a position on the common law approach requested that the rights in phonograms as well as the rights in works should also be covered by the proposed protocol.[12] This request was taken up and another committee was established to consider the rights of phonograms and also performers.[13] This committee's work resulted in the WPPT.

---

[8] See the preface by Dr Kamil Idris, the Director-General of WIPO, WIPO, *WIPO World Symposium on Broadcasting, New Communication Technologies and Intellectual Property (Manila, 1997),* (WIPO Publication No. 757(E), Geneva, WIPO, 1998) i.

[9] A form of a separate instrument which was considered at first was a protocol to the Berne Convention. See, for detailed account of a protocol, Ricketson S & Creswell C, *The Law of Intellectual Property: Copyright, Designs and Confidential Information*, (2nd ed, Sydney, Lawbook Co., 2001) [16.235].

[10] Sakka F, *Shoukai:Chosakuken-hou*, (2nd ed, Tokyo, Gyousei, 2002) 535 [trans: *Explication: Copyright Law*].

[11] Bently L & Sherman B, *Intellectual Property Law*, (Oxford, Oxford University Press, 2001) 39.

[12] Seven delegations were in favour of the inclusion of phonograms and eight delegations opposed. World Intellectual Property Organisation, 'Committee of Experts on Model Provisions for Legislation in the Field of Copyright, First Session, (Geneva, February 20 to March 3, 1989)', [1989] *Copyright* 146, 147–149.

[13] 'Questions concerning a Possible Protocol to the Berne Convention' [1992] *Copyright* 182.

As the Preamble mentions, the WPPT is to introduce international rules to cope with the development of information and communication technologies.[14] Since the WPPT is an update of existing rights to adapt to technological development,[15] the rights of broadcasting organisations could have been involved. In fact, it was in the course of the discussions at the committee that the possibility of including the rights of broadcasting organisations was mentioned.[16] However, the rights of broadcasting organisations were not brought into the WPPT.[17]

3. WIPO World Symposium on Broadcasting, New Communication Technologies and Intellectual Property

Although it was decided that new rights for broadcasting organisations were not to be considered by the committee preparing the WPPT, 'the Government [of the Philippines] invited WIPO to organise a world symposium in Manila on the rights of broadcasting organisations'.[18] At the Symposium, the current problems in relation to protecting broadcasting were discussed by the relevant parties.[19] As will be discussed below, this Symposium did not reach any particular conclusions.[20] However, the Symposium played a role as a brainstorming session to raise all of the issues that need to be considered in relation to the rights of broadcasting organisations.

The WIPO World Symposium was comprised of six panel discussions: Broadcasters as Owners of Neighbouring Rights; The Legal Status of Broadcast Programmes at the Borderline of Copyright and Neighbouring Rights; Broadcasters as 'Users'; Convergence of Communication Technologies;

---

[14] Preamble of the WPPT.

[15] See the statement by the delegations of Hungary, France, Japan, Israel and the Netherlands in the Report adopted by the Committee: World Intellectual Property Organisation, 'Committee of Experts on a Possible Protocol to the Berne Convention for the Protection of Literary and Artistic Works, First Session' (1992) *Copyright* 30, 42 and 44.

[16] See the suggestion by the delegations of Sweden and Norway in World Intellectual Property Organisation, 'Committee of Experts on a Possible Protocol to the Berne Convention for the Protection of Literary and Artistic Works, First Session' (1992) *Copyright* 30, 45.

[17] See further, Reinbothe J, Martin-Prat M & von Lewinski S, 'The New WIPO Treaties: A First Résumé' [1997] *European Intellectual Property Review* 171, 171.

[18] WIPO, *WIPO World Symposium on Broadcasting, New Communication Technologies and Intellectual Property (Manila, 1997),* (WIPO Publication No. 757(E), Geneva, WIPO, 1998) i.

[19] See the 'Program', WIPO, *WIPO World Symposium on Broadcasting, New Communication Technologies and Intellectual Property (Manila, 1997),* (WIPO Publication No. 757(E), Geneva, WIPO, 1998) 1–6.

[20] See, 'Sixth Panel Discussion: Concluding Debate', WIPO, *WIPO World Symposium on Broadcasting, New Communication Technologies and Intellectual Property (Manila, 1997),* (WIPO Publication No. 757(E), Geneva, WIPO, 1998) 103–115.

Terrestrial Broadcasting, Satellites Broadcasting and Communication to the Public by Cable; Digital Transmissions on the Internet and Similar Networks; and Concluding Debate.[21]

3.1. First Panel Discussion: Broadcasters as Owners of Neighbouring Rights

The panellists of this session were comprised of the representatives of broadcasting organisations.[22] In this session, the issues that broadcasting organisations had been facing were discussed.[23]

3.1.1. *Gap between Modern Technology and That at the Time the Rome Convention Was Concluded*

The panellists of this session considered that the problems which broadcasting organisations have been facing were caused by the gap in technology between what the Rome Convention recognises and current reality. This gap was regarded as the cause of piracy. The panel found the following gap.

When the Rome Convention was adopted, there were:

- no facilities to fix or reproduce broadcasts;[24]

  Because there were no facilities for fixation or reproduction, it was quite difficult to rebroadcast a broadcast at a different time from the original broadcasting by using a recorded broadcast. Therefore the Rome Convention does not recognise the right of deferred broadcasting.

- cable distribution had not yet been developed;[25]

  Because cable distributors were not prevalent at that time, the rights of cable distributors were not taken into account by the Rome Convention. The Rome Convention also does not recognise the right of cable distribution for broadcasting organisations.

---

[21] 'Program', WIPO, *WIPO World Symposium on Broadcasting, New Communication Technologies and Intellectual Property (Manila, 1997),* (WIPO Publication No. 757(E), Geneva, WIPO, 1998) 1–6.

[22] 'Program', WIPO, *WIPO World Symposium on Broadcasting, New Communication Technologies and Intellectual Property (Manila, 1997),* (WIPO Publication No. 757(E), Geneva, WIPO, 1998) 1.

[23] 'First Panel Discussion: Broadcasters as Owners of Neighbouring Rights', WIPO, *WIPO World Symposium on Broadcasting, New Communication Technologies and Intellectual Property (Manila, 1997),* (WIPO Publication No. 757(E), Geneva, WIPO, 1998) 15–31.

[24] See the remark of Werner Rumphorst, WIPO, *WIPO World Symposium on Broadcasting, New Communication Technologies and Intellectual Property (Manila, 1997),* (WIPO Publication No. 757(E), Geneva, WIPO, 1998) 19.

[25] See the remark of Werner Rumphorst, WIPO, *WIPO World Symposium on Broadcasting, New Communication Technologies and Intellectual Property (Manila, 1997),* (WIPO Publication No. 757(E), Geneva, WIPO, 1998) 19.

- no satellite broadcasting;[26]

  Because satellites had never been used for broadcasting before the Rome Convention was concluded, the Convention does not provide clear protection for satellite broadcasting.[27]

- no encrypted broadcasting;[28]

  The Rome Convention does not recognise the right of decoding encrypted signals because encryption technology had not arrived when the Convention was established.

- television sets were not widely distributed.[29]

  Since television was not common when the Rome Convention was adopted, the Convention did not envisage a situation other than that a broadcast was publicly performed at the place where people could access the broadcast only on payment. Hence, the Rome Convention did not recognise the right of communication to the public which includes the communication to the public without payment.

Because of the above status of technology at the time of conclusion of the Rome Convention, there currently are gaps between modern technology and the technology which the Rome Convention recognises.

3.1.2. *Listed Rights Which Should Be Recognised for Broadcasters*

To fill the above gaps, the panellists for this discussion listed the exclusive rights which should be recognised for broadcasting organisations.[30] These are the rights of:

- rebroadcasting including deferred broadcasting;
- cable distribution including deferred cable distribution;
- making available by wire or wireless means;
- communication to the public not only at premises where people can access on payment of an entrance fee but also elsewhere;

---

[26] See the remark of Werner Rumphorst, WIPO, *WIPO World Symposium on Broadcasting, New Communication Technologies and Intellectual Property (Manila, 1997),* (WIPO Publication No. 757(E), Geneva, WIPO, 1998) 19.

[27] The Rome Convention, however, can be interpreted to provide protection for satellite broadcasting. See Chapter Four.

[28] See the remark of Tom Rivers, WIPO, *WIPO World Symposium on Broadcasting, New Communication Technologies and Intellectual Property (Manila, 1997),* (WIPO Publication No. 757(E), Geneva, WIPO, 1998) 24.

[29] See the remark of Linda Nai, WIPO, *WIPO World Symposium on Broadcasting, New Communication Technologies and Intellectual Property (Manila, 1997),* (WIPO Publication No. 757(E), Geneva, WIPO, 1998) 31.

[30] See the statement of Jaime J. Yambao, WIPO, *WIPO World Symposium on Broadcasting, New Communication Technologies and Intellectual Property (Manila, 1997),* (WIPO Publication No. 757(E), Geneva, WIPO, 1998) 30.

- fixation;
- reproduction of a fixation;
- distribution of a fixation;
- reproduction or distribution of legally made fixations;
- making a still photograph;
- reproduction or distribution of a still photograph;
- decoding an encrypted broadcast;
- importation and distribution of a fixation made without authorisation in a country where there is no protection on such a fixation; and
- reproduction of a fixation made without authorisation in a country where there is no protection for such a reproduction.

3.1.3. *Re-examination of the Findings of This Panel*

Where the rights listed above are referred to, it will be found that they do not exactly correspond with the gap between modern technology and the rights that were considered by the panellists to be recognised for broadcasting organisations.

Amongst the listed rights, the rights that are not recognised under the Rome Convention are the rights of: deferred broadcasting; cable distribution; deferred cable distribution; making available by wire or wireless means; communication to the public at premises other than those which people can access on payment of an entrance fee; distribution of a fixation; making a still photograph; reproduction or distribution of a still photograph; decoding an encrypted broadcast; importation and distribution of a fixation made without authorisation in a country where there is no protection in respect of such a fixation; and reproduction of a fixation made without authorisation in a country where there is no protection regarding such a reproduction.

As explained above in relation to the gap between modern technology and the technology at the time of the Rome Convention, deferred broadcasting and deferred cable distribution are the rights which became required because facilities to fix or reproduce broadcasts appeared. The facilities to fix or reproduce broadcasts also require the granting of the rights of: making available by wire or wireless means; distribution of a fixation, making a still photograph; reproduction or distribution of a still photograph; importation and distribution of a fixation made without authorisation in a country where there is no protection in respect of such a fixation; and reproduction of a fixation made without authorisation in a country where there is no protection regarding such a reproduction. Rights of cable distribution and decoding an encrypted broadcast are the rights that became needed because of the prevalence of cable distribution and the availability of signal decryption.

However, extension of the coverage of the right of communication to the public from television broadcasts to broadcasts, which includes both television

and sound broadcasts, cannot be for filling the gap in technology because radio broadcasting was not invented after the Rome Convention. Rights of: importation and distribution and reproduction of a fixation without authorisation in a country where there is no protection over such a fixation or reproduction, are not entirely relevant to the development of technology because providing these rights effectively work for extending the jurisdiction to offshore. Although extension of jurisdiction came under examination because of piracy caused outside the jurisdiction (and modern technology surely helps in actualising the piracy), the extension of jurisdiction itself is still different from the technological gap.

In this panel's view, the problem of the protection of broadcasters' rights can be summarised as the gap between newly developed technology and the provisions of the Rome Convention. Therefore, the need to fill the gap between modern technology and the rights recognised for broadcasting organisations was confirmed at this panel.[31] However, when the listed rights are closely examined, it is found that the rights listed there are more than the ones that correspond to recently developed technologies, hence this panel's proposal of updating broadcasters' rights cannot be for just filling the technology gap and the Rome Convention provisions. The true reason for upgrading broadcasters' rights seems to be, contrary to the conclusions reached at this session, more than just adapting broadcasters' rights to new technology.

3.2. Second Panel Discussion: The Legal Status of Broadcast Programmes at the Borderline of Copyright and Neighbouring Rights

The members of the panel were government representatives.[32] The panel members explained the need for legislation to protect broadcasts in their respective countries.[33]

3.2.1. *Two Approaches to the Protection of Broadcasters' Rights*

This panel clarified the existence of two different approaches towards the protection of broadcasters' rights. As explained in Chapter One, there are, in

---

[31] See the statement of Jaime J. Yambao, WIPO, *WIPO World Symposium on Broadcasting, New Communication Technologies and Intellectual Property (Manila, 1997),* (WIPO Publication No. 757(E), Geneva, WIPO, 1998) 30.

[32] See, WIPO, *WIPO World Symposium on Broadcasting, New Communication Technologies and Intellectual Property (Manila, 1997),* (WIPO Publication No. 757(E), Geneva, WIPO, 1998) 47.

[33] Hyuuga H & Moriya M, 'WIPO Shimpojiumu ni Sanka shite' [6/1997] *Kopiraito* 11, 14 [trans: 'The Discussion at the WIPO World Symposium' in *Copyright*]. See also, WIPO, *WIPO World Symposium on Broadcasting, New Communication Technologies and Intellectual Property (Manila, 1997),* (WIPO Publication No. 757(E), Geneva, WIPO, 1998) 34–46.

general, two approaches, the copyright and continental approaches. The copyright approach recognises copyright in broadcasts while the continental approach recognises neighbouring rights for broadcasting organisations. Although there is a difference between the two approaches as to whether copyright or neighbouring rights are recognised, both approaches recognise rights for broadcasters that broadcast. The programmes that are broadcast do not necessarily have to be produced by the broadcasting organisation.

3.2.2. *U.S. Approach for the Protection of Broadcasters' Rights*

The discussion of this panel revealed a third approach concerning the protection of the rights of broadcasting organisations. This third approach is adopted by the United States.[34] In the United States, as is the case in many other-common law countries,[35] the *Copyright Act* does not contain neighbouring rights provisions. The sole protection which the *Copyright Act* provides is copyright.

In order to obtain copyright protection, a work has to be an embodied expression in a tangible form.[36] A work also has to demonstrate originality.[37] Where a work consisting of sounds, images, or both, is fixed concurrently when it is transmitted, the work is deemed to be fixed and can be protected by copyright.[38] Hence a broadcast can be protected by copyright provided that the broadcast is fixed when it is broadcast and also satisfies the originality test.[39]

---

[34] See the remark of Peter Fowler, WIPO, *WIPO World Symposium on Broadcasting, New Communication Technologies and Intellectual Property (Manila, 1997),* (WIPO Publication No. 757(E), Geneva, WIPO, 1998) 36–37.

[35] See Chapter One.

[36] Eight categories of protected subject matter (literary works, graphic works, audio-visual works, sound recordings and architectural works) (s.102) are examples of protected works. Protected works are not limited to them. See: Miller A & Davis M, *Intellectual Property: Patents, Trademarks, and Copyright*, (3rd ed., MN, U.S.A., West Group, 2000) 294; and Geller P, *International Copyright Law and Practice Vol. 2*, (Matthew Bender, 2004), USA-19.

[37] See: Miller A & Davis M, *Intellectual Property: Patents, Trademarks, and Copyright*, (3rd ed., MN, U.S.A., West Group, 2000) 294; and Geller P, *International Copyright Law and Practice Vol. 2*, (Matthew Bender, 2004), US-17.

[38] See paragraph 39, World Intellectual Property Organisation, 'Existing International, Regional and National Legislation Concerning the Protection of the Rights of Broadcasting: Memorandum Prepared by the International Bureau' (1998), SCCR/1/3.

[39] Miller A & Davis M, *Intellectual Property: Patents, Trademarks, and Copyright*, (3rd ed., MN, U.S.A., West Group, 2000) 295. See further Geller P, *International Copyright Law and Practice Vol. 2*, (Matthew Bender, 2004), US-24–25.

Minimal creativity is required for the broadcast to be original.[40] This means that a broadcasting organisation will be protected only when it is a creator of a broadcasting programme. The rights of a broadcasting organisation as a party that transmits broadcasting signals are not protected in the United States.

The United States does not recognise the social demand for protecting broadcasting organisations as a disseminator of a programme. Accordingly, it can be said that the United States does not take the position of recognising the social-oriented rationale. It can also be said that the United States does not recognise the creator-oriented rationale because it does not grant protection for broadcasters by recognising the labour of a broadcaster as a party being engaged in broadcasting.

3.2.3. *Re-examination of the Findings of This Panel*

In relation to the issue of the international harmonisation of copyright, the collision between the common law and the civil law approaches is often mentioned. However, this panel clarified that there is the third approach, namely, denying both the creator-oriented and social-oriented approaches and not recognising protection for broadcasters' rights.

Although this approach, which is taken by the United States, was advocated eagerly by the delegate of the United States, it made little impression on the panel. This reaction of the panel can be explained by applying the analysis of Professor Andrew Christie in his article regarding copyright reform following the development and convergence of information and communication technologies.[41]

Professor Christie, in relation to the possibility that nothing would done as regards copyright law reform, stated that:

> 'This is not, in fact, a practical option. Even if individual countries like Australia or the United Kingdom do not take action other countries such as the United States and Japan almost certainly will.[42] ... It seems clear that any country which chooses to do nothing in

[40] See the explanation by Peter Fowler about the U.S. legal position including the well-known *Feist* case (*Feist Publications v Rural Telephone Service,* 449 US 340 (1991)), WIPO, *WIPO World Symposium on Broadcasting, New Communication Technologies and Intellectual Property (Manila, 1997),* (WIPO Publication No. 757(E), Geneva, WIPO, 1998) 37. See, for general explanation: Miller A & Davis M, *Intellectual Property: Patents, Trademarks, and Copyright*, (3rd ed., MN, U.S.A., West Group, 2000) 299; and Geller P, *International Copyright Law and Practice Vol. 2*, (Matthew Bender, 2004), US-29.

[41] Christie A, 'Towards a New Copyright for the New Information Age' (1995) 6 *Australian Intellectual Property Journal* 145.

[42] Professor Christie's basis for this opinion is, however, wrong. Professor Christie, in order to justify this view, pointed out that 'the latter two countries [U.S. and Japan] have last year

> relation to the reform of its copyright law will find, in due course, that all the necessary changes have been decided for it.'[43]

In the case of protecting the rights of broadcasting organisations, effectively the only individual country which wishes to take no action is the United States. Other countries are protecting broadcasters' rights and will conclude an international instrument to further their protection. In these circumstances, it seems, even just for the purposes of argument, impractical to take into account the approach of not recognising protection for broadcasters' rights. It thus seems appropriate to disregard this third approach to the rights of broadcasting organisations.

3.3. Third Panel Discussion: Broadcasters as 'Users'

The panellists of this session comprised delegations of both broadcasting organisations, and authors and other rights owners.[44] The topic of this panel was 'Broadcasters as "Users"'.

The topic, 'Broadcasters as "Users"', is not relevant to the rights of broadcasting organisations in intellectual property legislation as clarified in Chapter Two.[45] However, when broadcasting organisations use works for their broadcasting, it is not impossible, as explained below, to regard the use as the exercise of their rights. These rights come to the fore only when broadcasting organisations use the rights of other parties. Therefore this topic might have been included for the sake of completeness to discuss the rights exercised by broadcasting organisations.

Nevertheless, this topic is irrelevant to the rights of broadcasting organisations, the inclusion of which was mentioned by the Committee of Experts that was considering a new international instrument. The focuses of this panel were two: the ephemeral right and the collective administration of rights.

---

released major discussion papers dealing with possible reform initiatives' and referred to a paper, Institute of Intellectual Property, *Exposure '94: A Proposal of the New Rule on Intellectual Property for Multimedia*, (Tokyo, Institute of Intellectual Property, 1994). This paper has nothing to do with the Japanese Government and is not the one that should be accorded the same weight as the U.S. Green Paper.

[43] Christie A, 'Towards a New Copyright for the New Information Age' (1995) 6 *Australian Intellectual Property Journal* 145, 153.

[44] See, WIPO, *WIPO World Symposium on Broadcasting, New Communication Technologies and Intellectual Property (Manila, 1997),* (WIPO Publication No. 757(E), Geneva, WIPO, 1998) 47.

[45] In fact, the Japanese broadcasters that attended the Symposium questioned the topic. See, Hyuuga H & Moriya M, 'WIPO Shimpojiumu ni Sanka shite' [6/1997] *Kopiraito* 11, 18 [trans: 'The Discussion at the WIPO World Symposium' in *Copyright*].

3.3.1. *Ephemeral Right*

The ephemeral right is a right that allows a broadcasting organisation to temporarily reproduce or fix a work in relation to which the broadcaster has obtained the authorisation for broadcasting, in order to conform it to broadcasting. Although it is called an ephemeral right, it is an exception to copyright which is recognised in a work rather than a right of a broadcaster.

The Berne Convention for the Protection of Literary and Artistic Works (Berne Convention) provides for the exclusive right of reproducing literary and artistic works (Art. 9(1)).[46] However, in special cases, the Berne Convention allows member countries to provide exceptions to this right on the condition that the reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author (Art. 9(2)). The Berne Convention also left it open to member countries to determine whether or not to regulate ephemeral recordings made by a broadcasting organisation by means of its own facilities and used for its own broadcasts (Art. 11bis(3)). Accordingly, it is for each country to decide whether or not to provide for an ephemeral right.

This flexibility has caused disputes because rights owners whose literary and artistic works are used for broadcasting are opposed to the provision of an ephemeral right. The reason for this is that their right of reproduction will effectively be restricted automatically when rights owners permit the broadcast of their works by broadcasting organisations. Of course, broadcasting organisations have insisted on the ephemeral right because they will be inconvenienced in making broadcasts if the right is not granted.

The Berne Convention explicitly indicates that permission for ephemeral recording is not included in a permission to broadcast by stating that 'In the absence of any contrary stipulation, permission granted in accordance with paragraph (1) of this Article shall not imply permission to record, by means of instruments recording sounds or images, the work broadcast.' (Art. 11bis(3)) However, it does not seem to be reasonable that the right of broadcasting does not encompass the right to record works temporarily for broadcasting in the circumstance where it is common for works to be recorded or reproduced temporarily for broadcasting. If the recording or reproduction cannot be allowed without obtaining a separate permission for reproduction apart from that of broadcasting where there are separate rights owners in reproduction and broadcasting, the owner of the reproduction right would virtually get the right to decide the exercise of the broadcasting right. This does not appear to have any justification.

---

[46] Reproduction includes making a sound or visual recording (Art. 9(3) of the Berne Convention).

In any event, however, the ephemeral right is an exception to the rights of owners of literary and artistic works. This issue should be considered in the context of an appropriate construction of the rights for owners of literary and artistic works rather than that relating to broadcasters' rights.

3.3.2. *Collective Administration of Rights*

Another issue was the collective administration of rights. The collective administration of rights means that a rights management organisation authorises the use of literary and artistic works and collects fees for such use on behalf of rights owners. For rights owners, rights management organisations are more effective in negotiating and monitoring the use of their works.[47] For broadcasters, as users of works, particularly as heavy users, collective administration is convenient because they can avoid the time and cost in tracking down individual owners.[48] The collective administration of rights has been undertaken for these reasons. As is clear from the above, this issue, collective administration of rights, is purely a matter of convenience and not that of rights themselves.

The collective administration of rights enables the owners of works to obtain fees for the use of their works without devoting time to monitoring the use of their works and the actual collection of fees. On the other hand, its nature is such as to make owners of works unable to determine whether or not their authorisation has been given for the use of their works in individual cases. Therefore, from the broadcasters' point of view, the collective administration of rights could be regarded as the exercise of their right to use whichever works they wish to use subject to the payment of fees. For the rights owners of works, the collective administration of rights is, like the ephemeral right, a form of limitation on their rights.

Nowadays, technological advancement has made the development of a rights management database practicable. Because of this, the choice of either source licensing – that is, obtaining the right which is needed for a specific programme by contacting directly an individual right owner – or collective administration was proposed to be provided under a new instrument at this panel discussion.[49] If source licensing is actualised, broadcasting organisations will no longer be

---

[47] Turner C, 'Collective Administration of Rights', Christie A & Ricketson S (eds), *Intellectual Property, 23 Laws of Australia* (NSW, LBC, 1996) [544].

[48] Ricketson S & Creswell C, *The Law of Intellectual Property: Copyright, Designs & Confidential Information*, (2nd ed, Lawbook Co., 2001–) [15.0].

[49] See the remark of Benjamin Ivins, WIPO, *WIPO World Symposium on Broadcasting, New Communication Technologies and Intellectual Property (Manila, 1997),* (WIPO Publication No. 757(E), Geneva, WIPO, 1998) 62.

able to use any works without obtaining the individual authorisation from each owner of the work.

In this panel, broadcasting organisations did not object to source licensing probably because there was no justification for maintaining the current system for the collective administration of rights as it was established for mere convenience of both authors and users and has been maintained as a compromise for authors abandoning the exercise of selecting a user for the sake of convenience. In any event, the collective administration of rights is not part of the rights of broadcasting organisations themselves. The discussion about collective administration of rights might be better held in the context of database construction.[50]

3.3.3. *Re-examination of the Findings of This Panel*

In summary, this panel concentrated on criticising broadcasting organisations as they did not respect rights other than their own.[51] Major focuses of criticism are the rights owners' claim of the ephemeral right and dissatisfaction with the current system of collective administration of rights.

However, as discussed above, the ephemeral right should be considered in relation to the broadcasting right as one of the rights for literary and artistic works. Similarly, the issue of the collective administration of rights should be considered as a matter concerning database construction. Accordingly, the rights of broadcasting organisations as users are not the ones that are examined in the preparation of a new instrument for protecting the rights of broadcasting organisations.

3.4. Fourth Panel Discussion: Convergence of Communication Technologies: Terrestrial Broadcasting and Communication to the Public by Cable

This panel discussed:

(i) whether satellite broadcasting is broadcasting;
(ii) whether the right of cable distribution should be recognised for broadcasting organisations; and

---

[50] See, for an overview discussion concerning the possibility of constructing such database, Port K, 'Application of ACPA and Its Problems', Matsuo K & Satoh K, *Domain Name Dispute*, (Tokyo, Koubundou, 2001) 131.

[51] See, WIPO, *WIPO World Symposium on Broadcasting, New Communication Technologies and Intellectual Property (Manila, 1997)*, (WIPO Publication No. 757(E), Geneva, WIPO, 1998) 49–66.

(iii) whether cable originators should have rights in a cable-originated programme.[52] The panellists comprised the delegations of broadcasting organisations, cable distributors and Internet related firms.[53]

3.4.1. *Protection of Satellite Broadcasting*

As for satellite broadcasting, the panellists unanimously agreed that it should be considered as broadcasting although the Rome Convention itself was totally silent about this.[54] Because regional legislation, such as the EC Directives or national laws of countries, had included satellite broadcasting in broadcasting, it seemed to be considered that there was no problem in protecting satellite broadcasting.[55]

3.4.2. *Right of Cable Distribution*

The right of cable distribution for broadcasting organisations was supported by delegations of broadcasting organisations because the cable distribution industry became too large to ignore their free riding on broadcasting organisations after the Rome Convention was adopted.[56] The delegation from the cable industry questioned the need for the right since broadcasting organisations usually held the right of cable distribution of the works included in their broadcasts.[57]

However, broadcasters do not necessarily have the rights to works that are broadcast. It is rather in such a situation where broadcasting organisations do not hold the rights of works included in their broadcasts that the protection of broadcasting organisations is effective. Therefore, the counterargument that the right of cable distribution is not necessary for broadcasters is not persuasive.

---

[52] WIPO, *WIPO World Symposium on Broadcasting, New Communication Technologies and Intellectual Property (Manila, 1997),* (WIPO Publication No. 757(E), Geneva, WIPO, 1998) 69.

[53] WIPO, *WIPO World Symposium on Broadcasting, New Communication Technologies and Intellectual Property (Manila, 1997),* (WIPO Publication No. 757(E), Geneva, WIPO, 1998) 68.

[54] However, the Rome Convention can be interpreted to include satellite broadcasting in broadcasting. See Chapter Four.

[55] See further Chapter Three.

[56] WIPO, *WIPO World Symposium on Broadcasting, New Communication Technologies and Intellectual Property (Manila, 1997),* (WIPO Publication No. 757(E), Geneva, WIPO, 1998) 76.

[57] See the remark of Peter Kokken, WIPO, *WIPO World Symposium on Broadcasting, New Communication Technologies and Intellectual Property (Manila, 1997),* (WIPO Publication No. 757(E), Geneva, WIPO, 1998) 75.

3.4.3. *Protection of Cable Distribution*

In relation to the question of whether or not cable distributors should have the same rights as broadcasting organisations, a panellist asked what a cable-originated programme was.[58] As discussed in Chapter Four in relation to the reality of modern technology, it is no longer feasible to define a cable-originated programme with transmission technology. Not only a cable-originated programme but also cable distribution cannot be defined.

3.4.4. *Re-examination of the Findings of This Panel*

At this panel discussion, the dominant opinions were that satellite broadcasting should be protected as broadcasting and the right of cable distribution should be included in the rights of broadcasting organisations. However, questions were also raised as to whether broadcasters need the cable distribution right or even what cable distribution was. Although the panel did not consider what satellite broadcasting was, it is difficult to define satellite broadcasting as well as cable distribution.[59]

The finding of this panel was confined to a general principle that the Rome Convention could no longer cope with modern technology. The real issue of this general principle was, however, more specific as analysed in Chapter Four.

3.5. Fifth Panel Discussion: Digital Transmissions on the Internet and Similar Networks

The members of this panel were the delegations of broadcasting organisations, cable distributors, Internet service providers, performers and authors including phonogram producers and the software industry.[60] The topics of this session, like the Third Session, were not the rights of broadcasting organisations. However, digital transmission on the Internet has been one of the biggest concerns for broadcasters in relation to protecting their rights on broadcasting. This panel seems to have been set up as these topics were not avoidable when considering the protection of the rights of broadcasting organisations.

---

[58] See, the remark of Peter Kokken, WIPO, *WIPO World Symposium on Broadcasting, New Communication Technologies and Intellectual Property (Manila, 1997),* (WIPO Publication No. 757(E), Geneva, WIPO, 1998) 75.

[59] See Chapter Four.

[60] WIPO, *WIPO World Symposium on Broadcasting, New Communication Technologies and Intellectual Property (Manila, 1997),* (WIPO Publication No. 757(E), Geneva, WIPO, 1998) 84.

The panel discussed mainly two topics,

(i) whether or not the Internet requires special control, and
(ii) whether Internet Service Providers have liability for contents which are put on the Internet through them.

3.5.1. *Special Control over the Internet*

The need for special control over the Internet was supported by the opinions that the Internet had a world-wide reach and was different from local retransmission and that digital transmission allowed more piracy and theft than traditional analogue communication.[61] One of the opposing opinions was that short wave radio, like the Internet, had reached multiple countries, therefore a world-wide reach could not be a sufficient reason to treat the Internet in a special manner. There was also a question as to why only the Internet required special control even though copyright protection had begun recently.[62]

3.5.2. *Liability of Internet Service Providers*

As to the liability of Internet Service Providers, it was remarked that Internet Service Providers should be liable to some extent for the contents that the Internet Service Providers enabled to be transmitted.[63] Another comment was that the Internet should be bound by all the laws in the world because there had been no international rule of applicable law concerning the Internet.[64] However, as there has been no harmonisation of laws to date, it seems unlikely that an Internet transmission could satisfy all laws when the transmission is made. If compliance with all the laws of the world is required for the contents of an Internet transmission and liability for the contents is incurred by Internet Service Providers, the services of Internet Service Providers would seem to be unable to be maintained.

---

[61] See the remark of Lewis Flacks, WIPO, *WIPO World Symposium on Broadcasting, New Communication Technologies and Intellectual Property (Manila, 1997),* (WIPO Publication No. 757(E), Geneva, WIPO, 1998) 98.

[62] See the remark of Peter Harter, WIPO, *WIPO World Symposium on Broadcasting, New Communication Technologies and Intellectual Property (Manila, 1997),* (WIPO Publication No. 757(E), Geneva, WIPO, 1998) 98.

[63] See the remarks of Andre Chaubeau and Peter Harter, WIPO, *WIPO World Symposium on Broadcasting, New Communication Technologies and Intellectual Property (Manila, 1997),* (WIPO Publication No. 757(E), Geneva, WIPO, 1998) 90.

[64] See the remark of Benjamin Ivins, WIPO, *WIPO World Symposium on Broadcasting, New Communication Technologies and Intellectual Property (Manila, 1997),* (WIPO Publication No. 757(E), Geneva, WIPO, 1998) 89.

3.5.3. *Control by Market Dynamics*

Through the discussions, the opinion was repeatedly expressed that the Internet would need more time to become prevalent[65] and most of the problems regarding the Internet, such as the fees for works or broadcasts to be transmitted by the Internet and the method of collecting such fees, would be resolved by market dynamics.[66]

In fact, the Internet can accommodate market dynamics well in the sense that it does not require large capital investment at first where a large number of accesses will not be expected. Investment can be increased as the size of the audience grows. Broadcasting, on the other hand, requires a considerable amount of capital investment at the very beginning before a broadcaster can expect sufficient audiences and income because the facilities and equipment that are needed for broadcasting is fixed regardless of the size of the audience.

3.5.4. *Re-examination of the Findings of This Panel*

This panel considered that it was premature to make a decision regarding the problems of the Internet, namely whether or not the Internet should be subject to some control and whether or not Internet Service Providers should be liable for contents that the Internet Service Providers enabled to be transmitted. The reason for this was that these problems were likely to be resolved by market dynamics.

The Internet certainly appears to have the capacity to adapt to market dynamics as discussed above. This characteristic of the Internet seems to provide sufficient justification to grant protection for broadcasting organisations but not for Internet Service Providers. Contrary to the initial purpose of setting up this panel, the panel did not suggest any reason for control over the Internet or to impose liability on Internet Service Providers. However, it can be said that the panel clarified the difference between Internet Service Providers and broadcasting organisations which can justify the different treatment between the two.

---

[65] See the remark of Peter Harter, WIPO, *WIPO World Symposium on Broadcasting, New Communication Technologies and Intellectual Property (Manila, 1997),* (WIPO Publication No. 757(E), Geneva, WIPO, 1998) 87.

[66] See the remark of Lewis Fracks, WIPO, *WIPO World Symposium on Broadcasting, New Communication Technologies and Intellectual Property (Manila, 1997),* (WIPO Publication No. 757(E), Geneva, WIPO, 1998) 98.

3.6. Sixth Panel Discussion: Concluding Debate

The panellists of this session comprised the same government officials as the second panel discussion.[67] In this panel, each panellist stated their position concerning the new international norm for protecting broadcasters' rights.

All agreed that there was a need for further discussion on this issue and also a need to harmonise national legislation in this regard.[68] The moderator, the Assistant Director-General of WIPO, concluded that he would recommend that the new Director-General should continue the discussion.[69]

3.7. Issues Raised at the WIPO World Symposium

Through the re-examination of the findings of each panel, the discussions held at the WIPO World Symposium can be evaluated as follows.

First, the WIPO World Symposium clarified that the world trend is in favour of upgrading the rights of broadcasting organisations. However, secondly, the reason for updating broadcasters' rights is not, in fact, limited to technological developments after the Rome Convention. Thirdly, there are three approaches to the protection of the rights of broadcasting organisations, namely, the creator-oriented and social-oriented approaches and no protection, the third of which is negligible. Fourthly, issues of ephemeral right and collective administration of rights should be considered separately from broadcasters' rights. Fifthly, 'broadcasts' need to be re-defined. Sixthly, Internet Service Providers are not broadcasting organisations because Internet Service Providers are not required to undertake large-scale investment.

As was clarified above, the issues that should be considered in order to establish a new treaty for broadcasting organisations can be reduced to the definition of 'broadcasts' for the purpose of upgrading the protection of the rights of broadcasting organisations in the light of two approaches to the protection. In other words, the questions to be answered are: what is broadcasting; and why should it be protected? It should be repeated that the reason for updating the protection cannot merely be technological development.

---

67 WIPO, *WIPO World Symposium on Broadcasting, New Communication Technologies and Intellectual Property (Manila, 1997),* (WIPO Publication No. 757(E), Geneva, WIPO, 1998) 104.

68 See the comment of Mihály Ficsor, WIPO, *WIPO World Symposium on Broadcasting, New Communication Technologies and Intellectual Property (Manila, 1997),* (WIPO Publication No. 757(E), Geneva, WIPO, 1998) 114.

69 WIPO, *WIPO World Symposium on Broadcasting, New Communication Technologies and Intellectual Property (Manila, 1997),* (WIPO Publication No. 757(E), Geneva, WIPO, 1998) 114.

4. WIPO Standing Committee on Copyright and Related Rights

The WIPO Standing Committee on Copyright and Related Rights was established as a 1998–1999 biennial programme[70] in order to conduct specialised substantive discussions on copyright and related rights and to make recommendations to the general assembly of WIPO.[71] The Committee dealt with the protection of the rights of broadcasting organisations as a result of the above WIPO's symposium and other meetings.[72]

Sessions of the WIPO Standing Committee on Copyright and Related Rights have been held approximately twice every year since November 1998. The latest session was held in November 2004, which is the twelfth session of the committee. Among the seven sessions, the rights of broadcasting organisations were not taken up at the fourth session.[73] The following is a brief review of the development of discussions in each session.

4.1. The First Session (2–10 November, 1998)

The Memorandum prepared by the International Bureau of WIPO[74] reports on:

- the current conventions, regional agreements and national legislation relating to the protection of broadcasting organisations; and
- the issues which had previously been considered to require further examination at the WIPO World Symposium, which was discussed in

[70] Director General of WIPO, 'Activities of the Standing Committee on the Law of Patents (SCP), the Standing Committee on the Law of Trademarks, Industrial Designs and Geographical Indications (SCT) and the Standing Committee on Information Technologies (SCIT)', WO/GA/23/1. There are three other Standing Committees apart from the Standing Committee on Copyright and Related Rights. Their names appear in the title of the above document. See also, WIPO, *WIPO Intellectual Property Handbook: Policy, Law and Use*, (WIPO Publication No. 489(E)) 459–460, [7.113]–[7.115].

[71] WIPO, *Press Release,* PR/98/145.

[72] The Chairman at the First Session of the Committee explained that 'protection of the rights of broadcasting organisations had been raised several times in international fora, including the meetings preparing the WCT and the WPPT, and at the international fora organised by WIPO in Manila in 1997 and in Cancun in 1998.' See, World Intellectual Property Organisations, 'Standing Committee on Copyright and Related Rights, First Session, Report' (1998), SCCR/1/9.

[73] The fourth session was held on 11, 12 and 14 April, 2000. This session dealt with the protection of audiovisual performances. See World Intellectual Property Organisation, 'Standing Committee on Copyright and Related Rights, Fourth Session, Report' (2000), SCCR/4/6.

[74] World Intellectual Property Organisation, 'Existing International, Regional and National Legislation Concerning the Protection of the Rights of Broadcasting: Memorandum Prepared by the International Bureau' (1998), SCCR/1/3.

the previous section, and the WIPO Symposium for Latin American and Caribbean Countries on Broadcasting, New Communication Technologies and Intellectual Property, which was held in Cancun, Mexico in February 1998.

A report confirming the need for further discussion of a new treaty was adopted.[75] Also, a recommendation that the International Bureau should invite proposals was made.[76]

4.2. The Second Session (2–11 May, 1999)

A Draft of the treaty from Switzerland,[77] proposals from the EC,[78] Japan[79] and Mexico[80] (also from Cameroon[81] after the session) and certain drafts and proposals from certain Non Governmental Organisations[82] were submitted. The contents of these proposals were substantially in accordance with the recommendation made at the Symposium examined in the previous section.

In addition to the recommendation:

- the relationship with other conventions;
- national treatment;

---

75 World Intellectual Property Organisation, 'Standing Committee on Copyright and Related Rights, First Session, Report' (1998), SCCR/1/9.

76 See World Intellectual Property Organisation, 'Standing Committee on Copyright and Related Rights, First Session, Report' (1998), SCCR/1/9, para 204.

77 Switzerland, 'Proposal for a Protocol on the Rights of Broadcasting Organisations Under the WIPO Performances and Phonograms Treaty' in World Intellectual Property Organisation, 'Standing Committee on Copyright and Related Rights, Second Session, Submissions Received from Member States of WIPO and the European Community by March 31, 1999' (1999), SCCR/2/5.

78 European Community and Its Member States, 'Submission on the protection of rights of broadcasting organisations' in World Intellectual Property Organisation, 'Standing Committee on Copyright and Related Rights, Second Session, Submissions Received from Member States of WIPO and the European Community by March 31, 1999' (1999), SCCR/2/5.

79 Japan, 'Suggestion on the Protection of the Rights of Broadcasting Organisations' in World Intellectual Property Organisation, 'Standing Committee on Copyright and Related Rights, Second Session, Submissions Received from Member States of WIPO and the European Community by March 31, 1999' (1999), SCCR/2/5.

80 World Intellectual Property Organisation, 'Standing Committee on Copyright and Related Rights, Second Session, Submission by Mexico' (1999), SCCR/2/7.

81 World Intellectual Property Organisation, 'Standing Committee on Copyright and Related Rights, Second Session, Submission by Cameroon' (1999), SCCR/2/12.

82 World Intellectual Property Organisation, 'Standing Committee on Copyright and Related Rights, Second Session, Submissions Received from Non-Governmental Organisations by March 31, 1999' (1999), SCCR/2/6.

- limitations on the rights;
- the duration of protection; and
- the technological measures and rights management information,

were mentioned in the drafts and proposals. Most participants expressed their intention to consider the proposals positively.[83] A number of delegates recognised that the protection by the Rome Convention had become insufficient due to technological development and that updating protection was logical due to the updating of the other rights holders by the WPPT and the WCT.[84]

While most member countries confined their statements to general remarks regarding the proposals, the right of making photographs from television signals was objected to by Hungary as the rationale for protection was 'labour and money invested in making programmes'[85] which only justified the protection of the part identifiable as part of the broadcasts. The right of decoding encryption was questioned by the United Kingdom, Australia and Japan as it was not included in the WPPT.[86]

4.3. The Third Session (16–20 November, 1999)

A draft bill by Argentina[87] and joint proposals by African countries[88] as well as a separate proposal by Tanzania[89] were submitted during this session. The contents of these submissions were along the lines of the previous session – there was nothing particularly novel to be found in the submissions. Asian

[83] See World Intellectual Property Organisation, 'Standing Committee on Copyright and Related Rights, Second Session, Report' (1999), SCCR/2/11, 29–36.

[84] See, for example, the statement of the delegate of Ghana in paragraph 126 and the statement of the delegate of Singapore in paragraph 132, World Intellectual Property Organisation, 'Standing Committee on Copyright and Related Rights, Second Session, Report' (1999), SCCR/2/11.

[85] See World Intellectual Property Organisation, 'Standing Committee on Copyright and Related Rights, Second Session, Report' (1999), SCCR/2/11, para 125.

[86] See World Intellectual Property Organisation, 'Standing Committee on Copyright and Related Rights, Second Session, Report' (1999), SCCR/2/11, paras 121, 133 and 135.

[87] World Intellectual Property Organisation, 'Standing Committee on Copyright and Related Rights, Third Session, Proposal by Argentina' (1999), SCCR/3/4.

[88] World Intellectual Property Organisation, 'Standing Committee on Copyright and Related Rights, Third Session, Report of the Regional Roundtable for African Countries on the Protection of Databases and on the Protection of the Rights of Broadcasting Organisations, Held in Cotonou, from June 22 to 24, 1999' (1999), SCCR/3/2.

[89] World Intellectual Property Organisation, 'Standing Committee on Copyright and Related Rights, Third Session, Document Submitted by the United Republic of Tanzania' (1999), SCCR/3/5.

countries issued a statement drawing attention to the benefits of the submissions to developing countries.[90]

In the discussion, Japan, the United Kingdom, the European Community and Singapore suggested careful consideration of the definitions of 'broadcasting' and 'broadcasting organisations'.[91] In particular, Russia, the United Kingdom, and the United States referred to the necessity of examining whether Internet broadcasting should be included in broadcasting.[92] The United Kingdom, the European Community and Australia considered the need for further discussions on the right of decoding encrypted signals[93] while Argentina, Peru and Switzerland presented a supporting view on setting the right of decoding encryption in order to protect against piracy.[94] Argentina, the European Community and Peru referred to piracy as the basis for considering the updating of protection.[95]

4.4. The Fifth Session (7–11 May, 2001)

Proposals were submitted by Kyrgyzstan[96] and Sudan[97] before this session. A draft treaty was submitted by Japan.[98] The secretariat of WIPO prepared a

---

[90] World Intellectual Property Organisation, 'Standing Committee on Copyright and Related Rights, Third Session, Statement Adopted at the Regional Roundtable for Countries of Asia and the Pacific on the Protection of Databases and on the Protection of the Rights of Broadcasting Organisations, Held in Manila, from June 29 to July 1, 1999 Submitted by Bangladesh, China, Fiji, India, Indonesia, Mongolia, Pakistan, Philippines, Singapore, Sri Lanka, Thailand and Viet Nam' (1999), SCCR/3/6.

[91] See World Intellectual Property Organisation, 'Standing Committee on Copyright and Related Rights, Third Session, Report' (1999), SCCR/3/11, paras 89, 92, 93 and 94.

[92] See World Intellectual Property Organisation, 'Standing Committee on Copyright and Related Rights, Third Session, Report' (1999), SCCR/3/11, paras 88, 92 and 96.

[93] See World Intellectual Property Organisation, 'Standing Committee on Copyright and Related Rights, Third Session, Report' (1999), SCCR/3/11, paras 92, 93 and 102.

[94] See World Intellectual Property Organisation, 'Standing Committee on Copyright and Related Rights, Third Session, Report' (1999), SCCR/3/11, paras 91, 95 and 98.

[95] See World Intellectual Property Organisation, 'Standing Committee on Copyright and Related Rights, Third Session, Report' (1999), SCCR/3/11, paras 91, 93 and 95.

[96] World Intellectual Property Organisation, 'Standing Committee on Copyright and Related Rights, Fifth Session, Proposal by the Delegation of Kyrgyzstan' (2001), SCCR/5/2.

[97] World Intellectual Property Organisation, 'Standing Committee on Copyright and Related Rights, Fifth Session, Proposal by the Delegation of Sudan' (2001) SCCR/5/3.

[98] World Intellectual Property Organisation, 'Standing Committee on Copyright and Related Rights, Fifth Session, Proposal by the Delegation of Japan' (2001), SCCR/5/4.

comparative table of proposals.[99] The Chairman noted that UNESCO and some non-governmental organisations had made submissions.[100]

The delegates of member countries explained the related legislation and its development in their own country.[101] The United States, Japan, the European Community, Uruguay, the Russian Federation and China expressed their support to upgrade the protection of broadcasters' rights.[102] The Chairman stated that the justification for the protection of broadcasters' rights was 'the effort and investment in the establishing of the program supply and its diffusion'[103] and suggested the starting points for discussions as follows.

As for the object of protection and the definitions, the definition of 'broadcasting' in the Rome Convention should be the starting point and the possible extension of protection to satellite broadcasting, encrypted broadcasting signals, cable distribution and webcasting should be considered.[104] As for the beneficiaries of protection, there were two approaches, the Rome Convention type and the TRIPS type, found in the proposals submitted to the Standing Committee. However, since both approaches had the same legal effect, the Chairman suggested that this could be considered later as well as national treatment regarding which the proposals were roughly the same.[105] As for the rights granted under a new instrument, the Chairman listed, for the purpose of consideration, the rights of retransmission to the public, fixation, reproduction of fixations, deferred rebroadcasting, communication to the public, decoding signals, and the right concerning pre-broadcast signals.[106] As for the obligations

[99] World Intellectual Property Organisation, 'Standing Committee on Copyright and Related Rights, Fifth Session, Protection of the Rights of Broadcasting Organisations: Comparative Table of Proposals Received by April 30, 2001' (2001) SCCR/5/5.

[100] See World Intellectual Property Organisation, 'Standing Committee on Copyright and Related Rights, Fifth Session, Report' (2001), SCCR/5/6, para 25.

[101] See, for example, the statement of the delegate of Australia in World Intellectual Property Organisation, 'Standing Committee on Copyright and Related Rights, Fifth Session, Report' (2001), SCCR/5/6, para 31.

[102] See World Intellectual Property Organisation, 'Standing Committee on Copyright and Related Rights, Fifth Session, Report' (2001), SCCR/5/6, paras 27, 28, 29, 30, 32 and 34.

[103] See World Intellectual Property Organisation, 'Standing Committee on Copyright and Related Rights, Fifth Session, Report' (2001), SCCR/5/6, para 52.

[104] See World Intellectual Property Organisation, 'Standing Committee on Copyright and Related Rights, Fifth Session, Report' (2001), SCCR/5/6, para 52.

[105] See World Intellectual Property Organisation, 'Standing Committee on Copyright and Related Rights, Fifth Session, Report' (2001), SCCR/5/6, para 84.

[106] See World Intellectual Property Organisation, 'Standing Committee on Copyright and Related Rights, Fifth Session, Report' (2001), SCCR/5/6, para 85.

on technological measures and application in time, the provision of the WPPT should be the starting point.[107]

4.5. The Sixth Session (26–30 November, 2001)

Draft Conventions in treaty language were submitted by the European Community[108] and Ukraine[109] before this session. The United States delegation stated that it had launched a consultation process to develop its own proposal.[110] From this Session, substantial discussions appear to have started. The discussions were held in parts and concentrated on particular issues in each part. The focuses were the definitions and rights to be granted.

4.5.1. *Definitions*

The first issue discussed was the definition of 'broadcasting'. Argentina[111] and Japan[112] proposed that the definition of broadcasting should follow that of the WPPT and be limited to wireless transmission.[113] The European Community suggested in its proposal that cable distribution should be included.[114] Russia and Andorra supported the proposition that the definition be limited to wireless transmission and Switzerland and Australia supported the proposition that the definition be extended to cable distribution. The countries that supported the proposition that the definition be limited to wireless transmission agreed that cable distribution should be protected but by providing a separate definition from 'broadcasting'.

---

[107] See World Intellectual Property Organisation, 'Standing Committee on Copyright and Related Rights, Fifth Session, Report' (2001), SCCR/5/6, para 92.

[108] World Intellectual Property Organisation, 'Standing Committee on Copyright and Related Rights, Sixth Session, Protection of the Rights of Broadcasting Organisations Submitted by the European Community and Its Member States' (2001), SCCR/6/2.

[109] World Intellectual Property Organisation, 'Standing Committee on Copyright and Related Rights, Sixth Session, Proposal by Ukraine' (2001), SCCR/6/3.

[110] World Intellectual Property Organisation, 'Standing Committee on Copyright and Related Rights, Sixth Session, Report' (2001), SCCR/6/4, 6.

[111] See World Intellectual Property Organisation, 'Standing Committee on Copyright and Related Rights, Sixth Session, Report' (2001), SCCR/6/4, para 35.

[112] See World Intellectual Property Organisation, 'Standing Committee on Copyright and Related Rights, Sixth Session, Report' (2001), SCCR/6/4 para 33.

[113] See the Chairman's summary, World Intellectual Property Organisation, 'Standing Committee on Copyright and Related Rights, Sixth Session, Report' (2001), SCCR/6/4, para 21.

[114] See World Intellectual Property Organisation, 'Standing Committee on Copyright and Related Rights, Sixth Session, Report' (2001), SCCR/6/4, para 19.

It was agreed that the categories of broadcasting which should be protected were traditional free-to-air broadcasting, cable distribution, and simultaneous transmission over the Internet of the same content of a broadcast made by a broadcasting organisation.[115] On-demand transmission and cable retransmission of free-to-air broadcasting were not to be protected.[116]

The second issue discussed was the definitions of 'rebroadcasting', 'retransmission' and 'communication to the public'. The European Community and Switzerland proposed that 'retransmission' should be defined as simultaneous and deferred transmission of a broadcast by wireless and cable[117] and that 'communication to the public' should be defined as making a broadcast audible or visible to the public.[118] Japan's proposal was to add deferred rebroadcasting to the definition of 'rebroadcasting',[119] that is simultaneous rebroadcasting, in the Rome Convention and 'communication to the public' should be any means of communication to the public other than the means of broadcasting defined in the Berne Convention.[120]

Protection for broadcasters' rights by both the European Community and Switzerland, and also Japan's proposal covered simultaneous and deferred transmission by wireless and cable. However, the notion of 'communication to the public' favoured by Japan is broader.

The third issue discussed was the definition of 'signals prior to broadcasting'. Signals prior to broadcasting were proposed to be protected. It should be clarified whether it means that signals prior to broadcasting are part of an uninterrupted chain ending in a broadcast, or signals transporting a programme not for direct reception by the public but to an operator.[121]

---

[115] See World Intellectual Property Organisation, 'Standing Committee on Copyright and Related Rights, Sixth Session, Report' (2001), SCCR/6/4, para 76.

[116] See World Intellectual Property Organisation, 'Standing Committee on Copyright and Related Rights, Sixth Session, Report' (2001), SCCR/6/4, para 76.

[117] See World Intellectual Property Organisation, 'Standing Committee on Copyright and Related Rights, Sixth Session, Report' (2001), SCCR/6/4, para 86. The delegation of Canada agreed to this definition, but also suggested that the protection against retransmission could be premature. See World Intellectual Property Organisation, 'Standing Committee on Copyright and Related Rights, Sixth Session, Report' (2001), SCCR/6/4, para 79.

[118] This follows the sense of Article 11bis(1)(iii) of the Berne Convention.

[119] See World Intellectual Property Organisation, 'Standing Committee on Copyright and Related Rights, Sixth Session, Report' (2001), SCCR/6/4, para 81.

[120] See Article 11 bis a(1)(i) of the Berne Convention.

[121] See World Intellectual Property Organisation, 'Standing Committee on Copyright and Related Rights, Sixth Session, Report' (2001), SCCR/6/4, paras 107–111.

4.5.2. *Rights to be Granted*

The first issue was the right of retransmission. 'Retransmission' does not mean simultaneous retransmission of a broadcast as defined by the *Australian Copyright Act* 1968[122] but both simultaneous and deferred broadcasting and cable transmission of a broadcast.[123] The definition of 'retransmission' was discussed in the previous section on definitions.

The main concern for participants in the discussion was the balance between broadcasters and other rights owners. Canada asserted that protection for broadcasting organisations would become too strong if the right of retransmission was granted. The European Community[124] and Japan[125] suggested that on-demand transmission should be covered by the right of making available. However, the European Community also proposed a retransmission right to prevent non-interactive transmission which would not be covered by a making available right.[126] After discussing the rights of retransmission, other rights were mentioned but the discussions on those rights did not become substantive.[127] It was repeatedly stated that keeping the current balance amongst rights owners was important.

4.6. The Seventh Session (13–17 May, 2002)

Before this session, a proposal in treaty language was submitted by the Republic of Uruguay.[128] A technical background paper[129] and a comparative table of proposals[130] were released by the Secretariat of WIPO.

---

[122] See Article 10 of the *Copyright Act* 1968 (Cth).

[123] See, for example, Article 6 of a proposed 'WIPO Treaty on the Protection of Broadcasting Organisations' in World Intellectual Property Organisation, 'Standing Committee on Copyright and Related Rights, Sixth Session, Protection of the Rights of Broadcasting Organisations Submitted by the European Community and Its Member States' (2001), SCCR/6/2, 35.

[124] See World Intellectual Property Organisation, 'Standing Committee on Copyright and Related Rights, Sixth Session, Report' (2001), SCCR/6/4, para 123.

[125] See World Intellectual Property Organisation, 'Standing Committee on Copyright and Related Rights, Sixth Session, Report' (2001), SCCR/6/4, para 119.

[126] See World Intellectual Property Organisation, 'Standing Committee on Copyright and Related Rights, Sixth Session, Report' (2001), SCCR/6/4, para 123.

[127] See World Intellectual Property Organisation, 'Standing Committee on Copyright and Related Rights, Sixth Session, Report' (2001), SCCR/6/4, paras 140–154.

[128] World Intellectual Property Organisation, 'Standing Committee on Copyright and Related Rights, Seventh Session, Proposal by the Eastern Republic of Uruguay' (2002), SCCR/7/7.

[129] World Intellectual Property Organisation, 'Standing Committee on Copyright and Related Rights, Seventh Session, Technical Background Paper' (2002), SCCR/7/8.

[130] World Intellectual Property Organisation, 'Standing Committee on Copyright and Related Rights, Seventh Session, Comparative Table of Proposals Received by May 6, 2002' (2002) SCCR/7/9.

In the technical background paper, the object of protection for broadcasters' rights under the Rome Convention, the traits of new broadcasting technologies that caused legal issues and issues to be considered – the subject of protection – are mainly described. This paper, however, does not deal with another significant factor, the rationale for protection.

The focuses of the discussions lay principally in two areas: the objects of protection; and the rights to be granted.

4.6.1. *Objects of Protection*

This discussion corresponds with one of the issues at the previous session, namely, the definition of broadcasting. In the discussion at the previous session, it was agreed that simultaneous real-time streaming over the Internet of the same programme broadcast by a broadcasting organisation should be protected. With respect to this, the Chairman suggested that dealing with the same broadcast signal over the air and the Internet under different instruments was unrealistic.[131] Japan proposed protection for simultaneous transmission under a different instrument from protection for broadcasting because a new instrument is to update the rights of broadcasting organisations in accordance with the established rights of other rights holders.[132]

Japan's opinion is underlain by a difficulty in deciding which real-time streaming is protected and which is not. Cameroon and Ireland pointed out the same issue stating that there was no difference in conduct between making real-time streaming of a programme over the Internet independently undertaken of broadcasting and making real-time streaming of a programme over the Internet and air simultaneously.[133] Canada stated that protecting real-time streaming might not be appropriate because there might not be effort with respect to the programme and content by those involved in real-time streaming.[134] The United States proposed criteria for protection by reference to the nature of an organisation, namely, whether or not the organisation was regulated by a broadcasting authority, because this could exclude real-time streaming by an individual without excluding that by traditional broadcasting organisations.[135]

[131] See World Intellectual Property Organisation, 'Standing Committee on Copyright and Related Rights, Seventh Session, Report', (2002), SCCR/7/10, para 78.

[132] See World Intellectual Property Organisation, 'Standing Committee on Copyright and Related Rights, Seventh Session, Report', (2002), SCCR/7/10, para 118.

[133] See World Intellectual Property Organisation, 'Standing Committee on Copyright and Related Rights, Seventh Session, Report', (2002), SCCR/7/10, paras 116 and 119.

[134] See World Intellectual Property Organisation, 'Standing Committee on Copyright and Related Rights, Seventh Session, Report', (2002), SCCR/7/10, para 117.

[135] See World Intellectual Property Organisation, 'Standing Committee on Copyright and Related Rights, Seventh Session, Report', (2002), SCCR/7/10, para 121.

The United Kingdom opposed this proposition since there was no harmonisation between the telecommunication laws of different countries.[136]

4.6.2. *Rights to Be Granted*

The European Community categorised the rights that were under consideration to be granted in this session into four groups:[137]

(1) rights that are granted under the Rome Convention (i.e. the right of fixation, reproduction of fixations, the right of simultaneous rebroadcasting and the right of communication to the public);
(2) rights that are similar to the rights granted under the Rome Convention (i.e. the right of both simultaneous and deferred cable retransmissions and the right of deferred rebroadcasting);
(3) rights that are granted to other rights holders under the WPPT (i.e. the right of distribution of fixations[138] and the right of making available of fixations[139]);
(4) rights that are not to be found anywhere in relation to broadcasting (i.e. the right of decryption of encrypted broadcasts and the right of rental of fixations).

The European Community stated that category (4) was not needed for broadcasting organisations because a new instrument was considered necessary for the rights of broadcasting organisations to catch up with the modernisation of the rights of other rights holders which had been made by the WPPT.[140] Although the European Community categorised the right of rental in group (4), a rental right is granted to both performers and producers of phonograms under the WPPT (Art. 9 and 13). Amongst these listed rights, China and Kenya suggested that the right of decryption should not to be granted as an exclusive right but be part of the obligations concerning technological measures.[141]

[136] See World Intellectual Property Organisation, 'Standing Committee on Copyright and Related Rights, Seventh Session, Report', (2002), SCCR/7/10, para 124.
[137] See World Intellectual Property Organisation, 'Standing Committee on Copyright and Related Rights, Seventh Session, Report', (2002), SCCR/7/10, para 69.
[138] See, Article 8 and 12 of WPPT.
[139] See, Article 10 and 14 of WPPT.
[140] See World Intellectual Property Organisation, 'Standing Committee on Copyright and Related Rights, Seventh Session, Report', (2002), SCCR/7/10, para 69.
[141] See World Intellectual Property Organisation, 'Standing Committee on Copyright and Related Rights, Seventh Session, Report', (2002), SCCR/7/10, paras 88 and 93.

For a pre-broadcasting signal, the possibility of protection by a telecommunications law was discussed. Japan favoured this possibility.[142] The European Community suggested that there needed to be additional protection to that contained in the current telecommunication laws to combat piracy.[143] The Chairman concluded that the need for protection of a pre-broadcasting signal was agreed, however, the measure would continue to be considered.[144]

4.7. The Eighth Session (4–8 November, 2002)

For this session, the Secretariat of WIPO prepared 'Protection of Broadcasting Organizations: Terms and Concepts',[145] an explanatory memorandum of generally accepted terms,[146] and 'Comparison of Proposals of WIPO Member States and the European Community and Its Member States Received by September 16, 2002'.[147] Honduras[148] and the United States[149] submitted proposals in a treaty language.

This session started with an explanation of its proposal by the United States, followed by questions by other countries. The delegate of the U.S. explained that in his country's opinion, protection limited to broadcasting organisations and cablecasting similar to broadcasting was an incomplete update of protection in the light of the stage of technological advancement.[150] Therefore the beneficiaries of the proposed new treaty would include webcasters. The U.S. further explained that its proposal had been drafted to attain the aim of combating signal piracy. Against the U.S. proposal, Japan, EU and India

---

142 See World Intellectual Property Organisation, 'Standing Committee on Copyright and Related Rights, Seventh Session, Report', (2002), SCCR/7/10, para 111.

143 See World Intellectual Property Organisation, 'Standing Committee on Copyright and Related Rights, Seventh Session, Report', (2002), SCCR/7/10, para 115.

144 See World Intellectual Property Organisation, 'Standing Committee on Copyright and Related Rights, Seventh Session, Report', (2002), SCCR/7/10, para 131.

145 World Intellectual Property Organisation, 'Standing Committee on Copyright and Related Rights, Eighth Session, Protection of Broadcasting Organizations: Terms and Concepts' (2002), SCCR/8/INF/1.

146 See World Intellectual Property Organisation, 'Standing Committee on Copyright and Related Rights, Eighth Session, Protection of Broadcasting Organizations: Terms and Concepts' (2002), SCCR/8/INF/1, para 1.

147 World Intellectual Property Organisation, 'Standing Committee on Copyright and Related Rights, Eighth Session, Comparison of Proposals of WIPO Member States and the European Community and Its Member States Received by September 16, 2002' (2002), SCCR/8/5.

148 World Intellectual Property Organisation, 'Standing Committee on Copyright and Related Rights, Eighth Session, Proposal Submitted by Honduras' (2002), SCCR/8/4.

149 World Intellectual Property Organisation, 'Standing Committee on Copyright and Related Rights, Eighth Session, Proposal Submitted by the United States of America' (2002), SCCR/8/7.

150 World Intellectual Property Organisation, 'Standing Committee on Copyright and Related Rights, Eighth Session, Report' (2002), SCCR/8/9, para 19.

expressed concerns that the rights that the WPPT did not recognise were included.[151] Australia and Singapore primarily raised difficulties in the proposal's effective extension of the rights owners to individuals.[152]

The Chairman set down the items for discussion in the following order:

(1) scope of protection and right holders;
(2) rights to be granted;
(3) national treatment and beneficiaries;
(4) limitations and exceptions;
(5) technological measures of protection and rights management information; and
(6) term of protection, application in time, formalities, reservations and enforcement.[153]

4.7.1. *Scope of Protection and Right Holders*

As for the scope of protection, the Chairman identified the issues involved: whether the protection should be extended to cable distribution; and whether webcasting should be treated as cable distribution.[154] There was consensus amongst participating countries to support the extension of protection to cable distribution.[155] This did not include webcasting. Each country except for the United States considered that webcasting could be differentiated from broadcasting as webcasting was not subject to any regulation by government.[156] These countries also considered that protection of webcasting should be a separate matter from the present proposed treaty because it would take a long time for the member countries to come to share an opinion regarding webcasting in the current circumstances where there were a certain number of countries in which webcasting was not yet common.[157]

---

[151] World Intellectual Property Organisation, 'Standing Committee on Copyright and Related Rights, Eighth Session, Report' (2002), SCCR/8/9, paras 21, 24 and 25.

[152] World Intellectual Property Organisation, 'Standing Committee on Copyright and Related Rights, Eighth Session, Report' (2002), SCCR/8/9, paras 22 and 23.

[153] See World Intellectual Property Organisation, 'Standing Committee on Copyright and Related Rights, Eighth Session, Report' (2002), SCCR/8/9, para 30.

[154] See World Intellectual Property Organisation, 'Standing Committee on Copyright and Related Rights, Eighth Session, Report' (2002), SCCR/8/9, para 29.

[155] See World Intellectual Property Organisation, 'Standing Committee on Copyright and Related Rights, Eighth Session, Report' (2002), SCCR/8/9, 11–19.

[156] See, for example, the statement of the delegate of Japan in World Intellectual Property Organisation, 'Standing Committee on Copyright and Related Rights, Eighth Session, Report' (2002), SCCR/8/9, para 31.

[157] See, for example, the statement of the delegate of China in World Intellectual Property Organisation, 'Standing Committee on Copyright and Related Rights, Eighth Session, Report' (2002), SCCR/8/9, para 38.

4.7.2. *Rights to Be Granted*

The Chairman drew attention to the working paper on the 'Protection of Broadcasting Organisations: Terms and Concepts'[158] and reiterated the rights listed in it. They were the rights of:

(1) fixation;
(2) reproduction of fixations;
(3) distribution of fixations;
(4) decryption of encrypted broadcasts;
(5) rebroadcasting;
(6) cable retransmission;
(7) retransmission over the Internet;
(8) making available of fixed broadcasts;
(9) rental of fixations; and
(10) communication to the public (in places accessible to the public).[159]

Canada commented that the fixation of audio broadcasting would enjoy more protection than phonograms with the same contents.[160] Cameroon, Switzerland and the United States expressed their views that the rights to be granted under the new proposed instrument should be along the lines of that in the WPPT.[161] Japan and the Russian Federation suggested that the decryption right could be effectively granted by providing a provision for the technological measures of protection such as the provision in the WPPT.[162] The delegation of Canada opposed granting the cable retransmission right to free-to-air broadcasting.[163] Japan further suggested that the pre-broadcast signal should be protected by an exclusive right, a sui generis right or telecommunications law.[164] The European

[158] World Intellectual Property Organisation, 'Standing Committee on Copyright and Related Rights, Eighth Session, Protection of Broadcasting Organizations: Terms and Concepts' (2002), SCCR/8/INF/1.

[159] See World Intellectual Property Organisation, 'Standing Committee on Copyright and Related Rights, Eighth Session, Report' (2002), SCCR/8/9, para 62.

[160] See World Intellectual Property Organisation, 'Standing Committee on Copyright and Related Rights, Eighth Session, Report' (2002), SCCR/8/9, para 63.

[161] See World Intellectual Property Organisation, 'Standing Committee on Copyright and Related Rights, Eighth Session, Report' (2002), SCCR/8/9, paras 64, 66 and 69.

[162] See World Intellectual Property Organisation, 'Standing Committee on Copyright and Related Rights, Eighth Session, Report' (2002), SCCR/8/9, paras 65 and 68.

[163] See World Intellectual Property Organisation, 'Standing Committee on Copyright and Related Rights, Eighth Session, Report' (2002), SCCR/8/9, para 71.

[164] See World Intellectual Property Organisation, 'Standing Committee on Copyright and Related Rights, Eighth Session, Report' (2002), SCCR/8/9, para 75.

Community and the United States emphasised that the right of retransmission over the Internet was an important right.[165]

4.7.3. *National Treatment and Beneficiaries, Exceptions and Limitations, Technological Measures of Protection and Rights Management Information, Term of Protection, Application in Time, Formalities, Reservations and Enforcement*

The Chairman in his summary stated that, except for enforcement, the proposals showed convergence.[166] He commented that enforcement was a difficult issue at the Diplomatic Conference for the WPPT and suggested that the TRIPS approach might be a model.[167] The Chairman also suggested that the issue of reservations would be considered after the final draft was settled.[168] These issues were not developed into discussions.

4.8. The Ninth Session (23–27 June, 2003)

For this session, Kenya[169] and Egypt[170] submitted proposals in a treaty language. The United States submitted its revised proposal which took into consideration the questions asked by the delegates of numerous countries at the previous session.[171] The EC,[172] Japan[173] and Canada[174] submitted individual

---

[165] See World Intellectual Property Organisation, 'Standing Committee on Copyright and Related Rights, Eighth Session, Report' (2002), SCCR/8/9, paras 77 and 79.

[166] See World Intellectual Property Organisation, 'Standing Committee on Copyright and Related Rights, Eighth Session, Report' (2002), SCCR/8/9, 23–24.

[167] See World Intellectual Property Organisation, 'Standing Committee on Copyright and Related Rights, Eighth Session, Report' (2002), SCCR/8/9, para 85.

[168] See World Intellectual Property Organisation, 'Standing Committee on Copyright and Related Rights, Eighth Session, Report' (2002), SCCR/8/9, para 85.

[169] World Intellectual Property Organisation, 'Standing Committee on Copyright and Related Rights, Ninth Session, Proposal Submitted by Kenya' (2003), SCCR/9/3 and SCCR/9/3 REV.

[170] World Intellectual Property Organisation, 'Standing Committee on Copyright and Related Rights, Ninth Session, Proposal Submitted by Egypt' (2003), SCCR/9/8 REV.

[171] World Intellectual Property Organisation, 'Standing Committee on Copyright and Related Rights, Ninth Session, Revised Proposal Submitted by the United States of America' (2003), SCCR/9/9/4 and SCCR/9/4 REV.

[172] World Intellectual Property Organisation, 'Standing Committee on Copyright and Related Rights, Ninth Session, Proposal Submitted by the European Community and Its Member States' (2003), SCCR/9/12.

[173] World Intellectual Property Organisation, 'Standing Committee on Copyright and Related Rights, Ninth Session, Issues concerning "Webcaster" in WIPO New Broadcasting Organizations Treaty: Commuication Submitted by Japan' (2003), SCCR/9/9.

[174] World Intellectual Property Organisation, 'Standing Committee on Copyright and Related Rights, Ninth Session, Proposal Submitted by Canada' (2003), SCCR/9/10.

proposals. In addition, India submitted a proposal to revise the 'Report' of the previous session with respect to its statements.[175]

The African countries and India expressed their reluctance to proceed to a new treaty.[176] The United States pressed that webcasting should be protected by this new treaty together with traditional broadcasting.[177] The proposals of Japan and the EC were in essence to recommend that webcasting should be excluded from the protection of broadcasting.[178] Canada suggested that protection of the retransmission of wireless signals should be optional.[179]

The Chairman proposed that discussions should be concentrated on the issues on which consensus had not been reached such as the rights of decryption and decoding, and the making available of unfixed broadcasts.[180] The focuses of this session were set out by the Chairman: (1) the scope of protection; (2) the rights to be granted; (3) national treatment; and (4) relation to other treaties. However, the interests of member countries were directed only to the first two issues and the latter two were not developed into discussions at this session.[181]

4.8.1. *Scope of Protection*

The Chairman summarised[182] that protection of traditional broadcasting had been unanimously agreed to. The protection of pre-broadcast signals was also agreed to, despite some differences as to the means of protection. Cable-originated signals had also been considered to be protected but required more clarification as to what constituted cable-originated signals.

The European Community reiterated that it did not consider that webcasting should be protected under a new treaty. However, it proposed that simultaneous

---

[175] World Intellectual Property Organisation, 'Standing Committee on Copyright and Related Rights, Ninth Session, Corrigendum to the Report Submitted by India' (2003), SCCR/9/11 Corr.

[176] See World Intellectual Property Organisation, 'Standing Committee on Copyright and Related Rights, Ninth Session, Report' (2003), SCCR/9/11, paras 28, 29 and 32.

[177] See World Intellectual Property Organisation, 'Standing Committee on Copyright and Related Rights, Ninth Session, Report' (2003), SCCR/9/11, para 25.

[178] See World Intellectual Property Organisation, 'Standing Committee on Copyright and Related Rights, Ninth Session, Report' (2003), SCCR/9/11, para 26.

[179] See World Intellectual Property Organisation, 'Standing Committee on Copyright and Related Rights, Ninth Session, Report' (2003), SCCR/9/11, para 27.

[180] See World Intellectual Property Organisation, 'Standing Committee on Copyright and Related Rights, Ninth Session, Report' (2003), SCCR/9/11, para 33.

[181] The proposals made by member countries generally showed convergence in relation to the latter two issues.

[182] See World Intellectual Property Organisation, 'Standing Committee on Copyright and Related Rights, Ninth Session, Report' (2003), SCCR/9/11, para 37.

and unchanged cable transmission of broadcasts should be regarded as broadcasting and should be protected.[183] Japan questioned the EC's proposal with respect to the protection regardless of the means of transmission as it could lead to the protection of contents rather than signals.[184] India doubted the need for copyright protection of signals.[185] There had been no protection on cable retransmission of free-to-air broadcasts as signals were not considered to deserve the protection of intellectual property.

4.8.2. *Rights to Be Granted*

The Chairman listed for discussion the rights to be granted:

(1) fixation;
(2) reproduction of fixations;
(3) distribution of fixations;
(4) rebroadcasting (simultaneous);
(5) cable retransmission (simultaneous);
(6) retransmission over the Internet (simultaneous);
(7) deferred broadcasting/cable/Internet transmission based on fixation;
(8) making available of fixed broadcasts;
(9) communication to the public (in places accessible to the public against entrance fee);
(10) obligations regarding technological measures of protection and rights management information;
(11) decryption of encrypted broadcasts;
(12) rental of fixations; and
(13) making available of unfixed broadcasts.[186]

The delegate of India, with whom the delegate of Brazil agreed, commented that protection of the contents and the signal should be separated when protection of fixation was considered and signal piracy should be fought by technological means and not by new intellectual property rights.[187] The United States stated that it shared the concern of India and hence it proposed the two

[183] See World Intellectual Property Organisation, 'Standing Committee on Copyright and Related Rights, Ninth Session, Report' (2003), SCCR/9/11, para 38.
[184] See World Intellectual Property Organisation, 'Standing Committee on Copyright and Related Rights, Ninth Session, Report' (2003), SCCR/9/11, para 40.
[185] See World Intellectual Property Organisation, 'Standing Committee on Copyright and Related Rights, Ninth Session, Report' (2003), SCCR/9/11, para 48.
[186] See World Intellectual Property Organisation, 'Standing Committee on Copyright and Related Rights, Ninth Session, Report' (2003), SCCR/9/11, para 51.
[187] See World Intellectual Property Organisation, 'Standing Committee on Copyright and Related Rights, Ninth Session, Report' (2003), SCCR/9/11, paras 52, 58 and 87.

different categories of rights: rights to authorise or prohibit a certain act; and more limited rights to prevent or to prohibit a certain act.[188] Canada in this respect expressed its impression that different levels of protection depending on the circumstances under which fixation was made – a fixation in a studio or that from a broadcast – made them look arbitrary.[189] The European Community, Australia and the Chairman (from Finland) stated that they had not observed confusion regarding the protection of contents and signals in their countries.[190]

4.9. The Tenth Session (3–5 November, 2003)

For this session, there were five preparatory documents and a list of them was prepared and submitted.[191] However, amongst them, only two documents were concerned with the rights of broadcasting organisations: the Comparison of Proposals of WIPO Member States and the European Community and its Member States Received by September 15, 2003;[192] and the corrigendum for that document.[193]

At the beginning of this session, the delegates of member countries supported a plan that a comprehensive proposal which made clear the points of agreement and disagreement should be prepared for a diplomatic conference.[194] The Chairman summarised the progress of discussions at the previous session and analysed that there were two approaches: one is to propose 'a system of fully fledged economic intellectual property rights'; and the other is to propose a 'more limited system designed against the theft of signals'.[195]

Member countries except for the United States repeated their view as explained in the previous session that webcasting should be considered at a

[188] See World Intellectual Property Organisation, 'Standing Committee on Copyright and Related Rights, Ninth Session, Report' (2003), SCCR/9/11, para 54.

[189] See World Intellectual Property Organisation, 'Standing Committee on Copyright and Related Rights, Ninth Session, Report' (2003), SCCR/9/11, para 86.

[190] See World Intellectual Property Organisation, 'Standing Committee on Copyright and Related Rights, Ninth Session, Report' (2003), SCCR/9/11, paras 55, 56 and 59.

[191] See World Intellectual Property Organisation, 'Standing Committee on Copyright and Related Rights, Tenth Session, List of Preparatory Documents' (2003), SCCR/10//NF/1.

[192] World Intellectual Property Organisation, 'Standing Committee on Copyright and Related Rights, Tenth Session, Comparison of Proposals of WIPO Member States and the European Community and Its Member States Received by September 15, 2003' (2003), SCCR/10/3.

[193] World Intellectual Property Organisation, 'Standing Committee on Copyright and Related Rights, Tenth Session, Comparison of Proposals of WIPO Member States and the European Community and Its Member States Received by September 15, 2003 (Document SCCR/10/3), Corrigendum' (2003), SCCR/10/3 Corr.

[194] See World Intellectual Property Organisation, 'Standing Committee on Copyright and Related Rights, Tenth Session, Report' (2004), SCCR/10/5, 3–4.

[195] See World Intellectual Property Organisation, 'Standing Committee on Copyright and Related Rights, Tenth Session, Report' (2004), SCCR/10/5, para 17.

later stage under a separate treaty.[196] Canada and India favoured the anti-piracy approach and reiterated their positions as stated in the previous session.[197]

4.10. The Eleventh Session (7–9 June 2004)

In this session, the Chairman of this Standing Committee on Copyright and Related Rights together with the Secretariat of WIPO, based on the recommendation at the Tenth Session, prepared a consolidated text with explanatory comments of a proposed treaty.[198] Further, Singapore submitted a proposed treaty.[199] The Chairman explained that the Consolidated Text ('Consolidated Text for a Treaty on the Protection of Broadcasting Organisations') was to clarify the areas of agreement and disagreement and the task of this session was to reduce the number of options, twenty to thirty of which existed.[200]

The Russian Federation, Mexico, Norway, Japan, Morocco and Kenya expressed their expectation of a diplomatic conference in the near future.[201] The delegates of member countries except for the United States objected to the inclusion of a webcaster as a beneficiary.[202] India, Chile, Morocco and Benin were also opposed to the protection of cablecasters.[203] India suggested that the objective of a new treaty should be clarified in order to consider the balance between the protection under the new treaty and the right of the public to access information.[204] The United States and Mexico considered that a new treaty should be to combat piracy.[205]

---

[196] See World Intellectual Property Organisation, 'Standing Committee on Copyright and Related Rights, Tenth Session, Report' (2004), SCCR/10/5, 5–15.

[197] See World Intellectual Property Organisation, 'Standing Committee on Copyright and Related Rights, Tenth Session, Report' (2004), SCCR/10/5, paras 22 and 34.

[198] World Intellectual Property Organisation, 'Standing Committee on Copyright and Related Rights, Eleventh Session, Consolidated Text for a Treaty on the Protection of Broadcasting Organizations' (2004) SCCR/11/3.

[199] World Intellectual Property Organisation, 'Standing Committee on Copyright and Related Rights, Eleventh Session, Document Submitted by Singapore' (2003), SCCR/11/2.

[200] See World Intellectual Property Organisation, 'Standing Committee on Copyright and Related Rights, Eleventh Session, Report' (2004), SCCR/11/4, para 24.

[201] See World Intellectual Property Organisation, 'Standing Committee on Copyright and Related Rights, Eleventh Session, Report' (2004), SCCR/11/4, paras 29,31, 33, 34, 35 and 38.

[202] See World Intellectual Property Organisation, 'Standing Committee on Copyright and Related Rights, Eleventh Session, Report' (2004), SCCR/11/4, 6–13.

[203] See World Intellectual Property Organisation, 'Standing Committee on Copyright and Related Rights, Eleventh Session, Report' (2004), SCCR/11/4, paras 46, 55, 58 and 59.

[204] See World Intellectual Property Organisation, 'Standing Committee on Copyright and Related Rights, Eleventh Session, Report' (2004), SCCR/11/4, para 46.

[205] See World Intellectual Property Organisation, 'Standing Committee on Copyright and Related Rights, Eleventh Session, Report' (2004), SCCR/11/4, paras 36 and 47.

As for the substantive articles in the Consolidated Text, the European Community opposed the right to prohibit as it degraded the rights granted because of the Rome Convention.[206] China expressed a similar opinion.[207] The United States replied that the rights granted by the Rome Convention were too strong and the right to prohibit was required to avoid the conflict with the other rights owners.[208] The European Community and the Russian Federation supported the provision of technological protection measures and rights management information along the lines of the WPPT.[209] Brazil, Chile and India objected to technological measures because that would restrict access to information by the public and conflict with the other treaties that allowed for private use, reporting of current affairs and use for the purpose of teaching or scientific research.[210] India and Turkey suggested that signal protection should not be included in the proposed treaty.[211] The Chairman responded that the motivation was protection of creativity as well as effort and investment.[212]

At the end of the session, the Chairman referred to the draft recommendations of this session[213] and invited comments. India, Brazil, the Islamic Republic of Iran and Chile expressed their views that convening the diplomatic conference was premature.[214] However, the draft recommendations were generally supported by delegates of member countries and the following recommendations were made in relation to the rights of broadcasting organisations: (1) the possibility of convening a diplomatic conference be considered at the WIPO General Assembly at its September/October session in 2004; (2) a revised Consolidated Text be prepared by the Chair; (3) the progress of the work be assessed at the twelfth session, and the recommendation of the date and the

[206] See World Intellectual Property Organisation, 'Standing Committee on Copyright and Related Rights, Eleventh Session, Report' (2004), SCCR/11/4, para 64.

[207] See World Intellectual Property Organisation, 'Standing Committee on Copyright and Related Rights, Eleventh Session, Report' (2004), SCCR/11/4, para 69.

[208] See World Intellectual Property Organisation, 'Standing Committee on Copyright and Related Rights, Eleventh Session, Report' (2004), SCCR/11/4, para 65.

[209] See World Intellectual Property Organisation, 'Standing Committee on Copyright and Related Rights, Eleventh Session, Report' (2004), SCCR/11/4, paras 64 and 67.

[210] See World Intellectual Property Organisation, 'Standing Committee on Copyright and Related Rights, Eleventh Session, Report' (2004), SCCR/11/4, paras 71, 73 and 114.

[211] See World Intellectual Property Organisation, 'Standing Committee on Copyright and Related Rights, Eleventh Session, Report' (2004), SCCR/11/4, paras 111 and 112.

[212] See World Intellectual Property Organisation, 'Standing Committee on Copyright and Related Rights, Eleventh Session, Report' (2004), SCCR/11/4, para 113.

[213] See the Annex I in World Intellectual Property Organisation, 'Standing Committee on Copyright and Related Rights, Eleventh Session, Report' (2004), SCCR/11/4, 35.

[214] See World Intellectual Property Organisation, 'Standing Committee on Copyright and Related Rights, Eleventh Session, Report' (2004), SCCR/11/4, paras 125, 127, 132 and 133.

preparatory steps for a diplomatic conference be made; and (4) regional consultation meetings be organised depending on the decision of the WIPO General Assembly and the request of the regional groups.[215]

4.11. Issues to Be Resolved toward a New Treaty

While the reasons for considering the upgrading of the rights of broadcasting organisations were not, in fact, to conform to new technology, the WIPO Symposium, as examined above, commenced on the presumption that the strengthening of the rights of broadcasting organisations was required in order to adapt to technological developments. At the beginning of the Standing Committee of Copyright and Related Rights, it was considered that the reason for the need for a new treaty was that piracy caused by newly appearing technology had made it impossible for the Rome Convention to provide sufficient protection for broadcasting organisations. There, the rationale for broadcasters' rights was still regarded as the protection of the dissemination of artistic works in the public interest as was the case with the Rome Convention.

However, as the discussions in the Standing Committee have been progressing, maintaining that position is beginning to face difficulties. There was a persuasive contention that investment did not deserve to be protected by intellectual property rights as exemplified by the fact that a party who simply converted free-to-air broadcasting to cable transmission had not been protected.[216] The question, then, is why broadcasting organisations should be protected, namely the rationale for protection. This is the issue to be resolved in moving towards the diplomatic conference for a new treaty for the protection of the rights of broadcasting organisations.

To the contention of investment being no basis for intellectual property protection, the Chairman responded at the Eleventh Session that the rationale was 'creativity as well as effort and investment'.[217] This rationale, the protection of creativity and the dissemination of works,[218] was the one that the Monaco Draft was based on. The Chairman's comment can be deemed an indication that the rationale for the protection of broadcasting organisations currently being considered is getting back to one of the mixture of the social-oriented

---

[215] See World Intellectual Property Organisation, 'Standing Committee on Copyright and Related Rights, Eleventh Session, Report' (2004), SCCR/11/4, 33.

[216] See, for example, World Intellectual Property Organisation, 'Standing Committee on Copyright and Related Rights, Ninth Session, Report' (2003), SCCR/9/11, para 48.

[217] See World Intellectual Property Organisation, 'Standing Committee on Copyright and Related Rights, Eleventh Session, Report' (2004), SCCR/11/4, para 113.

[218] See Chapter Three.

and creator-oriented approaches. This rationale, as explained in Chapter Three, was reversed by the Hague Draft and the Rome Convention which followed the Hague Draft.

This account conforms with the unanimous consent at the Standing Committee of Copyright and Related Rights that the protection of webcasting should be considered at WIPO at some later stage. This is because if the creativity of collecting and assembling broadcasts is the rationale for the protection of broadcasters' rights, webcasters are also worthy of protection as their acts are more than similar to those of broadcasters'. Acceptance by the participating countries of the Standing Committee of Copyright and Related Rights of the issue of the webcaster as a future topic of the Committee might be regarded as implicit approval by those countries of the ongoing gradual transformation of the rationale from the social-oriented approach to the creator-oriented one.

If the rationale for the protection of the rights of broadcasting organisations is in transition, the reason for upgrading the rights of broadcasting organisations can also be well explained. The rights of broadcasting organisations have to be updated in order to conform to the creator-oriented rationale, the idea of which is that an organisation's labour belongs to it.

5. WIPO General Assembly (September 2004 Session)

The General Assembly is the top-decision making body of WIPO comprised of the countries that are members of the treaties administered by WIPO amongst all member countries of the WIPO Treaty.[219] The functions of the General Assembly include: the appointment of the Director General; the review and approval of the reports of the Director General and the Coordination Committee; the adoption of the budget common to the Unions and the measures concerning the administration of international agreements; and so on.[220] Recommended by the Standing Committee of Copyright and Related Rights, the General Assembly at its Thirty-First (15th Extraordinary) Session considered the possibility of convening a diplomatic conference.

The General Assembly found that there was no country which opposed convening a diplomatic conference on the protection of the rights of broadcasting organisations.[221] However, it considered that it was not possible to set a date for a diplomatic conference at this stage where there were still substantive

---

[219] See Art. 6 and Art. 2(vii) of the WIPO Treaty.

[220] See Art. 6(2) of the WIPO Treaty.

[221] See paragraph 51, World Intellectual Property Organisation, 'WIPO General Assembly, Thirty-First (15th Extraordinary) Session, Report' (2004), WO/GA/31/15.

issues to be resolved at the Standing Committee on Copyright and Related Rights.[222] The General Assembly indicated that it could approve a diplomatic conference at the General Assembly in 2005 and recommended that the Standing Committee accelerate its work at the next session.[223]

6. Conclusion

As reviewed above, the discussions concerning the updating of the protection of broadcasters' rights was instigated by the claim of broadcasting organisations that the Rome Convention had become obsolete due to the development of technology. Broadcasting organisations pleaded the need to update the protection of their rights in light of the rights of the other parties in the Rome Convention having been updated by the WPPT. The discussions are continuing at the Standing Committee on Copyright and Related Rights to date and the advancement of technology is still advocated as the basis of the need to update the protection.

However, what is to be achieved by a new treaty cannot be said to be merely the filling of the gap between newly arrived technology and the protection of broadcasters' rights by the Rome Convention. The underlying grounds for upgrading the protection seem to be the introduction of the creator-oriented rationale into the traditional rationale for the protection of broadcasters' rights, that is the social-oriented rationale, which the Rome Convention has taken. While this potential gradual shift of the rationale for the protection of the rights of broadcasting organisations, which is the transition from the pure social-oriented rationale to some mixture of the social and creator-oriented rationale, has not been explicit, this seems to have caused the difference between the countries. Some of the countries stick to the social-oriented rationale more strictly while others tend to be more favourable to the transformation of the rationale.

What is the appropriate rationale for the protection of broadcasters' rights in this modern age? This is the issue which should be resolved during the course of concluding a new instrument for the protection of the rights of broadcasting organisations. In the next two Chapters, the ways in which the approaches adopted by the common law and civil law regimes have dealt with the protection of broadcasters' rights will be explored, in order to ascertain an appropriate rationale for their protection.

---

[222] See paragraph 51, World Intellectual Property Organisation, 'WIPO General Assembly, Thirty-First (15th Extraordinary) Session, Report' (2004), WO/GA/31/15.

[223] See paragraph 56, World Intellectual Property Organisation, 'WIPO General Assembly, Thirty-First (15th Extraordinary) Session, Report' (2004), WO/GA/31/15.

Chapter 6
The Protection of the Rights of Broadcasting Organisations in Australia

1. Introduction

According to the traditional understanding of copyright, as explained in the Introduction, the recognition of copyright is based on the social-oriented rationale for the common law approach and on the creator-oriented rationale for the civil law approach. Because the rights of broadcasting organisations are socially oriented, the common law approach recognises copyright for broadcasting organisations whereas the civil law approach does not.

However, this understanding, under which both the common law and civil law approaches consider the rights of broadcasting organisations as social-oriented rights, cannot explain the difference between the statements by the delegations of Australia and Japan at the first session of the WIPO Standing Committee on Copyright and Related Rights and the subsequent actions taken by those governments. If the rationale for protecting the rights of broadcasting organisations is social-oriented, the level of protection would be decided by policy considerations. Australia's standpoint – namely, that the current level of protection of broadcasting organisations is sufficient – can be supported as long as public policy analysis demonstrates that it is right. However, this standpoint leads to the question of why Australia needed to amend its *Copyright Act* 1968 (Cth) although there had been no problems in relation to the rights of broadcasting organisations in Australia.

In this Chapter, first, the Australian *Copyright Act* 1968 (Cth) at the time of the first session of the WIPO Standing Committee on Copyright and Related Rights will be analysed. The first Commonwealth Copyright Act was enacted in 1905.[1] This Act was not in force solely but together with the United Kingdom Copyright Act.[2] The *Copyright Act* 1912 was the first comprehensive copyright legislation in Australia although this Act merely adopted the United Kingdom *Copyright Act* 1911.[3] After the United Kingdom enacted its new Copyright Act in 1956, Australia commenced a review of the *Copyright Act* 1912.[4] The new Australian Copyright Act was passed in 1968 and came into force in May 1969. This is the Act that Australia has maintained so far with occasional amendments.

Secondly, the *Copyright Amendment (Digital Agenda) Act* 2000 (Cth), which is the latest amendment of the *Copyright Act* 1968 (Cth) related to broadcasters' rights, enacted in 2000 will be examined. The amendment was made after the Australian Delegation at the First Session of the WIPO Standing Committee of Copyright and Related Rights in 1988 stated that there had been no major problems concerning the protection of broadcasting organisations in Australia.[5] Analysis of the amendment is, therefore, necessary to ascertain the reasons why Australia found it necessary to amend its Copyright Act even though no problems with the broadcasting provisions had earlier been recognised.

Finally, a recent case regarding the protection of broadcasting – *TCN Channel Nine Pty Ltd v Network Ten Pty Ltd* (*The Panel* case) – will be analysed. This is the first case in Australia dealing with the issues concerning the infringement of copyright in broadcasts. The decision at first instance was delivered before the commencement of the *Copyright Amendment (Digital Agenda) Act*

---

1 Ricketson S & Richardson M, *Intellectual Property: Cases, Materials and Commentary*, (2nd ed, Sydney, Butterworths, 1998) 66.

2 Ricketson S & Richardson M, *Intellectual Property: Cases, Materials and Commentary*, (2nd ed, Sydney, Butterworths, 1998) 66. See for further details of the development of the relationship between United Kingdom law and Australian law, Reynolds R & Stoianoff N, *Intellectual Property: Text and Essential Cases*, (2nd ed, Sydney, Federation Press, 2005) 16–17.

3 Ricketson S & Richardson M, *Intellectual Property: Cases, Materials and Commentary*, (2nd ed, Sydney, Butterworths, 1998) 66. Ricketson S & Creswell C, *The Law of Intellectual Property: Copyright, Designs & Confidential Information*, (2nd ed, Sydney, Lawbook Co., 2001) [3.360].

4 Ricketson S & Richardson M, *Intellectual Property: Cases, Materials and Commentary*, (2nd ed, Sydney, Butterworths, 1998) 66.

5 World Intellectual Property Organisations, 'Standing Committee on Copyright and Related Rights, First Session, Report' (1998), SCCR/1/9.

2000 (Cth) although the Full Court[6] and the High Court[7] decisions were delivered after the coming into operation of the *Copyright Amendment (Digital Agenda) Act* 2000 (Cth). The Act applied to the case was the *Copyright Act* 1968 (Cth) before the amendment made by the *Copyright Amendment (Digital Agenda) Act* 2000 (Cth). However, the provisions that were the central issue of the case were not amended by the *Copyright Amendment (Digital Agenda) Act* 2000 (Cth). Therefore, the decision in this case is still important in determining Australia's position regarding the protection of the rights of broadcasting organisations even after the *Copyright Amendment (Digital Agenda) Act* 2000 (Cth).

2. *Copyright Act* 1968 in 1998

The Australian *Copyright Act* 1968 (Cth) provides protection for broadcasting organisations in Part IV – Copyright in Subject-Matter Other Than Works. It recognises copyright in 'television broadcasts' and 'sound broadcasts' (s.87). The following are the provisions regarding the protection of broadcasts.

2.1. Definition of 'Broadcast'

'Television broadcast' is defined as 'visual images broadcast by way of television, together with any sounds broadcast for reception along with those images'. 'Sound broadcasts' is defined as 'sounds broadcast otherwise than as part of a television broadcast' (s.10(1)). 'Broadcast' is defined as meaning 'transmit by wireless telegraphy to the public' (s.10(1)) and is the only form in which copyright is recognised without the condition of fixing the content into a material form. Thus, a live programme will be protected if it is broadcast.[8]

Additionally, 'wireless telegraphy' is defined as 'the emitting or receiving otherwise than over a path that is provided by a material substance, of electromagnetic energy' (s.10(1)). Therefore, cable distribution – so-called cable broadcasting, which uses a path provided by a material substance – was not included in the definition of 'broadcast' under the *Copyright Act* 1968 (Cth) in 1998.[9]

---

[6] The Full Court of the Federal Court of Australia hears and determines an appeal from the decision of a single judge made at first instance in the Federal Court of Australia.

[7] The High Court of Australia is the highest court in the Commonwealth of Australia.

[8] McKeough J & Stewart A, Intellectual Property in Australia, (2nd ed, Sydney, Butterworths, 1997) 133. Ricketson S & Creswell C, *The Law of Intellectual Property: Copyright, Designs & Confidential Information*, (2nd ed, Sydney, Lawbook Co., 2001), [8.75].

[9] Ricketson S & Creswell C, *The Law of Intellectual Property: Copyright, Designs & Confidential Information*, (2nd ed, Sydney, Lawbook Co., 2001), [8.75].

The exclusion of cable distribution from 'broadcasting' has two aspects. One is that cable distributors did not have protection for their programmes under the *Copyright Act* 1968 (Cth) at the time. The other aspect is that cable distribution which cable distributors made by utilising the broadcast of a broadcasting organisation did not constitute an infringement of the broadcaster's right to rebroadcast its broadcast.

The case *Amalgamated TV v Foxtel*[10] demonstrated that not only copyright in broadcasts but also copyright in cinematograph films or even other legal heads apart from the *Copyright Act* 1968 (Cth) could not prevent cable distributors from retransmitting free-to-air broadcasts by cable.

> Amalgamated Television Services Pty Ltd v Foxtel Digital Cable Television Pty Ltd
>
> Foxtel Digital Cable Television Pty Ltd (Cable) was a cable distributor with twenty subscription television broadcasting service licences under the *Broadcasting Services Act* 1992. In 1995, together with Foxtel Management Pty Ltd (Management) – a corporation without a broadcasting licence – Cable proposed a pay television subscription service, which provided twenty channels, by distributing programmes by cable. Among twenty services, seventeen of which were provided by Cable with its own programmes and the remaining three services were provided by Management with retransmitted free-to-air TV (Channel Seven, Nine and Ten) programmes. The applicants, who were the proprietors of commercial broadcasting stations (Channel Seven, Nine, Ten and others), tried to prevent the respondent – Management – from retransmitting the applicants' free-to-air television programmes.
>
> At first instance, the Federal Court dismissed the applicants' claim on 20 October 1995. The argument centred on the interpretation of s.212 of the *Broadcasting Services Act* 1992 (Cth). The section states that 'a service that does no more than re-transmit programmes' does not require a licence or permission unless the party which engages in the re-transmission is a licensee under the Act.
>
> The applicants submitted that 'a service' referred to in s.212 included the service that both the respondents intended to provide. The respondents submitted that 'a service' in s.212 of the Act meant one channel and more than a channel would be expressed as 'services'. The judge (Davies J) supported the respondents' argument because subsections (a) and (b) of s.212 referred to 'a national broadcasting service' and 'a commercial broadcasting service or a community broadcasting service licensee'. Furthermore, subsections (a) and (b) were connected with the word 'or' to make the two an alternative to each other. Hence, 'a service' did not include multi-channels.
>
> The applicants also submitted that what Management intended to do was 'more than re-transmit' because: (1) Management stated that there would be 'efficient and trouble free reception' in the subscription agreement; and (2) Cable processed signals to get over the difference between wireless and cable transmission and also encrypted signals. In addition, the signals were not received by a subscriber's television set directly but by Cable's

---

[10] *Amalgamated Television Services Pty Ltd v Foxtel Digital Cable Television Pty Ltd* (1995) 32 IPR 323.

set-top units. Davies J did not support this submission because: (1) efficient and trouble free reception was intended within the legislation; and (2) the technique of the retransmission was not a problem unless the reception through cable was perceived by human eyes and ears differently from the direct reception by a television set.

The applicants submitted that there was a breach of the principles of the *Broadcasting Services Act* 1992 (Cth) because Management charged a fee for free-to-air broadcasting. The judge agreed that the fee for the services by Management effectively covered the entitlement of receiving free broadcasting. The judge, however, decided that there was no breach of the principles of the *Broadcasting Services Act* 1992 (Cth) because the retransmission by Management did not impinge on the services by commercial broadcasting services, that is the services which made broadcasting available to the public free of charge by obtaining advertising revenue.

The applicants submitted that the respondents breached the copyright of Channel Seven, Nine and Ten. Davies J did not agree with this because s.199(4) of the *Copyright Act* 1968 (Cth) stated that when a cable transmission is made by receiving free-to-air broadcasts, a cable distributor will be deemed to be a licensee of copyright in works or cinematograph films that are broadcast. The 'broadcasts' had to be made by a licence holder under s.7(a) of the *Broadcasting Act* 1942 (Cth). The *Broadcasting Act* 1942 (Cth) was repealed by the *Broadcasting Services (Transitional Provisions and Consequential Amendments) Act* 1992 (Cth). However, that repeal included the provision in s.5(b) stating that a commercial broadcasting licence under the *Broadcasting Act* 1942 was to be treated as a licence under the *Broadcasting Services Act* 1992. Hence, the applicant was a licence holder under the *Broadcasting Services Act* 1992 (Cth).

The *Acts Interpretation Act* 1901 (Cth) states that if an Act includes a reference to another Act, the referred Act means the amended Act when the referred Act had been amended (s.10 of the *Acts Interpretation Act* 1901 (Cth)). Accordingly, a licensee in s.199(7) of the *Copyright Act* 1968 (Cth) meant a licensee under the *Broadcasting Services Act* 1992 (Cth). The interpretation of s.199 of the *Copyright Act* 1968 (Cth) was not inconsistent with that of s.212 of the *Broadcasting Services Act* 1992 (Cth).[11]

The Full Court dismissed the appeal in 1996. The issues on appeal were: (1) whether the transmission by the respondent of broadcasting programmes by the appellants amounted to 'no more than [to] retransmit programmes that [were] transmitted by a national broadcasting service' set out in s.212 of the *Broadcasting Services Act* 1992 (Cth); and (2) whether the retransmission by the respondent of broadcasting programmes of the appellants was an infringement of copyright in cinematograph films that constituted the broadcasting programmes.[12]

As for the first issue, the appellants argued that the service which the respondent provided for its subscribers amounted to more than merely 'retransmit' because the respondent provided it as part of its package to its subscribers. Whether or not the appellants' argument

[11] The decision also concerned a registered trade mark issue, which this research does not deal with.

[12] The argument in relation to a registered trade mark issue was not brought to the Full Court.

was supported depended on whether a 'service' encompassed a service provided by the respondent to its subscribers generally. Although at first instance Davies J dismissed the applicant's claim deciding that a 'service' meant an output of a channel, the Full Court decided the issue on a different ground. The Full Court suggested that there was no fixed definition of the word 'service' in the *Broadcasting Services Act* 1992 (Cth) and the word 'service' meant a particular channel or an output of a channel in each context in the Act. The Full Court determined, however, a 'service' in s.212 meant a particular channel. This was because subsection 1 of s.212, which concerned a 'service' to which the *Broadcasting Services Act* 1992 (Cth) did not apply, was not applied to a 'licensee' (s.212(2) of the Broadcasting Services Act 1992(Cth)). Since the 'service' and 'licensee' in the section were both singular, the 'service' in the section was determined to be a particular channel.

The Full Court supported the decision at first instance regarding the issue as to whether the retransmission by the respondent was 'no more than' retransmission stating that the 'expression is directed to program content, not techniques to achieve re-transmission of them'.

As for the second issue, the appellants argued that the respondent was not deemed to have a licence to transmit the film although s.199(4) of the *Copyright Act* 1968 (Cth) provided that the respondent could be treated as a licence holder if the respondent transmitted 'broadcasts' by reception of 'broadcasts' of the appellants. This is because s.199(7) states that 'broadcasts' means broadcasts made by a licence holder under the *Broadcasting Act* 1942 (Cth). The *Broadcasting Act* 1942 (Cth) had already been repealed. Therefore, it was contended that the appellants were not licence holders under the *Broadcasting Act* 1942 (Cth) and broadcasts by the appellants were not 'broadcasts' under s.199(4) of the *Copyright Act* 1968 (Cth).

Whether or not the appellants' argument was supported depended on whether or not the reference to '*Broadcasting Act* 1942' in the *Copyright Act* 1968 (Cth) was to be read as the *Broadcasting Services Act* 1992 (Cth). At first instance, the judge interpreted the reference to 'the holder of a licence or permit granted under the *Broadcasting Act* 1942' in s.199(7) of the *Copyright Act* 1968 (Cth) as a reference to a licence or permit granted under the *Broadcasting Services Act* 1992 (Cth). However, the Full Court decided that s.5(1)(b) of the *Broadcasting Services (Transitional Provisions and Consequential Amendments) Act* 1992 (Cth) kept the commercial broadcasting licences under the *Broadcasting Act* 1942 (Cth) in force 'as if they had been allocated under the 1992 Act (to use the language of s.5(1)(b) of the Transitional Provisions Act), but they remain licences granted under the [*Broadcasting Act*] 1942'. Accordingly, the appellants were the licence holders under the *Broadcasting Act* 1942 (Cth). Hence, the respondent was deemed to be a licence holder of the transmission of the appellants' film.

2.2. Broadcasts in Which Copyright Subsists

'Television broadcasts' and 'sound broadcasts' in which copyright subsists are: broadcasts made in Australia by the Australian Broadcasting Corporation (ABC)[13] and the Special Broadcasting Service (SBS);[14] television broadcasts

[13] Public broadcasting under the *Australian Broadcasting Corporation Act* 1983 (Cth). The ABC and SBS are public broadcasting organisations in Australia.

[14] Public broadcasting under the *Special Broadcasting Service Act* 1991 (Cth).

(s.91(a)) and sound broadcasts (s.91(c)) by broadcasting organisations that hold a licence under the *Radiocommunications Act* 1992 (Cth); and television broadcasts (s.91(b)) and sound broadcasts (s.91(c)) authorised by a licence or class licence granted by the Australian Broadcasting Authority under the *Broadcasting Services Act* 1992 (Cth) at the time of broadcasting.

The *Broadcasting Services Act* 1992 (Cth) classifies broadcasts into: (a) national broadcasting services; (b) commercial broadcasting services; (c) community broadcasting services; (d) subscription broadcasting services; (e) subscription narrowcasting services; and (f) open narrowcasting services (s.11 of the *Broadcasting Services Act* 1992 (Cth)).

National broadcasting services are broadcasting services by: (a) the Australian Broadcasting Corporation under the *Australian Broadcasting Corporation Act* 1984 (Cth); (b) the Special Broadcasting Service Corporation under the *Special Broadcasting Services Act* 1991 (Cth); or (c) a provider under the *Parliamentary Proceedings Broadcasting Act* 1946 (Cth) (s.13(1) of the *Broadcasting Services Act* 1992(Cth)).

Commercial broadcasting services are broadcasting services that satisfy all the following conditions: (a) providing programs that appear to be intended to appeal to the general public; (b) providing programs that are able to received by commonly available equipment and are made free to the public; (c) being funded by advertising revenues; (d) being operated for profit or as part of a profit-making enterprise; and (e) complying with any determinations or clarifications by the Australian Broadcasting Authority (s.14 of *the Broadcasting Services Act* 1992 (Cth)).

Community broadcasting services are broadcasting services that: (a) are provided for community purposes; (b) are not for profit or as part of a profit-making enterprise; (c) provide programs that are able to be received by commonly available equipment and made available free to the public; and (d) comply with any determinations or clarifications by the Australian Broadcasting Authority (s.15 of the *Broadcasting Services Act* 1992 (Cth)).

Subscription broadcasting services are broadcasting services that: (a) provide programs appearing to the general public; (b) are made available to the public on payment of subscription fees; and (c) comply with any determinations or clarifications by the Australian Broadcasting Authority (s.16 of the *Broadcasting Services Act* 1992 (Cth)).

Subscription narrowcasting services are broadcasting services: (a) whose reception is limited by special interest groups, locations, period to cover a special event, the appeal of programmes or some other reason; (b) that are made available on payment of subscription fees; and (c) that comply with any determinations or clarifications by the Australian Broadcasting Authority (s.17 of the *Broadcasting Services Act* 1992 (Cth)).

Open narrowcasting services are broadcasting services: (a) whose reception is limited by special interest groups, locations, period to cover a special

event, the appeal of programmes or some other reason: and (b) that comply with any determinations or clarifications by the Australian Broadcasting Authority (s.18 of the *Broadcasting Services Act* 1992 (Cth)).

Among these, commercial broadcasting services, community broadcasting services and subscription television broadcasting services are obliged to obtain a licence and other broadcasting services are obliged to acquire a class licence (s.12 of the *Broadcasting Services Act* 1992 (Cth)).

The *Broadcasting Services Act* 1992 (Cth) defines broadcasting services as 'a service that delivers television programs or radio programs whether the delivery uses the radiofrequency spectrum, cable, optical fibre, satellite or any other means or a combination of those means' (s.6(1)). Hence, 'broadcasting' under the *Broadcasting Services Act* 1992 (Cth) includes cable distribution. However, the *Copyright Act* 1968 (Cth), as explained above, limits 'broadcasting' to wireless telegraphy. Accordingly, cable distribution is not broadcasting in which copyright subsists. The *Broadcasting Services Act* 1992 (Cth) does not include teletext and on-demand transmission in 'broadcasting services' (s.6(1)). Accordingly, teletext and on-demand transmission are not broadcasting even if they are wireless telegraphy.

The above provisions applying to broadcasts are capable of being extended to broadcasts originating outside Australian territory by the Copyright Regulations (s.184(1)(f)). In addition, the Copyright Regulations have expanded the application of the *Copyright Act* 1968 (Cth) to broadcasting organisations whose headquarters are located in one of the member states of the Rome Convention and whose broadcasts qualify for protection under the legislation of the relevant member state (s.4(6) of the Copyright (International Protection) Regulations 1969).[15]

2.3. Exclusive Rights in Broadcasts

The copyright which subsists in broadcasts is: as regards images broadcast on television, the exclusive right 'to make a cinematograph film of the broadcast, or a copy of such a film' (s.87(a)); in the case of a sound broadcast and the sound of a television broadcast, the exclusive right 'to make a sound recording of the broadcast, or a copy of such a sound recording' (s.87(b)); and for a television broadcast or sound broadcast, the exclusive right 'to re-broadcast it' (s.87(c)).

[15] By the operation of the Copyright (International Protection) Amendment Regulations 2004 (No.2) which amended the Copyright (International Protection) Regulations 1969 as a consequence of the *US Free Trade Agreement Implementation Act* 2004 (Cth), the protection has been extended to US broadcasters.

The Australian Act recognises broadcasts themselves as the object of protection.[16] This may be demonstrated where a broadcast of a broadcasting organisation is redirected by another organisation, and subsequently that redirected broadcast is fixed and reproduced by an organisation other than the two mentioned above. Under the Australian Act, it is the original broadcasting organisation that can claim the rights in respect of the broadcast. If the broadcast of a broadcasting organisation is fixed and rebroadcast by another organisation, the Australian Act recognises not only the fixing but also the rebroadcasting as an infringement of the original organisation's copyright in the broadcast.

Attention should be drawn to the fact that copyright in broadcasts is recognised independently of copyright in works, performances or cinematograph films that are broadcast. Suppose, for instance, someone (person A) composed music. The music was played by another person (person B) and recorded by a record company. The record was used for radio broadcasting. In this case, person A has copyright in a musical work. Person B has performer's rights. The record company has copyright in the sound recording. The radio broadcasting organisation has copyright in the broadcast. Each copyright has a different object.

Even if a person makes a broadcast which includes a reading or recitation of a published literary or dramatic work or an adaptation of such a work, to be performed in public by receiving the broadcast, it is not regarded as an infringement of copyright in a published literary or dramatic work or an adaptation of such a work (s.199(1)). It is also not an infringement of copyright in a sound recording or a cinematograph film to make the sound recording heard or to make the cinematograph film to be heard or seen in public by receiving a broadcast which includes them (s.199(2)(3)).

Copyright in broadcasts is, in this way, recognised apart from copyright in any underlying works, sound recordings or cinematograph films.

3. *Copyright Amendment (Digital Agenda) Act* 2000

The *Copyright Amendment (Digital Agenda) Act* 2000 (Cth) originated from the Copyright Convergence Group (CCG) appointed by the Minister for Justice in 1993.[17] The membership of the CCG was announced in January 1994 and the report of the CCG was published in August 1994.[18] The recommendations of

---

[16] This is in contrast to Japanese law. See Chapter Seven.

[17] McKeough J & Stewart A, Intellectual Property in Australia, (2nd ed, Sydney, Butterworths, 1997) 161; Ricketson S & Creswell C, *The Law of Intellectual Property: Copyright, Designs & Confidential Information*, (2nd ed, Sydney, Lawbook Co., 2001), [8.80].

[18] Report of the Copyright Convergence Group, *Highways to Change: Copyright in the New Communications Environment*, (Canberra, Australian Government Publishing Service, 1994).

the CCG were incorporated into the Discussion Paper issued by the Attorney-General and Minister for Communications and the Arts in July 1997[19] which provided the basis for the Copyright Amendment (Digital Agenda) Bill.[20] This Bill was introduced into the House of Representatives in September 2000.[21] It was revised and finally enacted in August 2000.[22] The Bill became the *Copyright Amendment (Digital Agenda) Act* 2000 (Cth) (Digital Agenda Act), which came into effect in March 2001.[23]

WIPO adopted the WCT in 1996 to enhance copyright protection, to reflect the digital age. One of the roles of the Digital Agenda Act is to provide provisions that accord with the WCT in the *Copyright A*ct 1968 (Cth) in order to ratify the WCT.[24] However, the Digital Agenda Act, as described below, introduced new rights for broadcasting organisations, which the WCT does not include. Accordingly, the Digital Agenda Act cannot be regarded as an Act merely for the ratification of the WCT.

3.1. Objectives of the Digital Agenda Act

The Digital Agenda Act is concerned with new acts in which new technologies enable material to be used, particularly electronic forms of material.[25] Parliament explained in the Bill's Digest No. 102 1999–2000 that '[f]or example, it is now possible to make material available on the Internet, and to scan material into computers for searching and electronic distribution'.[26]

---

[19] Attorney General's Department and the Department of Communications and the Arts, *Copyright Reform and the Digital Agenda: Proposed Transmission Right, Right of Making Available and Enforcement Measures*, (Canberra, Australian Government Publishing Service, 1997).

[20] See, the Outline in the Parliament of the Commonwealth of Australia, House of Representatives, *Copyright Amendment (Digital Agenda) Bill 1999 Explanatory Memorandum* 2.

[21] Parliament of Australia*, Daily Bills List, 39th Parliament – 1st Session – 1998–1999–2000*. Parliament of Australia, *Bills Digest No. 102, 1999–2000, Copyright Amendment (Digital Agenda) Bill 1999* <http://www.aph.gov.au/library/pubs/bd/1999–2000/2000bd102.htm>.

[22] Attorney General's Department, *Copyright Reform: Copyright Amendment (Digital Agenda) Act 2000* <http://www.ag.gov.au/agd/Department/Publications/publications/copyfactsheet/copyfactsheet.html>.

[23] *Copyright Amendment (Digital Agenda) Act* 2000 (Cth), No. 110 of 2000.

[24] Middleton G, 'Copyright beyond the Digital Frontier: Australia's Proposed Digital Agenda Reforms' (1999) 10 *Journal of Law and Information Science* 52, 81; Ricketson S & Creswell C, *The Law of Intellectual Property: Copyright, Designs & Confidential Information*, (2nd ed, Sydney, Lawbook Co., 2001), [16.245]. See further, Gamertsfelder L, 'Digitising Copyright Law: An Australian Perspective' (2001) 6 *Media and Arts Law Review* 13, 13; Aplin T, 'Contemplating Australia's Digital Future: The Copyright Amendment (Digital Agenda) Act 2000' [2001] *European Intellectual Property Review* 565, 565.

[25] Parliament of Australia, *Bills Digest No. 102 1999–2000, Copyright Amendment (Digital Agenda) Bill 1999* <http://www.aph.gov.au/library/pubs/bd/1999–2000/2000bd102.htm>.

[26] Parliament of Australia, *Bills Digest No. 102 1999–2000, Copyright Amendment (Digital Agenda) Bill 1999* <http://www.aph.gov.au/library/pubs/bd/1999–2000/2000bd102.htm>.

The discussion paper prepared by the Attorney-General's Department and the Department of Communication and the Arts stated that:

> 'Digital technology and the growth of computer networks, particularly, of course, the Internet, have posed many challenges to the protection and enforcement of copyright throughout the world.'[27] 'The development of new communications technologies has meant that there are gaps in the protection afforded by the Copyright Act'.[28]

The Parliamentary Committee also explained in its Advisory Report on the Copyright Amendment (Digital Agenda) Bill 1999 that:

> 'the digital environment could not be linked to the print environment in all aspects. This is so particularly because the volume and quality of reproductions that can be made in the digital domain potentially far exceed those in the print domain. . . . The Committee recognises that the greatest potential for copyright infringement lies in the digital domain, given the ease of digital to digital reproduction of material'.[29]

The objective of the Digital Agenda Act is, in short, 'to improve copyright protection'[30] to catch up with the digital environment which gives easier copying and distribution of copyright material.

The reforms made by the Digital Agenda Act to achieve the above objective include:[31]

(1) establishing the communication right in place of the broadcasting right which did not cover cable distributions and the like;

---

[27] Attorney-General's Department and the Department of Communication and the Arts, *Discussion Paper, Copyright Reform and the Digital Agenda: Proposed Transmission Rights, Rights of Making Available and Enforcement Measures*, (Canberra, Australian Government Publishing Service, 1997) xi. See also, Parliament of the Commonwealth of Australia, House of Representatives, *Copyright Amendment (Digital Agenda) Bill 1999 Explanatory Memorandum* 5.

[28] Attorney-General's Department and the Department of Communication and the Arts, *Discussion Paper, Copyright Reform and the Digital Agenda: Proposed Transmission Rights, Rights of Making Available and Enforcement Measures*, (Canberra, Australian Government Publishing Service, 1997) xi. See also, Parliament of the Commonwealth of Australia, House of Representatives, *Copyright Amendment (Digital Agenda) Bill 1999 Explanatory Memorandum* 5.

[29] Parliament of the Commonwealth of Australia, House of Representatives, Standing Committee on Legal and Constitutional Affairs, *Advisory Report on Copyright Amendment (Digital Agenda) Bill* 1999, 7 [1.23].

[30] Parliament of the Commonwealth of Australia, House of Representatives, *Copyright Amendment (Digital Agenda) Bill 1999 Explanatory Memorandum*, 16.

[31] Attorney General's Department, *Copyright Reform: Copyright Amendment (Digital Agenda) Act 2000* <http://www.ag.gov.au/agd/Department/Publications/publications/copyfactsheet/copyfactsheet.html>. See also, Parliament of the Commonwealth of Australia, House of Representatives, *Copyright Amendment (Digital Agenda) Bill 1999 Explanatory Memorandum* 7. See also, Costelloe R, 'The New Digital Copyright Law in the Media, Entertainment and Communication Industries' (2001) 12 *Australian Intellectual Property Journal* 19, 20.

(2) reviewing the provisions in relation to limitation of copyright such as the fair dealing provisions in order to adapt them to deal with digital information;
(3) introducing provisions concerning circumvention devices, rights management information and broadcast decoding devices;
(4) clarifying that it is not Internet service providers but the persons who determine content who are liable for an infringement of copyright where a communication involving the infringement is made on the Internet; and
(5) introducing a statutory licence scheme for the re-transmission of free-to-air broadcasts, which were formerly made without the need for the permission of the broadcasting organisations and without payment.

3.2. Amended Provisions in Relation to the Broadcasters' Rights

The Digital Agenda Act altered the following provisions of the *Copyright Act* 1968 (Cth) in relation to the rights of broadcasting organisations.

3.2.1. *Definition of 'communicate'*

A new notion of 'communicate' was introduced to the *Copyright Act* 1968 (Cth). 'Communicate' means make available online or electronically transmit.[32] The means of transmission are not limited to wireless telegraphy. In so far as a work or subject-matter is transmitted whether over a path of material substance or otherwise, it falls within the definition of 'communicate'.[33]

3.2.2. *Definition of 'to the public'*

The meaning of 'to the public' was newly defined. The phrase 'to the public' had been used without defining it in the definition of 'broadcast' under the *Copyright Act* 1968 (Cth) before the amendment by the Digital Agenda Act. The definition of 'to the public' clarified that the public means both within and outside Australia.[34]

3.2.3. *Definition of 'broadcast'*

The definition of 'broadcast' was replaced from 'transmit by wireless telegraphy to the public' to 'communication to the public delivered by a broadcasting

---

[32] Parliament of the Commonwealth of Australia, House of Representatives, *Copyright Amendment (Digital Agenda) Bill 1999 Explanatory Memorandum* 24.

[33] Parliament of the Commonwealth of Australia, House of Representatives, *Copyright Amendment (Digital Agenda) Bill 1999 Explanatory Memorandum* 24.

[34] Parliament of the Commonwealth of Australia, House of Representatives, *Copyright Amendment (Digital Agenda) Bill 1999 Explanatory Memorandum* 27.

service within the meaning of the *Broadcasting Services Act* 1992'. Due to the introduction of 'communicate', 'broadcast' is no longer limited to wireless telegraphy. The *Broadcasting Services Act* 1992, as explained above, includes cable distribution in a broadcasting service; thus cable distribution is now included in broadcasting under the *Copyright Act* 1968 (Cth).

3.2.4. *Section 87(c)*

Section 87(c) was formerly the right of re-broadcasting[35] of a broadcast for a broadcasting organisation. It has now become the right of re-broadcasting of their broadcasts or communication to the public of their broadcasts. As a consequence of this amendment, copyright in broadcasts encompasses rebroadcasting by cable transmission and making available of a broadcast in addition to re-broadcasting by wireless telegraphy.[36] Because of the newly introduced definition of 'to the public', communication which is intended for an audience outside Australia is covered by copyright in broadcasts.[37]

3.2.5. *Definition of 'wireless telegraphy'*

Because of the alteration of the definition of 'broadcast', 'wireless telegraphy' is no longer referred to.[38] Therefore, the definition was repealed.

By the above amendments, the rights of cable distribution and making available both intended for the public in and outside Australia are recognised additionally for broadcasting organisations.

3.3. The Concept of the Digital Agenda Act

As explained above, it is improvement of copyright protection to catch up with the digital environment that the Digital Agenda Act has tried to achieve. The Digital Agenda Act extended copyright protection in order to encompass the use of copyright material in the digital environment, but tried not to change the balance of interests between owners of copyright and users of copyright material.

In relation to the maintenance of the balance, for example, the Parliamentary Committee notes in its Advisory Report that 'the department's

---

[35] 'Re-broadcasting' under the Australian Act means simultaneous and deferred retransmission of a broadcast.

[36] Parliament of the Commonwealth of Australia, House of Representatives, *Copyright Amendment (Digital Agenda) Bill 1999 Explanatory Memorandum* 52.

[37] Parliament of the Commonwealth of Australia, House of Representatives, *Copyright Amendment (Digital Agenda) Bill 1999 Explanatory Memorandum* 27.

[38] Parliament of the Commonwealth of Australia, House of Representatives, *Copyright Amendment (Digital Agenda) Bill 1999 Explanatory Memorandum* 27–28.

policy intention is to maintain the same balance between the interests of copyright owners and users in all environments.'[39] The Explanatory Memorandum of the Digital Agenda Bill also states that 'These recommendations balance the interests of copyright owners and copyright users'.[40]

The Digital Agenda Act can be said to be an Act to keep the balance between owners of copyright and users of copyright material in the digital environment where the potential for copyright infringement has been greatly increased because of the number of acts which users of copyright material can do has been so increased as to make copyright protection and enforcement difficult.

3.4. The Rationale for Copyright Protection by the Digital Agenda Act

The Attorney-General said the following in relation to the Digital Agenda Bill.

> 'The central aim of the bill . . . is to ensure that copyright law continues to promote creative endeavour, and at the same time, allows reasonable access to copyright material in the digital environment.'[41]

The parliamentary committee commented as regards the above statement in its Advisory Report that: 'The Attorney-General identified the two competing public interests. . . . On the one hand, there is a public interest in providing incentives to creators through equitable remuneration, and on the other, there is a public interest in maintaining reasonable access to copyright material for users.'[42] The Digital Agenda Act was to keep the balance between owners of copyright and users of copyright. The balance in this context is, according to the interpretation of the parliamentary committee, the balance within the extent of public interest.

Australia, a country which takes the common law approach, has protected copyright in subject-matter as well as that in works according to the social-oriented rationale, which means that protection is granted to achieve some public interest. Retaining the balance in the public interest is, therefore, applicable to all rights that are covered by the Digital Agenda Act. In other words, the

---

[39] House of Representatives, Standing Committee on Legal and Constitutional Affairs, *Advisory Report on Copyright Amendment (Digital Agenda) Bill* 1999, 7 [1.22].

[40] Parliament of the Commonwealth of Australia, House of Representatives, *Copyright Amendment (Digital Agenda) Bill 1999 Explanatory Memorandum* 16.

[41] The Hon. Daryl Williams AM QC MP, Attorney-General, Second Reading Speech, Copyright Amendment (Digital Agenda) Bill 1999, House of Representatives, *Hansard*, 2 September 1999, 7428.

[42] House of Representatives, Standing Committee on Legal and Constitutional Affairs, *Advisory Report on Copyright Amendment (Digital Agenda) Bill* 1999, 6 [1.17].

parliamentary committee recognised that the Digital Agenda Act was to strengthen copyright protection within the extent of the social-oriented rationale.

Because the objective of the Digital Agenda Act is to adapt to the digital environment, it is important to understand the nature of the digital environment. The parliamentary committee stated that:

> 'the digital environment could not be likened to the print environment in all respects. This is so particularly because the volume and quality of reproductions that can be made in the digital domain potentially far exceed those in the print domain. . . . This Committee recognises that the greatest potential for copyright infringement lies in the digital domain, given the ease of digital to digital reproduction of material.'[43]

The nature of the digital environment is the technical ease of reproduction, that is an environment which favours users of copyright material. The Digital Agenda Act was conceived as a framework under the environment of favouring users.[44]

Although the environment has shifted to users of copyright material, it was desired to maintain the balance between copyright owners and users. In that case, the only way to maintain the balance between copyright owners and users was to amend the *Copyright Act* 1968 (Cth) to grant more protection to owners of copyright. The Digital Agenda Act, therefore, placed importance upon improving protection for copyright owners.[45]

In fact, '[s]ome members of the [parliamentary] Committee are inclined towards the view that, due to the difficulty in controlling the unauthorised use of copyright material in the digital domain, use of digital material should be exclusively controlled by copyright owners.'[46] Particularly, in relation to communication technologies, the Attorney-General's Department noted that:

> 'The development of new communications technologies has exposed gaps in copyright protection under the *Copyright Act* 1968 (the Act). For example, the Act currently only grants copyright owners limited, technology-specific transmission rights, eg, the right to broadcast only extends to 'wireless' broadcasts, and the existing cable diffusion right does not extend to sound recordings or television and radio broadcasts. Further, copyright

---

[43] House of Representatives, Standing Committee on Legal and Constitutional Affairs, *Advisory Report on Copyright Amendment (Digital Agenda) Bill* 1999, 7 [1.23].

[44] See, Parliament of the Commonwealth of Australia, House of Representatives, *Copyright Amendment (Digital Agenda) Bill 1999 Explanatory Memorandum* 2.

[45] See the analysis of the shifting balance between copyright owners and users by the Digital Agenda Act exemplifying technological protection measures, Gamertsfelder L, 'Digitising Copyright Law: An Australian Perspective' (2001) 6 *Media and Arts Law Review* 13.

[46] Parliament of Australia, House of Representatives, Standing Committee on Legal and Constitutional Affairs, *Advisory Report on Copyright Amendment (Digital Agenda) Bill* 1999, 7 [1.24].

> owners currently do not have effective rights in relation to the use of their copyright material on the Internet.'[47]

As the above note demonstrates, the Digital Agenda Act highlighted only the rights of copyright owners particularly in the area related to the communication technologies.

The concern of the Digital Agenda Act seems to be that the object of copyright should be controlled by a copyright owner. It means that the idea of the Digital Agenda Act is that the object of copyright belongs to a copyright owner. The idea is, indeed, the rationale for protection under the natural rights theory. The rationale for protection of copyright including copyright in broadcasts under the Digital Agenda Act, therefore, seem to be based on the natural rights theory, that is the creator-oriented rationale.

3.5. Significance of the Digital Agenda Act

In order to maintain the position which Australia has taken traditionally, that is to grant copyright protection based on the social-oriented rationale, in the digital environment, which is far more favourable to users of copyright material than ever before, the Digital Agenda Act shifted the balance of protection to the side of copyright owners. As a result, the Digital Agenda Act had to introduce the idea of copyright protection by the natural rights theory, that is the rationale for protection under the creator-oriented rationale. The Digital Agenda Act can be considered the first Act in Australia which brought the creator-oriented rationale to the *Copyright Act* 1968 (Cth), in particular, to the area related to communication technologies including the rights of broadcasting organisations.

4. The Panel Case – *TCN Channel Nine Pty Ltd v Network Ten Pty Ltd*

In March 2004, the High Court of Australia handed down its first decision in the so-called *The Panel* case. At that time, the long standing issue of the definition of a television broadcast in Australia was finally resolved. *The Panel* case is the first and only case in Australia dealing directly with infringement by a free-to-air television broadcaster of copyright in broadcasts. Although this

---

[47] Attorney General's Department, *Copyright Reform: Copyright Amendment (Digital Agenda) Act 2000* <http://www.ag.gov.au/agd/Department/Publications/publications/copyfactsheet/copyfactsheet.html>.

case is often regarded as a case on the fair dealing defence,[48] the significance of this case lies in its determination of what constitutes a television broadcast to be protected under the *Copyright Act* 1968 (Cth).[49]

While the Digital Agenda Act, which includes provisions concerning broadcasts, was enacted in September 2000, it was in March 2001 that the Digital Agenda Act came into force. *The Panel* case was first brought into the Federal Court in February 2000. Hence *The Panel* case was decided under the former provisions of the *Copyright Act* 1968 (Cth). However, the relevant part of the provisions remains unchanged in the Digital Agenda Act so that the decision is still the leading case even after the coming into force of the Digital Agenda Act.

4.1. Primary Decision

4.1.1. *Background*

The respondent (Network Ten), a commercial broadcasting organisation in Australia, broadcast excerpts of programmes of the applicant (TCN Channel Nine and others), another commercial broadcasting station. The excerpts comprised twenty segments of sixteen programmes varying from eight seconds to forty-two seconds. The respondent was not authorised to do so by the applicant. The applicant instituted proceedings in the Federal Court of Australia against the respondent claiming that taping the segments of the applicant's programmes and broadcasting the excerpts of the applicant's programmes constituted an infringement of copyright in broadcasts owned by the applicant pursuant to s.87(c) and s.87(a) of the *Copyright Act* 1968 (Cth) respectively. The respondent denied copyright infringement.

As explained above, the right to make a cinematograph film of a television broadcast, or to re-broadcast it, is subject to the licence or permission of the

---

[48] See, for example, Handler M & Rolph D, '"A Real Pea Souper": *The Panel Case* and the Development of the Fair Dealing Defences to Copyright Infringement in Australia' (2003) 27 *Melbourne University Law Review* 381; O'Brien J, Heindl S & Wintermantel D, 'The "Panel" decision: the whittling down of fair dealing defences in the face of heightened risks of copyright infringement' (2003) 15 *Australian Intellectual Property Law Bulletin* 135; Brennan D, 'Copyright and Parody in Australia: Some Thoughts on Suntrust Bank v Houghton Mifflin Company' (2002) 13 *Australian Intellectual Property Journal* 161; De Zowart M, 'Seriously Entertaining: *The Panel* and the Future of Fair Dealing' (2003) 8 *Media and Arts Law Review* 1; O'Brien J, Heindl S & Wintermantel D, '"The Panel" Decision of the Full Federal Court' (2002) 21 *Communications Law Bulletin* 1. However, the significance of the case is not limited to fair dealing.

[49] CCH, 'Copyright: Novel Decision on Television', *Australian Intellectual Property News* No 199, 27 March 2001, 1.

copyright owner provided that a cinematograph film or re-broadcast comprises 'visual images' 'together with any sound broadcast for reception along with those images' 'which are transmitted by wireless telegraphy to the public' 'by way of television'. The *Copyright Act* 1968 (Cth), however, provides that acts done in relation to a substantial part of a work or other subject-matter are deemed to have been done in relation to the whole of the work or other subject-matter. The relevant provision states that 'a reference to the doing of an act in relation to a work or other subject-matter shall be read as including a reference to the doing of that act in relation to a substantial part of the work or other subject-matter' (s.14). The operation of this provision is the so-called substantiality test.[50] Due to the substantiality test, unless the excerpts used by Network Ten constituted television broadcasts, there could be no infringement by Network Ten of copyright in the broadcasts owned by TCN Channel Nine. Copyright infringement would have been dependent on whether the excerpts were substantial parts.

4.1.2. *Findings by the Primary Judge*

In February 2001, the primary judge (Conti J) decided that a television broadcast protected under the *Copyright Act* 1968 (Cth) was 'a television broadcaster's program, or respective segments of a program, if a program is susceptible to subdivision by reason of the existence of self contained themes'[51] and rejected the claim of the applicant, holding that the excerpts that the respondent used without permission of the applicant were not substantial parts of television broadcasts of the applicant.

In the judgment, the primary judge first went through the notion of substantiality in the cases concerning a dramatic work, a musical work, a literary work, a computer program (which is a literary work but defined independently of a literary work because a computer program has a particular definition apart from the definition of a literary work) and a published edition. The primary judge determined that a Full Court case concerning a published edition, *Nationwide New Pty Lid v Copyright Agency Ltd*,[52] was of assistance for the present case because both a published edition and a television broadcast are copyright material in which 'the originality of expression is not involved in establishment of copyright so protected'.[53] The primary judge agreed with Sackville J in *Nationwide News* and held that the substantiality of copyright material depended upon 'the quality of what is taken'.[54] Thus, partial

[50] See, Ogawa M, 'Substantiality of Television Broadcast in Australia' [2003] *Entertainment Law Review* 144.
[51] *TCN Channel Nine Pty Ltd v Network Ten Pty Ltd* (2001) 50 IPR 335, 369 [43]. See also 336.
[52] *Nationwide News Pty Ltd v Copyright Agency Ltd* (1996) 34 IPR 53.
[53] *TCN Channel Nine Pty Ltd v Network Ten Pty Ltd* (2001) 50 IPR 335, 345.
[54] *TCN Channel Nine Pty Ltd v Network Ten Pty Ltd* (2001) 50 IPR 335, 345.

taking amounts to an infringement where the quality of what is taken amounts to substantial part of a television broadcast.

According to the primary judge, a television broadcast protected by copyright was not a broadcasting signal and not a single image. The primary judge determined this relying on the following two passages of a textbook by Laddie, Prescott and Vitoria, *The Modern Law of Copyright and Designs*:[55]

> '… it is the "message" carried by the broadcast wave – the visual images, sound or other information . . . and not the waves as such which may be regarded as temporary packaging for use in transit . . . But the "message" carried by broadcast waves is nothing more nor less than what is encoded by the precursor signal used to modulate the carrier wave at the broadcasting station. It is submitted that to make sense of these matters one must have recourse to the rather metaphysical concept that the substance of the "work" – what everyone is interested in sending or receiving – is the "message", the wireless telegraphy waves are the outward accident thereof. Put in more practical terms, what is protected by broadcasting copyright are the visual images, sounds or other information but copyright cannot arise unless the author engages in the act of transmitting these by wireless telegraphy, this being a condition precedent to the acquisition of the right. It is, however, a mistake to suppose that the visual images, sounds or other information enjoy broad protection in the same way as an artistic, musical or literary work. For instance, in the case of sound broadcasting it is only sounds actually heard in the broadcasting studio which are protected, not the underlying intellectual content, and so on.'[56]

> '… the Act does stipulate that the copyright in a broadcast or cable program may be infringed by the copying of a "substantial part"… How lengthy must an extract be before it counts as a substantial part for this purpose? While no absolute standard can be laid down, the Act states that in relation to a film, television broadcast or cable program, "copyright" includes making a photograph of the whole or any substantial part of any image forming part thereof. This strongly suggests that the taking of even a single frame of a film (or the equivalent amount of a TV broadcast) may be an infringement. Yet in an average feature film a single frame forms less than 0.001 percent of the total. Sheer length, then, is unlikely to be conclusive. Perhaps a practical test is to inquire whether what is taken has any discernible market value. A poster would have. A short burst of sound engendered while "channel hopping" on a receiver in a shop would not. It may be that anything which is not de minimis would be regarded as "substantial".'[57]

According to the primary judge, a television broadcast was comprised of a number of images a number of which constituted a programme.[58] The primary judge held that this is because the Spicer Committee Report, which had recommended the introduction of copyright in broadcasts into Australia, used the word 'program' when explaining the reason why copyright protection should

[55] *TCN Channel Nine Pty Ltd v Network Ten Pty Ltd* (2001) 50 IPR 335, 351–352.

[56] Laddie H, Prescott P & Vitoria M, *The Modern Law of Copyright and Design*s, (2nd ed, London, Butterworths, 1995) 458.

[57] Laddie H, Prescott P & Vitoria M, *The Modern Law of Copyright and Design*s, (2nd ed, London, Butterworths, 1995) 470.

[58] *TCN Channel Nine Pty Ltd v Network Ten Pty Ltd* (2001) 50 IPR 335, 367.

be granted to broadcasters.[59] The primary judge also responded to Channel Nine's submission that every single visual image should be protected and commented that 'it may well follow by analogy that substantiality in relation to sound broadcasting would be fulfilled in relation to each and every individual sound... a surprising consequence'.[60]

4.1.3. *Difficulties with the Primary Decision*

The subject matter which previous cases have dealt with in relation to s.14 concerning substantiality are dramatic works, musical works, literary works including computer programs and published editions. *The Panel* case is the first decision that deals with broadcasts. Among the subject matter that the cases have dealt with, only a 'dramatic work' and 'literary work' have inclusive definitions. The definitions do not give an idea of what exactly is a dramatic or literary work. There is not even a definition for a 'musical work' or 'published edition'. Accordingly, the scope of these terms is a matter for case law.

A 'computer program' has a statutory definition, that is 'an expression, in any language, code or notation, of a set of instructions ... to cause a device having digital information processing capabilities to perform a particular function.' It is obvious that a computer program must be a consecutive expression which is designed to accomplish a particular objective. It is reasonable that substantiality will be an issue when an action is done only to a part of such a work since copyright in 'a literary ... work is infringed by a person who ... does in Australia ... any act comprised in the copyright.' (s.36(1))

In contrast to works or subject matter referred to above, 'television broadcast' has an exhaustive statutory definition. According to it, 'television broadcast' means 'visual images together with any sounds for reception along with those images' which are 'transmit[ted] by wireless telegraphy to the public'. Any other conditions such that the images must form an expression with consecutive meaning do not appear. The word 'message' which Laddie, Prescott and Vitoria used in their explanation does not mean a programme. The authors' understanding is that copyright in broadcasts does not protect signals or intellectual contents but whatever is conveyed by signals. This was demonstrated by their explanation in the case of sound broadcasting, that is, 'only sounds actually heard in the broadcasting studio which are protected, not the underlying intellectual content'.

The above authors' explanation can be put in the following way. Where music is broadcast by radio, what is protected by copyright in broadcasts is not the radio signals, not the music, but the sounds actually heard in the broadcasting

[59] *TCN Channel Nine Pty Ltd v Network Ten Pty Ltd* (2001) 50 IPR 335, 365.
[60] *TCN Channel Nine Pty Ltd v Network Ten Pty Ltd* (2001) 50 IPR 335, 361.

studio. Similarly, where a programme is broadcast by television, what is protected is not the signals, not the programme, but what was broadcast, namely the visual images each of which was comprised of several hundred lines transmitted one by one by a broadcasting organisation.

Since a television broadcast simply means what is merely conveyed by signals irrespective of the meaning or content, there is no beginning or end of a television broadcast. The notion of a 'substantial' part or even of a 'part' cannot therefore be applied to a television broadcast in the ordinary way of understanding the Act. It follows that substantiality cannot be an issue in relation to a television broadcast. There is no room for s.14 to operate over a television broadcast. The logical conclusion to be drawn from the discussion by Laddie, Prescott and Vitoria should have been that if an image of television broadcasting is copied or re-broadcast, that act constitutes an infringement.

Notwithstanding this, the authors affirm that an infringement of copyright only occurs when a substantial part of a television broadcast has been copied. This would appear to be based on the idea that a television broadcast is a series of images that has a consecutive meaning. However, there is no explanation by the authors of why a 'television broadcast' should be interpreted in this manner.

The primary judge's decision that a television broadcast means a program seems to be based on a similar idea to the authors'. The primary judge seems to have considered that since s.14 operated in *Nationwide New*s, a case of a published edition, s.14 should operate equally on a television broadcast. The grounds that the primary judge so considered seem to be that both a published edition and a television broadcast are copyright materials in which 'the originality of expression is not involved in establishment of the copyright so protected'. However, the factor which decides the operation of s.14 is the existence of the notion of the 'whole' or 'part' of copyright material. This notion exists in a published edition but not in a television broadcast.

Therefore, *Nationwide News* cannot be relied upon for this case since there is no resemblance or similarity between a published edition and a television broadcast. As discussed above, the first instance decision of *The Panel* case is questionable.

4.2. Full Court Decision

4.2.1. *Background*

The appellant (Channel Nine) appealed from the judgment of the primary judge to the Full Court of the Federal Court.[61]

---

[61] The following argument concerning the Full Court decision is based on: Ogawa M, 'Substantiality of Television Broadcasts in Australia' [2003] *Entertainment Law Review* 144.

4.2.2. *Findings by the Full Court*

In May 2002, the Full Court set aside the orders of the trial judge and allowed the appeal in part, holding that a television broadcast means any one or more visual images and accompanying sounds broadcast by means of television[62] and therefore the use by the respondent of the excerpts of the appellant's programme without permission of the appellant constituted an infringement.

In the Full Court, Hely and Finkelstein JJ respectively, with whose judgment Sundberg J agreed, explained that 'television broadcast' is not a particular television programme but 'visual images broadcast by way of television, together with any sounds broadcast for reception along with those images' (s.10).[63] The judges referred to the definition of a cinematograph film and a sound recording and explained they are respectively the 'aggregate of the visual images embodied in an article or thing so as to be capable of being shown as a moving picture' and the 'aggregate of the sound involved in a record'. To the court, the definitions pointed to the need for a series of images or sounds.[64] In contrast, a broadcast is simply defined as 'visual images . . .' and is not required to be a series of images. Copyright subsists in broadcasts in so far as the subject matter is broadcast. Hence, copyright infringement was to be determined irrespective of a television program.

Hely J explained the meaning of 're-broadcast' as simply meaning broadcasting what another broadcaster has already broadcast and that it is not confined to redirection which means simultaneous broadcasting of a programme of another broadcaster by means of receiving it,[65] and determined that rebroadcasting what was broadcast by another broadcaster constituted infringement of copyright because the interest protected for broadcasts was not the larger whole of visual images but the visual images themselves.[66] According to Hely J, there is room for the application of s.14(1) in terms of ascertaining infringement of copyright in broadcasts although that section was not applicable in this case.[67] The view of Hely J was that the substantiality of a broadcast will be considered when rebroadcasting of either visual images or sounds, or of cropped images is made.[68]

---

[62] See, *TCN Channel Nine Pty Ltd v Network Ten Pty Ltd* (2002) 55 IPR 112, 129 [85].
[63] *TCN Channel Nine Pty Ltd v Network Ten Pty Ltd* (2002) 55 IPR 112, 119 [33], 114 [8] and 113 [1].
[64] *TCN Channel Nine Pty Ltd v Network Ten Pty Ltd* (2002) 55 IPR 112, 119 [33] and 15 [12].
[65] See, *TCN Channel Nine Pty Ltd v Network Ten Pty Ltd* (2002) 55 IPR 112, 128 [78].
[66] *TCN Channel Nine Pty Ltd v Network Ten Pty Ltd* (2002) 55 IPR 112, 129 [82].
[67] *TCN Channel Nine Pty Ltd v Network Ten Pty Ltd* (2002) 55 IPR 112, 130 [89].
[68] *TCN Channel Nine Pty Ltd v Network Ten Pty Ltd* (2002) 55 IPR 112, 130 [89].

4.2.3. *Difficulties with the Full Court Decision*

The decision of the Full Federal Court appears to be generally appropriate with a sound explanation of reasons why the decision at first instance should not be upheld. However, there seems to be one point regarding the application of s.14(1) to broadcasts that should be considered more carefully following the full court decision.

Hely J's view, namely that the substantiality of a broadcast will still need to be considered when rebroadcasting of either visual images or sounds, or, of cropped images is made,[69] does not appear to be entirely consistent with his own explanation:

> 'It is the actual images and sounds broadcast which constitute the interest protected. The interested protected [by copyright in broadcasts] is not defined in terms of some larger "whole". . .'.[70]

As Hely J pointed out, 'today there is a continuous television broadcast, although the subject matter of that broadcast may be so arranged as to be of interest to different sections of the public at different times in the day. There may be some spectacles or events . . . continuing for more than a day'.[71] Because of this, there is no 'whole' broadcast, and protection is given for images as long as the images are broadcast by way of television. Since the notion of 'whole' does not exist, the notion of 'substantial part' or 'part' itself cannot exist either. In this respect, Hely J's explanation that 'the interest protected is . . . a part'[72] is slightly confusing. The word 'part' in this context should be understood as something which the judge at first instance thought of as a 'part' of a broadcast, or simply as an opposite to or negation of 'whole'.

Because the *Copyright Act* 1968 (Cth) does not provide for the notion of a 'whole' broadcast, unlike cinematograph films or sound recordings, there cannot be room for the notion of 'part' of such a broadcast. Hence, s.14(1) should not apply to broadcasts when an infringement of copyright in broadcasts is considered. Accordingly, it does not seem to be appropriate to apply s.14 to broadcasts when considering an infringement of copyright in broadcasts.

The following is a tentative consideration of a possible argument if s.14(1) were to apply to broadcasts. The application of s.14 could create arguments on more limited occasions than Hely J's above explanation for the following reasons.

---

[69] *TCN Channel Nine Pty Ltd v Network Ten Pty Ltd* (2002) 55 IPR 112, 130 [89].
[70] *TCN Channel Nine Pty Ltd v Network Ten Pty Ltd* (2002) 55 IPR 112, 129 [82].
[71] *TCN Channel Nine Pty Ltd v Network Ten Pty Ltd* (2002) 55 IPR 112, 129 [84].
[72] *TCN Channel Nine Pty Ltd v Network Ten Pty Ltd* (2002) 55 IPR 112, 129 [82].

Hely J suggested that the application of section 14 occurs where:

(1) only visual images without sounds of a television broadcast are rebroadcast;
(2) only sounds without visual images of a television broadcast are rebroadcast; or
(3) cropped visual images of a television broadcast are rebroadcast.

In relation to Hely J's first example where (1) only visual images of a television broadcast are rebroadcast, it seems difficult to contend that the visual images do not constitute a substantial part of a television broadcast. A television broadcast is, as defined 'visual images broadcast by way of television …', for the first intent, visual images. Although the visual images have to be accompanied by sounds, nevertheless, it is arguable that the real substance of a television broadcast is the visual images. This is clear from Hely J's explanation that 'the interest protected by the copyright is the visual images broadcast by way of television and any accompanying sounds'. Visual images are 'accompanied' by sounds. The main interest protected by copyright in broadcasts is visual images.

Another point in support of the argument that visual images will constitute a substantial part of a television broadcast is that the decision referred only to visual images rebroadcast or reproduced by the respondent. Although *The Panel* case dealt with the claim by the appellant that the respondent had rebroadcast excerpts of the appellant's television broadcast, that is visual images together with sounds, sounds were not referred to in the decision. Visual images cannot help but constitute a substantial part of a television broadcast at any time. If so, substantiality is automatically recognised when s 14(1) is applied to a consideration of whether there is an infringement of copyright in broadcasts where only visual images without sounds of a television broadcast are rebroadcast.

In Hely J's second example, where (2) only sounds of a television broadcast are rebroadcast, it seems difficult to argue that sounds alone constitute a substantial part of a television broadcast for the same reason as the above. A television broadcast is primarily appreciated by virtue of the visual images and the sounds are secondary in the sense that they merely accompany them. Depending on the actual programme, for instance a music programme, the main reason why viewers are attracted may be because of the sounds. However, this is a matter of the substantiality of a television programme, not a matter of substantiality of a television broadcast. The difference between a television programme and a television broadcast was repeatedly explained in the decision of the Full Federal Court in *The Panel* case.

If the rebroadcast of sounds alone does not constitute a substantial part, the denial of copyright protection for sounds of a television broadcast could cause

disadvantages for the rights-owners of the underlying works or subject matter that are broadcast. However, it seems to be unavoidable under the current *Copyright Act* 1968 (Cth). If the Act did not exclude sounds of a television broadcast from sound broadcasting, rebroadcasting sounds of a television broadcast would have been able to be dealt with as the copyright infringement of sound broadcasts and would not have caused a particular problem.

For (3), rebroadcasting cropped images by receiving parts of images of a television broadcast, it is technically unrealistic to anticipate this happening. Anyone who wants to rebroadcast a part of an image cannot avoid fixing the whole frame of an image to crop a part of it. Fixing any of the images in a broadcast constitutes infringement of copyright in broadcasts under s.87(a) and s.101. A cinematograph film of a television broadcast includes a cinematograph film of any of the visual images comprised in the broadcast (s.25(a)). The expression 'any of the visual images', as Hely J explained, 'encompasses any one or more of those images, without any requirement that the images should amount to a substantial part of the broadcast'.[73] Therefore, where cropped images of a television broadcast are rebroadcast, an infringement of copyright in broadcasts is always established by s.87(a). Accordingly, substantiality does not need to be considered unless an authorised person fixes an image of a broadcast and passes it to another person who rebroadcasts it.

Thus, even if s.14(1) is applied to broadcasts, the practical consideration of substantiality will not necessarily be required. When visual images of a television broadcast are rebroadcast, substantiality will be automatically recognised. When sounds of a television broadcast are rebroadcast, substantiality will be automatically denied. Only when an authorised person fixes a broadcast and another person crops an image of the fixed broadcast and rebroadcasts it, substantiality of part of an image will be considered.

The Full Court decision recognised whichever subject-matter is broadcast as 'television broadcast', which is more faithful to the definition of a 'television broadcast' which is defined in the *Copyright Act* 1968 (Cth) and denied the notion of a 'whole' television broadcast. Unless a 'whole' television broadcast exists, 'part' of a television broadcast cannot exist. However, the Federal Court seemed to intend to leave room to apply the substantiality test, of which the basis is the existence of 'part', for determining copyright infringement in relation to a television broadcast in the same way as determining copyright infringement in relation to works or subject-matter other than a television broadcast.[74]

---

[73] *TCN Channel Nine Pty Ltd v Network Ten Pty Ltd* (2002) 55 IPR 112, 126 [67].

[74] There is criticism that the substantiality test applies too narrowly in the Full Court decision. See, Handler M, '*The Panel* Case and Television Broadcast Copyright' (2003) 25 *Sydney Law Review* 391, 396.

4.3. High Court Decision

4.3.1. *Background*

Network Ten applied for special leave to appeal from the Full Federal Court decision primarily on the point of the construction of 'a television broadcast' within the meaning of the *Copyright Act* 1968 (Cth). This is because 'The Panel' was basically an entertainment programme so that some of the excerpts that Network Ten used were plainly not covered by fair dealing. Special leave was granted in April 2003.[75]

4.3.2. *Findings by the High Court*

In March 2004, the High Court of Australia (McHugh ACJ, Gummow, Hayne JJ, Kirby and Callinan JJ dissenting) set aside the decision made by the Full Federal Court and decided that 'a television broadcast' protected by copyright was a programme 'put out to the public, the object of the activity of broadcasting, as discrete periods of broadcasting identified and promoted by a title, such as *The Today Show*, *Nightline*, *Wide World of Sports*, and the like, which would attract the attention of the public'[76] for the following reasons.[77]

First, in interpreting a statute, the court may have regard to 'the words used by the legislature in their legal and historical context'[78] and to 'reports of law reform bodies'[79] so that the High Court had regard to the Spicer Committee Report, which introduced copyright in broadcasts in Australia. The Spicer Committee Report stated that protection for broadcasters could properly be included in copyright law with an adaptation of the provision in the UK *Copyright Act* 1956 Act.[80] The relevant provision in the UK Act was introduced following the recommendation by the Gregory Committee Report[81] in which it was stated that 'a broadcasting authority should have the right to prevent the copying of its <u>programmes</u> either by re-broadcasting or by the making of

[75] The transcript of the hearing of the special leave application, 'Transcript of Proceeding, *Network Ten Pty Ltd v TCN Channel Nine Pty Ltd* S213/2002', can be found at <http://www.austlii.edu.au/au/other/hca/transcripts/2002/S213/1.html>.

[76] *Network Ten Pty Limited v TCN Channel Nine Pty Limited* (2004) 59 IPR 1, para 75.

[77] This section is based on: Ogawa M, 'The Panel Case High Court Decision' [2004] *European Intellectual Property Review* 517.

[78] The High Court cited this phrase from *Newcastle City Council v GIO General Ltd* (1997) 191 CLR 85, 112.

[79] The High Court cited *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384, 408.

[80] The Parliament of the Commonwealth of Australia, *Report of the Committee Appointed by the Attorney-General of the Commonwealth to Consider What Alterations Are Desirable in the Copyright Law of the Commonwealth* (22 December 1959), para 288.

[81] Report of the Copyright Committee, 1951 (Gregory Committee) Cmd 8662.

records for sale and subsequent performance'.[82] (emphasis added) Therefore, the High Court concluded that the object of protection by copyright in broadcasts is a programme.[83] The High Court also emphasised that the Gregory Committee Report had recommended protecting 'the cost to, and the skill of, broadcasters in producing and transmitting their programmes'.[84]

Secondly, for instance, in the same way as the words, figures and symbols which constitute a novel were not a literary work,[85] the High Court found that 'a television broadcast' was not every single image and accompanying sounds but a programme.

Thirdly, if the construction of 'a television broadcast' by the Full Court was upheld, the interests of broadcasters would be placed in a better position than that of the owners of copyright in works because, according to the majority of the High Court, the interpretation of 'a television broadcast' by the Full Court did not require proof that a substantial part was taken in establishing infringement.[86]

For the foregoing reasons, the High Court decided that 'a television broadcast' is a programme which is assembled or prepared and transmitted to the public with cost and skill.[87] With this decision, the issue as to what constitutes a television broadcast was finally determined in Australia. This decision raises another problem in the context of copyright amendment by the Digital Agenda Act as follows.[88]

4.4. Inconsistency between the Digital Agenda Act and the Decision in *The Panel* Case

4.4.1. *Misconstruction of Legal and Historical Context*

One of the objectives of the Digital Agenda Act is 'to promote certainty for communications and information technology industries'.[89] In the interests of certainty, a number of reforms were made. In line with that, copyright in

---

[82] Report of the Copyright Committee, 1951 (Gregory Committee) Cmd 8662, para 328, Recommendation 31.

[83] This conclusion did not take into account the change of the rationale for the protection of broadcasters' rights between the Spicer Committee and the Gregory Committee Reports. See Chapter Eight.

[84] *Network Ten Pty Limited v TCN Channel Nine Pty Limited* (2004) 59 IPR 1, para 29.

[85] *Network Ten Pty Limited v TCN Channel Nine Pty Limited* (2004) 59 IPR 1, para 38.

[86] *Network Ten Pty Limited v TCN Channel Nine Pty Limited* (2004) 59 IPR 1, para 48.

[87] *Network Ten Pty Limited v TCN Channel Nine Pty Limited* (2004) 59 IPR 1, para 48.

[88] The following argument is based on: Ogawa M, 'The Destination of Australia's Digital Agenda: Implications of the Panel Case' (2004) 15 *Entertainment Law Review* 221.

[89] Attorney-General's Department, *Copyright Reform: Copyright Amendment (Digital Agenda) Act 2000*, <http://www.ag.gov.au/agd/Department/Publications/publications/copyfactsheet/copyfactsheet.html>

broadcasts was reviewed. However, the relevant part of the provisions discussed in *The Panel* case remains unchanged. It is not the normal understanding that, for some reason, only that part of the provisions was not subject to review although the relevant provisions were actually amended as explained above. A more supportable interpretation is that the latter part of the provisions was also reviewed but it was found that that part was coincidentally capable of working competently without changes being required.

The purpose of the Digital Agenda Act is to strengthen copyright protection. The Act is to 'update Australia's copyright regime to take into account the rapid development of new technologies' since Australia recognised that '[t]he development of new communications technologies has exposed gaps in copyright protection under the Copyright Act 1968'. The 'Gap' involves two discrete elements: the first concerning the subjects of rights; the second concerning the objects of rights.

The development of subjects means the development of acts in relation to the subjects. Hence, the objects of copyright in relation to the subjects have to be updated to encompass the new acts. In this sense, the objects of copyright are another aspect of the subject of copyright. On the other hand, the development of new acts may suddenly place more focus on a subject which did not previously attract attention. Therefore, the development of new objects does not necessarily mean the development of new subjects. In this sense, it is meaningful to distinguish the subjects of copyright from the objects of copyright. The Digital Agenda Act implicitly requires the recognition of both aspects of the gap – regarding subjects and objects of copyright – caused by technological development to strengthen copyright protection.

As for the content of copyright, the Digital Agenda Act has replaced technology-specific objects with technology-neutral objects. The notion of communication is established for introducing the technology-neutral content of copyright.

As for the subjects of copyright, it is possible to adjust to change (i.e. the change from an analogue form to a digital form) without reforming the previous provisions of the *Copyright Act* 1968 (Cth). For example, a novel published in an electronic format as well as a paper form is recognised as a literary work without any change being required to be made to the provisions in the *Copyright Act* 1968 (Cth). It is still an objective of the Digital Agenda Act to enhance protection in relation to the subjects of copyright.

Copyright in broadcasts was reviewed by the Digital Agenda Act. To follow the correct legal and historical context and to interpret 'a television broadcast' appropriately, the reports that should have been referred to were those for the Digital Agenda Act rather than those by the Gregory and Spicer Committees. One would hardly find justification in the Digital Agenda Act to construe 'a television broadcast' as a television programme.

4.4.2. *Failure to Secure Clarity of Substantiality*

The Digital Agenda Act is 'to improve copyright protection' in circumstances where 'the ease of digital to digital reproduction or material' has caused 'the greatest potential for copyright infringement'. To achieve an improvement in copyright protection, clarity of the acts that constitute copyright infringement is essential. To identify the acts that constitute copyright infringement, the criteria of substantiality is necessary since an act in relation to the whole or substantial part of a television broadcast is required in order to recognise an infringement of copyright. To determine what the substantiality of a television broadcast is, the definition of a television broadcast is vital.

This means that, in order to be consistent with the Digital Agenda Act, the definition of a television broadcast should be one that can determine the substantiality, which helps in identifying the acts that constitute copyright infringement, identifying which would lead to an improvement in copyright protection. Providing a sound basis to determine substantiality is also important 'to promote certainty for communications and information technology industries'.[90] 'A television broadcast' as construed in *The Panel* case seems to make it practically impossible to determine substantiality, typically explained subsequently as news content which is broadcast in a news programme.

Suppose the exact moment of an explosion in a chemical factory near a broadcasting organisation was recorded by chance with a camera installed on the top of the transmission tower of the broadcasting organisation. A broadcasting organisation in many cases retains cameras outside on top of its building and constantly records images which are kept for a short while in case they may be needed to report weather or other matters. Capturing the image by this means does not require any skill on the part of the broadcasting organisation. The cost of maintaining the cameras is not for a particular programme and, in any event, would be small.

According to the High Court decision, the interest protected by copyright in broadcasts is the cost and skill in producing and transmitting programmes and copyright does not cover each and every image. Therefore, once the image of the moment of the explosion was broadcast in a news programme such as 'The 7:30 Report' or 'Lateline' as one of the news items, the image would be nothing more than a part of a television broadcast and unlikely to be recognised on its own as a television broadcast which attracted protection by copyright.

---

[90] Attorney-General's Department, *Copyright Reform: Copyright Amendment (Digital Agenda) Act 2000*, <http://www.ag.gov.au/agd/Department/Publications/publications/copyfactsheet/copyfactsheet.html>.

Although the High Court decision did not decide whether a segment in a whole programme can independently be 'a television programme',[91] it can be said that at least the above image of the explosion is less likely to be recognised as 'a television programme' if it is compared to the images that are broadcast by another broadcasting organisation, which is located at a great distance from the chemical factory, sent their staff to the chemical factory to report the fire which took place following the explosion. Obviously, the latter organisation introduced more skill and cost for the particular purpose of broadcasting a certain programme. Ironically, it is plain that for other broadcasters, the image of the moment of the explosion is more attractive than the images of the subsequent fire. However, the latter is more likely to be protected by copyright, but not the former.

Even if the interests protected under copyright, which are the cost and skill, decided by the High Court are put aside, still the substantiality of a television broadcast is difficult to be determined where 'a television broadcast' means a television programme. If substantiality is recognised in the above image of the explosion on the ground that it is more attractive for competitors, it would result in the conclusion that material being copied is worth being protected, a proposition which the High Court criticised.[92] If substantiality is determined by whether or not the image has an impact in the programme, the determination of substantiality would end up depending upon the contents of other news items in the programme rather than on the image itself. It would be odd if an image of a similar accident broadcast in a similar way is protected on a day when there is no other eye-catching news but not protected on an eventful day. The interpretation of 'a television broadcast' as a television programme in this way makes it impossible to identify substantiality.

The definition of 'a television broadcast' given by *The Panel* case is not consistent with the Digital Agenda Act as discussed above. This problem would not have occurred if the decision of the Full Court regarding 'a television broadcast' – that any one or more visual images and accompanying sounds broadcast as television – was sustained because, according to the Full Court, substantiality would need to be considered on occasions where: (i) only visual images without sounds of a television broadcast are rebroadcast; (ii) only sounds without visual images of a television broadcast are rebroadcast; and (iii) cropped visual images of a television broadcast are rebroadcast.[93] The definition of 'a television broadcast' by the Full Court would have

[91] *Network Ten Pty Limited v TCN Channel Nine Pty limited* (2004) 59 IPR 1, para 77.

[92] *Network Ten Pty Limited v TCN Channel Nine Pty limited* (2004) 59 IPR 1, para 14.

[93] *TCN Channel Nine Pty Ltd v Network Ten Pty Ltd* (2001) 55 IPR 112, 130 [89]. See, for further discussion, Ogawa M, 'Substantiality of Television Broadcast in Australia' [2003] *Entertainment Law Review* 144.

been able to determine substantiality by asking whether the relevant part of a television broadcast is significant to convey a message or more bluntly, whether you can tell from the relevant part of a television broadcast what was broadcast.

4.5. Implications of *The Panel* Case

The decision in *The Panel* case did not refer to the Digital Agenda Act. Due to this, *The Panel* decision appears, at first blush, to be independent of the Digital Agenda Act. However, on closer inspection, it is apparent that *The Panel* decision cannot be irrelevant to the effect of the Digital Agenda Act.

The Digital Agenda Act, as discussed above, introduced for the first time in Australia the idea of the natural rights theory and the creator-oriented rationale for the protection of broadcasters' rights. *The Panel* decision, however, brought back the circumstances in which other organisations' television broadcasts could be exploited without authorisation unless the entire programme is taken. *The Panel* case can be said to have the effect of swinging the balance of protection back to the side of users of copyright material.

5. Conclusion

In Australia, broadcasting piracy was not a problem. The rights of broadcasting organisations were protected sufficiently as the delegate of Australia said at the WIPO Standing Committee on Copyright and Related Rights in 1988. However, the *Copyright Act* 1968 (Cth) was amended by the Digital Agenda Act in 2000 because of the potential infringement which might be caused by digital technology. When Australia tried to reconstruct the copyright regime to adapt to the digital environment while keeping the balance between owners and users of copyright as it had been, the creator-oriented rationale was unexpectedly and unconsciously introduced by the Digital Agenda Act.

The introduction of the creator-oriented rationale resulted in providing more comprehensive protection by copyright. Before the Digital Agenda Act came into force, broadcasts, namely the labour of broadcasting organisations, had not been under complete control by the broadcasting organisations since the rights which copyright covered were more limited than the acts that users could do in the digital environment. However, after the Digital Agenda Act, the use of broadcasts became fully controlled by the broadcasting organisations that made broadcasts.

This situation where the social-oriented rationale and the creator-oriented rationale were mixed, was again altered by *The Panel* case which brought back the situation where broadcasting organisations cannot fully control their

own broadcasts. Australia's rationale for the protection of broadcasters' rights has now reverted to the original position, a pure social-oriented approach. This position, however, appears to destroy the balance between the rights owners and the users of copyright material in the digital environment despite the policy behind the Digital Agenda Act requiring the balance to be maintained. It is ironic that maintaining the social-oriented rationale which is to attain desirable social ends cannot help but reach an end which is against society's desired ends.

Chapter 7
The Protection of the Rights of Broadcasting Organisations in Japan

1. Introduction

Japan proposed the rights of broadcasting organisations at the WIPO Standing Committee on Copyright and Related Rights in 1988, and reported that its Copyright Council was giving consideration to amending the provisions of its *Copyright Law*. The action which Japan has taken for six years since 1988 shows a clear contrast with Australia which was analysed in the previous Chapter. Therefore, the task of this Chapter is to examine Japan's position regarding the protection of the rights of broadcasting organisations and provide a parallel account to the previous Chapter.

In the following, first, the Japanese *Copyright Law* (Chosakuken-hou) will be analysed. The first *Copyright Law* of Japan, the so-called Old *Copyright Law* (Kyuu-chosakuken-hou), came into force in 1899. Until then, published editions, scenarios and music scores and photographs were protected under separate codes.[1] This Old *Copyright Law* was replaced by the current *Copyright Law* which was enacted in 1970 and came into force in 1971. Since then, Japan has maintained this *Copyright Law* with frequent minor amendments

[1] Sakka F, *Shoukai: Chosakuken-hou*, (2nd ed, Tokyo, Gyousei, 2002), 46 [trans: *Explication: Copyright Law*].

that took place in 1978, 1981, 1983–1986, 1988, 1989, 1991–2000, 2002–2004. In order to comprehend Japan's standpoint when the delegate of that country advanced its opinion, namely that broadcasters' rights should be upgraded, at the WIPO Standing Committee on Copyright and Related Rights in 1988, the provision of the *Copyright Law* examined in this section will be the one as at 1988.

Secondly, the reasons why Japan needs to strengthen the rights of broadcasting organisations and why an effective amendment has not been made will be considered. As explained in Chapter One, Japan had recognised the problems concerning the protection of broadcasters' rights and was willing to take action. However, what Japan could do was limited to the minor amendment in 2002. The problems of protection, the reasons for non-action and the content of the minor amendment will be analysed.

Finally, the possibility of Japan recognising copyright in broadcasts as a means of upgrading the rights of broadcasting organisations will be explored.

2. *Copyright Law* in 1998

The Japanese *Copyright Law* has eight chapters:

Chapter 1 – General Provisions;
Chapter 2 – Rights of Authors;
Chapter 3 – Right of Publication;
Chapter 4 – Neighbouring Rights;
Chapter 5 – Compensation for Private Recording;
Chapter 6 – Settlement of Disputes;
Chapter 7 – Infringements; and
Chapter 8 – Penal Provisions.[2]

Chapter 2 deals with moral rights and copyright. The right of publication, which appears in Chapter 3 forms part of copyright. Moral rights, copyright and neighbouring rights are the principal rights which the Japanese *Copyright Law* recognises.

Among these, in Chapter 4 – Neighbouring Rights, appears the rights of broadcasting organisations as well as the rights of performers, the rights of phonogram producers and the rights of cable distributors. It is often misunderstood that neighbouring rights are equivalent to Australian copyright in

[2] See Oyama Y et al, 'Copyright Law of Japan'. <http://www.cric.or.jp/cric_e/clj/clj.html>. The following argument concerning the Japanese *Copyright Law* in 1998 is based on: Ogawa M 'The Possibility of Copyright in Broadcasts in Japan' (2001) 19 *Copyright Reporter: Journal of the Copyright Society of Australia* 89.

subject-matter other than works, since the recipients of the protection accorded to neighbouring rights are the same as those in copyright in subject-matter other than works under Part IV of the Australian *Copyright Act* 1968 (Cth). However, neighbouring rights constitute, as explained below, the protection of acts, as opposed to copyright in subject-matter which protects the subject-matter.

2.1. Protection of Broadcasters' Rights as Neighbouring Rights

The Article which recognises the rights of broadcasting organisations appears in Chapter 4 – Neighbouring Rights. It provides that '[b]roadcasting organisations shall enjoy the rights mentioned in Articles 98 to 100' (Art. 89(3)).[3]

'Broadcasting organisations' means 'those who engage in the broadcasting business' (Art. 2(1)(ix)).[4] 'Broadcasting' means 'the public transmission of radiocommunication intended for simultaneous reception by the public of the same contents' (Art. 2(1)(viii)). 'Public transmission' is defined as 'the transmission of radiocommunication or wire-telecommunication intended for direct reception by the public' (Art. 2(1)(vii bis)).

Transmission for some specific party is, therefore, not included in broadcasting because the transmission is not intended for reception by the public. Similarly, on-demand transmission is not broadcasting since it is not intended for simultaneous reception by the public. In addition, cable broadcasting is not included in broadcasting as broadcasting is the transmission of radiocommunication.

The Japanese *Copyright Law* recognises the rights of cable distributors stating that 'cable broadcasting organisations shall enjoy the rights mentioned in Article 100 bis to quarter' (Art. 89(4)). Article 100 bis to quarter provides for rights equivalent to those which are recognised for broadcasting organisations in Article 98 to 100.

Article 98 provides the right of reproduction, stating that:

> 'Broadcasting organisations shall have the exclusive rights:
>
> > to make sound or visual recordings of their broadcasts or those distributed by cable from such broadcasts; and
> >
> > to reproduce the sounds or images incorporated in their broadcasts by means of photography or other similar processes
>
> by means of receiving their broadcasts'.

---

[3] Oyama Y (et al), *Copyright Law of Japan*, (Tokyo, Copyright Research and Information Centre, 1997).

[4] Oyama Y (et al), *Copyright Law of Japan*, (Tokyo, Copyright Research and Information Centre, 1997).

In the *Copyright Law*, reproduction includes fixation. Article 99 sets down the right of rebroadcasting and cable distribution, stating that:

> 'Broadcasting organisations shall have the exclusive rights to rebroadcast and to distribute by cable of their broadcasts by means of receiving their broadcasts.'

It should be noted that rebroadcasting means broadcasting by receiving a primary broadcast and simultaneously making a further broadcast.[5] For television broadcasts, the right of communication is recognised in Article 100. It states that:

> 'Broadcasting organisations shall have the exclusive right to communicate to the public of their television broadcasts or those distributed by cable from such broadcasts by means of receiving their broadcasts and by means of a special instrument for enlarging images.'

Broadcasts are protected not by means of recognising copyright but by recognising the rights of broadcasting organisations, that is, one of the so-called neighbouring rights. This explanation is not, on its own, sufficient to make clear the difference between copyright in broadcasts, which the Australian *Copyright Act* 1968 (Cth) recognises, and the rights of broadcasting organisations, which the Japanese *Copyright Law* recognises. The rights of broadcasting organisations, together with the rights of cable broadcasting organisations under the Japanese *Copyright Law*, may seem at first glance to be the same as copyright in broadcasts. However, the rights of broadcasting organisations are the rights to fix, reproduce or rebroadcast (and communicate to the public for television broadcast) 'by means of receiving their broadcasts'. These rights are different from the rights to fix, reproduce or rebroadcast their broadcasts, which are explained below.

Broadcasting organisations cannot prevent the re-rebroadcasting of their broadcasts if their broadcasts are rebroadcast by another party and subsequently re-rebroadcast by some other party. It is rebroadcasting that is exploited for re-rebroadcasting. Re-rebroadcasting thus is not made 'by means of receiving' the original broadcast.

Equally, the rights of broadcasting organisations cannot encompass the broadcast or reproduction by another party where the broadcast or reproduction is made by means of using the fixation of the original broadcast after the fixation is made. What the rights of broadcasting organisations can encompass is the fixation alone. The subsequent use after the fixation is the exploitation of the fixation. The exploitation is not made 'by means of receiving' their broadcasts.

In fact, the rights of broadcasting organisations are not for the protection of their broadcasts or broadcast signals as the outcome of their broadcasting.

---

[5] 'Rebroadcasting' in Japan's *Copyright Law* is equivalent to that in the Rome Convention. See, for 'rebroadcasting' in Australia's *Copyright Act* 1968 (Cth), Chapter Six.

It is the act of broadcasting by broadcasting organisations that the rights of broadcasting organisations protect.[6] Therefore, it is considered that even when a broadcast is made by means of exploiting a programme of a producer other than the broadcasting organisation, the rights of the broadcasting organisation will be recognised separately from copyright subsisting in the programme. This is the protection of the rights of broadcasting organisations that are the neighbouring rights.

As explained above, the rights of broadcasting organisations, that are the neighbouring rights, are the protection of the act of broadcasting that are recognised apart from copyright in broadcasts in broadcasting programmes. Hence, if a broadcasting organisation is a producer of the broadcasting programme, the rights other than the rights of broadcasting organisations are recognised for the broadcasting organisation.

If the broadcasting is television broadcasting and is made by using pre-recorded material in the above-mentioned examples, copyright is recognised in the pre-recorded material independent of the rights of broadcasting organisations. A copyright owner of pre-recorded material, therefore, can exercise the right of broadcasting (or reproduction) which the rights of the original broadcasting organisation cannot encompass.

As long as a copyright owner of the pre-recorded material is a broadcasting organisation itself, the broadcasting organisation usually does not need to exercise the rights of broadcasting organisations since copyright is generally more advantageous than the rights of broadcasting organisations. However, the rights of broadcasting organisations are more favourable than copyright when broadcasts are communicated to the public for non-profit making purposes and without charging any fees to the audience. It is because copyright regarding broadcasting is limited in such cases and hence communications to the public is permissible (Art. 38(3) of the *Copyright Law*). Furthermore, when broadcasts are live, copyright is not recognised as will be explained in the next section. Broadcasting organisations thus have to depend on the rights of broadcasting organisations on these occasions.

If the broadcasting is sound broadcasting, the pre-recorded material is a phonogram.[7] Therefore, a sound broadcaster which broadcasts pre-recorded material has the rights of phonogram producers as well as the rights of broadcasting organisations. The rights of phonogram producers are protected by the recognition of neighbouring rights. Copyright thus is not recognised in sound

---

6 See further, Ogawa M, 'Ohsutoraria "Shin" Chosakuken-hou to Housou-jigyousha no Kenri' (2001) 11 *Jouhou Chishiki Gakkai-shi* 11 [trans: 'The 'New" Australian *Copyright Act* 1968' in the *Journal of Japan Information and Knowledge*].

7 'Phonograms' means 'fixation of sounds on phonographic discs, recording-tapes and other material forms, excluding those intended for use exclusively with images' (Art. 2(1)(v)).

broadcasting whether the broadcasting is live or not. The right of producers of pre-recorded sound broadcasting are the right of reproduction of a phonogram (Art. 96) and the 'rights of making available' of a phonogram (Art. 96 bis).

The rights of broadcasting, cable distribution etc are not recognised for the producers of phonograms. However, the right of making available, which is not recognised for broadcasting organisations, is recognised for phonogram producers. If a broadcasting organisation itself is a producer of pre-recorded material for sound broadcasting, the broadcasting organisation will exercise either the rights of broadcasting organisations or the rights of phonogram producers depending upon the situation.

This is the current legislation for protecting broadcasting organisations in Japan. The rights of broadcasting organisations – that is the neighbouring rights – protect the act of broadcasting organisations. This protection is clearly different from copyright. It is now proposed to discuss the reason why broadcasting is not protected by copyright.

2.2. Reasons Why Japan Does Not Recognise Copyright in Broadcasts

2.2.1. *'Works' in Which Copyright Is Recognised*

The reasons why copyright is not recognised in broadcasts are found in the definition of works. This definition appears in Chapter 1 of the *Copyright Law* in Japan.

'Work' means 'a production in which thoughts or sentiments are expressed in a creative way and which falls within the literary and, scientific, artistic or musical domain' (Art. 2(1)(i)).

(1) To be a 'work', it should be a 'production'. An unexpressed idea is not produced yet, so it cannot be a work.[8] However, the form of a production is not defined. Thus, a production which is not fixed into a material form – e.g. a speech – can be a work.

(2) Further, a production should comprise 'thoughts or sentiments'. The mere presentation of facts does not satisfy this element. The mere presentation of facts therefore cannot be a work.

(3) Also, a work has to be expressed 'in a creative way'. A 'creative way' means an original expression. As long as it is expressed in a creative

[8] See, for example, *Nikkei Shimbun Youyaku Hon'an Jiken*, Tokyo Chihan Heisei 6.2.18, Heisei4(wa)2085 [trans: *The Nikkei News Summary and Adaptation Case,* Tokyo District Court Decision, 18 February 1994, Case Number Heisei4(wa)2085]. This is a case where the newspaper articles of the plaintiff were summarised, translated into English and distributed by means of print and cable by the respondent. In this case, the issue was whether what the respondent used were mere ideas of the plaintiff's articles or the creative expressions of the plaintiff's articles.

way, the level of creation is not considered. However, it will not be considered as an expression in a creative way, if anyone who wants to express it cannot avoid using that expression.[9] For instance, a well-known Japanese novel, 'I Am a Cat' by Soseki Natsume starts with the sentences, which all Japanese know, 'I am a cat. I don't have a name yet.' If a creative way is recognised in these two sentences and copyright were to be recognised, an expression to write a story about a cat which does not have a name would soon be exhausted.[10] Accordingly, these two sentences are not recognised as an expression in a creative way even though this novel was expressed in a creative way.

(4) Lastly, a production should fall 'within the literary, scientific, artistic or musical domain'. This phrase provides an extension to works separate from industrial items.[11] To be a work, a production is not required to belong only to one of these categories but to fall in the domain which is comprised by those four categories.

The above four criteria have to be satisfied simultaneously to be a work.[12] The paragraph numbers appearing above are allocated by the author of this book for the sake of convenience. There is no particular order in which these criteria

---

[9] Professor Tamura explains that a segment of a few sentences increases the possible expression to almost indefinite and hence copyright should be recognised. See Tamura Y, Chosakuken-hou Gaisetsu, (Dai-2han, Tokyo, Yuuhikaku, 2001) 15 [trans: *Copyright Compendium (2nd ed)*]. However, as demonstrated by 'I Am a Cat', it seems that everything depends on what is expressed in the sentences and the number of sentences cannot be a benchmark of any sort.

[10] See, for example, *Rasuto Messeiji in Saishuu-gou Jiken*, Tokyo Chihan Heisei 7.12.18, Heisei6(wa)9532 [trans: *The Last Messages in the Final Issues Case*, Tokyo District Court Decision, 18 December 1995, Case number Heisei6(wa)9532]. This is a well-known case in which creativity was argued in relation to each message announcing discontinuation in the last issues of discontinued magazines. The messages were collected and published as a book by the defendant.

[11] Japanese Copyright Law has faced the same issue as the Australian *Copyright Act* 1968 (Cth) as to whether copyright can be recognised in an item which can be registered under the Designs Law. See, for example, *Mokume Kesho-gami Jiken*, Tokyo Kohan Heisei 3.12.17, Heisei2(ne)2733 [trans: *The Engrained Paper Case*, Tokyo High Court Decision, 17 December 1991, Case Number Heisei2(ne)2733]. This case suggested that protection under the Design Law and the Copyright Law can be overlapping, stating that an article which was produced for industrial use could be a work (an artistic work) provided that the production involved was of a sophisticated artistic nature and recognition of the character of pure arts in the production was socially accepted.

[12] There is another doctrine which considers three criteria: ((1) production of thoughts or sentiments, (2) creative way, and (3) the literary, scientific, artistic or musical domain) to determine copyright. See, Saito H, Chosakuken-hou, (Yuuhukikaku, Tokyo, 2000) 69 [trans: *The Copyright Law*].

need to be satisfied: however, (4) is usually considered after all other criteria are satisfied when Article 2 of the *Copyright Law* is read in Japanese.

When the above four criteria are examined in relation to broadcasting, (1) is satisfied because broadcasting is an expression. However, (2) cannot be fulfilled because broadcasting is a mere act of dissemination and is not admitted 'thoughts or sentiment'. (3) cannot be satisfied either, because broadcasting is just a technology which cannot be expressed in a 'creative way' although producing broadcasting programmes is creative. Because (2) and (3) are not satisfied, copyright is not recognised in broadcasting without considering criterion (4).

2.2.2. *Economic Rights*

Copyright in Japan is recognised comprehensively in any copyright materials as: the right of reproduction (Art. 21); performance (Art. 22); presentation (Art. 22 bis); public transmission (Art. 23); making available (Art. 23); recitation (Art. 24); exhibition (Art. 25); transfer of ownership (Art. 26 bis); lending (Art. 26 ter); rental (art. 26 ter); translation and adaptation (Art. 27); exploitation of derivative works (Art. 28); and to claim compensation for private recording (Art. 30(2), 33(2), 38(5)).[13]

It may appear strange that the right of performance is recognised even in architecture. However, it is the way adopted by the Japanese *Copyright Law* that recognises all these rights in all copyright material and the rights which can be practically exercised are determined by the nature of each kind of copyright material.

2.2.3. *Moral Rights*

A person who creates a work enjoys moral rights as well as copyright (Art. 17). Moral rights are: the right of deciding to make a work available to the public (Art. 20); the right of determining the indication of the author's name (Art. 19); and the right of integrity (Art. 20). Moral rights are considered protection for an author's personal rights. Hence, they are attributed only to the author and are not allowed to be transferred to another party. The importation or possession of material for distribution, or the distribution of material is deemed to infringe moral rights where the material would infringe moral rights if it was made in Japan (Art. 113(1)). An act of exploitation of a work prejudicial to the honour or reputation of the author is considered an infringement of his or her moral rights (Art. 113(3)).

[13] The exceptional case is copyright in cinematograph films. In cinematograph films (including pre-recorded television broadcasts), the right of distribution without exhaustion is also recognised (Art. 26).

These rights cannot be completely separated from the economic rights. For instance, the right of deciding to making a work available to the public, no doubt, guarantees the author a way to gain honour or reputation but the right is usually exercised to gain economic profit.[14] The sole exercise of copyright irrespective of moral rights is impossible.[15] For example, the right of reproduction or the right of broadcasting cannot be exercised without the author's consent because of the right to decide to make a work available to the public which is always owned by the author.[16]

Copyright in Japan is recognised in a creative expression of thoughts or sentiment by an author and copyright includes not only economic rights but also moral rights. As discussed above, copyright is not recognised in broadcasts in Japan. The rights of broadcasting organisations in Japan are intended to protect the act of broadcasting by broadcasting organisations irrespective of creativity, in order to satisfy social demands.

3. Needs and Difficulties in Upgrading the Protection of Broadcasters' Rights

3.1. Problems of Protection

Neighbouring rights protect the act of dissemination. Hence, the rights of broadcasting organisations are recognised only in respect of broadcasting which the broadcasting organisation has undertaken.

This is demonstrated by the case where 'Pokemon', which had been broadcast by a free-to-air television station, was distributed by a cable distributor

---

[14] Handa M, *Chosakuken-hou no Kenkyuu*, (Tokyo, Ichiryuu-sha, 1971) 40 [trans: *A Consideration of the Copyright Law*].

[15] This is the theoretical basis for the monist theory of copyright and moral rights. According to this theory, copyright together with moral rights constitutes an author's rights. Copyright and moral rights cannot be independent of each other. See, Handa M, *Chosakuken-hou no Kenkyuu*, (Tokyo, Ichiryu-sha, 1971), 40 [trans: *Consideration of the Copyright Law*]. See, also, Sterling J, *World Copyright Law: Protection of Authors' Works, Performances, Phonograms, Films, Video, Broadcasts and Published Editions in National, International and Regional Law*, (2nd ed, London, Sweet & Maxwell, 2003) [2.05] 42.

There are two other opinions that take the position of dualist theory: (1) copyright exists completely separately from moral rights and there is no relationship between the two; and (2) copyright cannot be completely separate from moral rights and these two together constitute the broader author's rights. See, Handa M, *Chosakuken-hou Gaisetsu*, (8ed, Tokyo, Ichiryuu-sha, 1997) 2 [trans: *Copyright Law Compendium*].

[16] Handa M, *Chosakuken-hou no Kenkyuu*, (Tokyo, Ichiryuu-sha, 1971) 146 [trans: *A Consideration of the Copyright Law*].

and subsequently re-distributed by another cable distributor that the free-to-air television station had not authorised.[17] In this case, the free-to-air television station had no means of preventing the re-distribution since the second cable distributor had exploited the first cable distributor's signal and the first cable distributor's signal was the outcome of the act of the first cable distributor not of the free-to-air television station.

There was also a case where a movie which had been broadcast on free-to-air television, was broadcast by another free-to-air television station without the authorisation of the first station.[18] To restore an old movie for broadcasting usually involves considerable cost. In that case, the movie was an old one in which copyright had expired. Neighbouring rights encompass the fixation of broadcasting. However, if the fixed broadcast is distributed or broadcast by a person other than the one who fixed it, neighbouring rights cannot be used to stop distribution or broadcasting.

Additionally, in Japan, a number of piracies have been reported where the subject-matter that had not been broadcast, was stolen while it was being transmitted from one station to other stations in the same network.[19] The rights of broadcasting organisations are not recognised before the broadcasting is made. Thus, neighbouring rights cannot deal with this situation.

As these examples show, the rights of broadcasting organisations can no longer operate effectively because of technical developments which have made reproduction and distribution without debasing original quality possible.

3.2. Reasons for Non-Action

The present rights of broadcasting organisations do not provide sufficient protection to broadcasting organisations in the digital age because the rights of broadcasting organisations are neighbouring rights. For example, when a

[17] Chosakuken Shingikai, 'Chosakuken Shingikai Maruchimedia Shou-iinkai Housou-jigyousha no Kenri ni kansuru Wahkingu Guruupu (Dai Ikkai Giji Youshi)' (1999) [trans: Copyright Committee, 'Working Group on the Rights of Broadcasting Organisations, Sub-committee of Multimedia, Copyright Committee (The First Session Minutes)']

[18] Chosakuken Shingikai, 'Chosakuken Shingikai Maruchimedia Shou-iinkai Housou-jigyousha no Kenri ni kansuru Wahkingu Guruupu (Dai Ikkai Giji Youshi)' (1999) [trans: Copyright Committee, 'Working Group on the Rights of Broadcasting Organisations, Sub-committee of Multimedia, Copyright Committee (The First Session Minutes)'].

[19] Chosakuken Shingikai, 'Chosakuken Shingikai Maruchimedia Shou-iinkai Housou-jigyousha no Kenri ni kansuru Wahkingu Guruupu (Dai Ikkai Giji Youshi)' (1999) [trans: Copyright Committee, 'Working Group on the Rights of Broadcasting Organisations, Sub-committee of Multimedia, Copyright Committee (The First Session Minutes)'].

broadcast is re-broadcast, the rights of broadcasting organisations as neighbouring rights cannot prevent the re-rebroadcasting. When a broadcast is fixed and subsequently broadcast by means of using the fixation (this is so-called deferred broadcasting), the rights of broadcasting organisations cannot encompass the broadcasting with the fixation. Digitisation of broadcasting and the development of digital equipment enable the indefinite rebroadcast, reproduction or the combination of these without debasing quality.

This situation triggered the review of the rights of broadcasting organisations by the Working Group on the Rights of Broadcasting Organisations of the Subcommittee on Multimedia, Copyright Council in Japan in 1999.[20] A year before the onset of the discussions at this Working Group, the WIPO Standing Committee of Copyright and Related Rights commenced discussions regarding strengthening the rights of broadcasting organisations. Japan intends to keep up with the developments at WIPO and reinforce its domestic legislation in order to accede without delay to a new broadcasters' treaty whenever such a treaty is formulated.

In the discussions at the Working Group in Japan, it was suggested that there should be recognition of copyright for broadcasting in Japan.[21] Replying to this suggestion, the official of the Agency for Cultural Affairs said that strengthening the rights of broadcasting organisations within the framework of neighbouring rights should be discussed.[22] The fear that the recognition of copyright for broadcasting would destroy the current framework of the Copyright Law seems to lie behind this view. In other words, the Agency for Cultural Affairs appears to consider that the current regime of the Copyright Law can be maintained if the rights of broadcasting organisations are strengthened within the framework of neighbouring rights. However, it seems difficult to accomplish the strengthening of the rights of broadcasting organisations in this simplistic way for the following reasons.

---

[20] Chosakuken Shingikai, 'Chosakuken Shingikai Maruchimedia Shou-iinkai Housou-jigyousha no Kenri ni kansuru Wahkingu Guruupu (Dai Ikkai Giji Youshi)' (1999) [trans: Copyright Committee, 'Working Group on the Rights of Broadcasting Organisations, Sub-committee of Multimedia, Copyright Committee (The First Session Minutes)'].

[21] Chosakuken Shingikai, 'Chosakuken Shingikai Maruchimedia Shou-iinkai Housou-jigyousha no Kenri ni kansuru Wahkingu Guruupu (Dai Kyukai Giji Youshi)' (2000) [trans: Copyright Committee, 'Working Group on the Rights of Broadcasting Organisations, Sub-committee of Multimedia, Copyright Committee (The Ninth Session Minutes)'] (Japan).

[22] Chosakuken Shingikai, 'Chosakuken Shingikai Maruchimedia Shou-iinkai Housou-jigyousha no Kenri ni kansuru Wahkingu Guruupu (Dai Kyukai Giji Youshi)' (2000) [trans: Copyright Committee, 'Working Group on the Rights of Broadcasting Organisations, Sub-committee of Multimedia, Copyright Committee (The Ninth Session Minutes)'] (Japan).

3.3. Difficulties in Upgrading

Strengthening the rights of broadcasting organisations within a framework of neighbouring rights seems to mean the recognition of 'the right of re-rebroadcasting', 'the right of deferred broadcasting' and so on.[23] At a glance, this way appears to be able to strengthen the rights of broadcasting organisations without changing the basic structure of the *Copyright Law*. That is, the rights recognised under the *Copyright Law* are the rights of authors (including moral rights) and the neighbouring rights. The rights of broadcasting organisations are included in neighbouring rights.

If the rights of the original broadcasting organisation are recognised even when re-rebroadcasting occurs, or broadcasting is made with the fixation of the original broadcasting, it can no longer be regarded as the protection of the act of broadcasting. It is the protection of the content of broadcasting, in other words, the protection of broadcasts. Neighbouring rights do not protect production but the act of disseminating works. It is copyright that protects production. The content of broadcasting, therefore, should be protected by copyright. Accordingly, if the indefinite re-rebroadcasting or deferred broadcasting is recognised, neighbouring rights would effectively involve copyright. This would create considerable confusion with respect to the framework of the *Copyright Law*.

If the recognition of the rights of the original broadcasting organisation are finite at some stage of re-rebroadcasting or deferred broadcasting (or the combination of these), it is not possible to explain the reason why the original broadcasting organisation is protected to that stage but is not protected from the next stage. In the first place, strengthening the rights of broadcasting organisations is to adapt those rights to the digital age in which the indefinite fixation, reproduction or rebroadcast of a broadcast without debasing quality are actualised. Therefore, definite protection to some stage does not help in any event.

As above, there is a dilemma, namely, that strengthening the rights of broadcasting organisations within the framework of neighbouring rights substantially changes neighbouring rights into copyright. Strengthening the rights of broadcasting organisations within the framework of neighbouring rights seems to be impossible.

---

[23] See, the discussions at the Standing Committee on Copyright and Related Rights of WIPO: World Intellectual Property Organisation, 'Standing Committee on Copyright and Related Rights, First Session, Report' (1998), SCCR/1/9; and World Intellectual Property Organisation, 'Standing Committee on Copyright and Related Rights, Second Session, Report' (1999), SCCR/2/11.

Japan has traditionally protected broadcasters' rights as the protection of the act of broadcasting by a broadcasting organisation and recognised neighbouring rights that are social-oriented rights. Japan does not recognise copyright, which is a creator-oriented right, in broadcasts as a creation. However, technological developments began to make it difficult for neighbouring rights to provide the sufficient level of protection which society demanded. If the rights of broadcasting organisations are strengthened in order to satisfy social demands, the rights cannot help but become the equivalent rights that are recognised in creation.

Japan intends to maintain the social-oriented rationale for protecting the rights of broadcasting organisations even in the digital age. Retaining the social-oriented rationale, however, is unable to satisfy social demands. As discussed above, it is impossible to provide sufficient protection if the rights of broadcasting organisations remain as neighbouring rights. Because of this, Japan, which has suggested strengthening the rights of broadcasting organisations at the WIPO Standing Committee on Copyright and Related Rights, has not been able to amend its domestic *Copyright Law* except for the minor amendment explained below.

3.4. Copyright Law Amendment in 2002

In January 2002, a Bill to amend the *Copyright Law* was enacted. This Bill was prepared primarily for the implementation of the WPPT in Japan[24] but was not limited to that purpose. The Bill included a new provision (Art. 99 bis) which granted a new right for broadcasting organisations given that webcasting was becoming prevalent. Since the rights of cable distributors equal to those of broadcasters were recognised in Japan, the Bill also included an equivalent provision to grant a new right for cable distributors.[25]

The following is the new provision (Art. 99 bis) of the rights of broadcasting organisations inserted in Art. 99 by the Bill.

> 'Broadcasting organisations shall have the exclusive right to make available:
>
> their broadcasts; or
>
> those distributed by cable from such broadcasts
>
> by means of receiving their broadcasts.'

---

[24] Sakka F, *Shoukai: Chosakuken-hou*, (2nd ed, Tokyo, Gyousei, 2002), 79 [trans: *Explication: Copyright Law*].

[25] The new provision was inserted as Art. 100 quarter and the previous Art. 100 quarter was re-numbered as Art. 100 quinquies.

The provision is consistent with the other provisions concerning the rights of broadcasting organisations as it grants an exclusive right to do a certain act 'by means of receiving their broadcasts'.

It is true that this amendment enhanced the protection of the rights of broadcasting organisations in the sense that it extended the protection to a different kind of act. Nonetheless, the amendment should be said to be minor as it does maintain the limit of protection in that only actions done 'by means of receiving' broadcasts are covered by the exclusive rights of broadcasters.

4. Possibility of Copyright in Broadcasts

As examined above, if the social-oriented rationale for protecting the rights of broadcasting organisations is maintained, it will be impossible to strengthen the rights of broadcasting organisations. However, if the rights of broadcasting organisations are not strengthened, the social requirement of the protection of broadcasters' rights will not be satisfied. An obvious solution to this problem might be to adopt the creator-oriented rationale for protecting the rights of broadcasting organisations. The feasibility of this will be examined below.

4.1. Reconsideration of the Reason Why Japan Does Not Recognise Copyright in Broadcasts

It may be useful to reconfirm the reason why the Japanese *Copyright Law* does not recognise copyright in broadcasts. The Japanese *Copyright Law* generally does not recognise copyright in broadcasts; however, a broadcasting organisation holds copyright in its broadcast when the broadcasting organisation produces a pre-recorded television broadcast and broadcasts it.

It is sometimes thought in Japan that pre-recorded television broadcasts are cinematograph films, and cinematograph films are works, so that copyright is recognised in them.[26] This, however, is inaccurate. The Japanese *Copyright Law* does not require a work to be fixed in a material form.[27] That is, it is possible for a broadcast to be recognised as a work even though it has not been pre-recorded.

The logical interpretation of the reason why copyright should be recognised in pre-recorded television broadcasts is that they are the outcome of

[26] See for more explanation, Tamura Y, *Chosakuken-hou Gaisetsu*, (Yuuhikaku, Tokyo, 1998) 41 and 323 [trans: *Copyright Compendium*].

[27] There is an opinion that fixing into a material form is implicitly required in order to be a cinematograph film. However, even those who hold such an opinion never contend that the requirement is applicable to works generally.

editing; hence they are expressions of thoughts or sentiments in a creative way, and thus they are works. The assertion that pre-recorded television broadcasts are works whereas live broadcasts are not is, however, questionable when the process of editing is used as a benchmark for works.

As explained above, under the *Copyright Law* of Japan, a copyright 'work' is required to be a production. Live broadcasting is no doubt a production. However, live broadcasting cannot be categorised as 'thoughts or sentiments'. For example, in the case of the on-the-spot broadcasting of an address by a politician, copyright is recognised in the address itself because the address is an expression of thoughts or sentiments in a creative way by the politician. However, the live broadcasting of the address on the spot is a simple presentation of a fact that the politician made an address. The mere presentation of facts cannot be recognised as thoughts or sentiments.

Furthermore, the variety of ways of expression in live broadcasting is limited. If copyright is recognised in a live broadcast, the ways of expression will soon be exhausted. Therefore, live broadcasting is not regarded as an expression in a creative way. Insofar as the criteria that a production should be thoughts or sentiments and that it should be expressed in a creative way are not satisfied, the criterion that a production should fall within the literary, scientific, artistic or musical domain is not considered. Hence live broadcasting is not a work.

As for sound broadcasting, the criterion that a work should be a production is also satisfied. However, the criteria that a production should be thoughts or sentiments and that it should be expressed in a creative way are not satisfied for the same reason as live broadcasting. Accordingly, sound broadcasting also is not recognised as a work.

4.2. Possible Copyright in Broadcasts as Compilations

4.2.1. *A Broadcast Edited by a Director*

With respect to the possibility of recognising copyright in broadcasts, Professor Masao Handa expressed an interesting opinion. The opinion by Professor Handa is that the act by a director of on-the-spot live broadcasting constitutes editing.[28] According to Professor Handa, the on-the-spot live broadcasting of baseball games by some broadcasting organisation, for instance,

---

[28] Handa M, 'Shin-jidai ni muketa Housou-chosakuken no Kadai to Tenbou: Kentou Hitsuyou na Housou-jigyousha no Kenri Hogo' [July 1999] *Gekkan Minpou,* 4, 8 [trans: 'The Tasks and Prospects of Copyright in Broadcasts toward a New Age: The Need for Examination of the Protection of the Rights of Broadcasting Organisation in *Monthly Commercial Broadcasting*].

engages twelve cameras and the director of the broadcasting instantly selects the best image from amongst the twelve images and that image is broadcast.[29] The *Copyright Law* clearly provides protection for compilations stating that 'Compilations ... which, by reason of the selection or arrangement of their contents, constitute intellectual creations shall be protected as independent works' (Art. 12(1)).[30] It can be contended that editing by a director subsists even in live broadcasting. If so, it seems possible to recognise copyright in live broadcasting.

However, the issue whether 'live broadcasting' can be a work or not is different from the question whether 'broadcasting' can be a work or not. The opinion which regards the on-the-spot live broadcasting of a baseball game as an example does not seem to express this difference clearly. The discussion is not concerned with an individual broadcast which is made by a director but broadcasts generally that are made by broadcasting organisations. If the question is whether a broadcast can be a work or not, the examination of a production by a director – i.e. the nature of the editing by a director – may be sufficient. It is, however, all broadcasts by broadcasting organisations that should be examined since the question is whether broadcasts by broadcasting organisations generally can be works or not.

4.2.2. *A Broadcast Not Edited by a Director*

As mentioned above, live broadcasting can be a work as long as the programme is made by a director of a broadcasting organisation. Creativity as a result of editing is recognised in most cases. However, broadcasting organisations can broadcast programmes without editing, e.g. an image of a town with a fixed camera, or sound broadcasting where an announcer merely reads the news. Furthermore, broadcasting organisations broadcast not only programmes made by them; they also broadcast cinematograph films which are made entirely by others. An examination of whether broadcasting can be a work in these cases renders it necessary to determine whether broadcasting generally can be a work or not. Hereafter, broadcasting a programme which has been made by parties other than broadcasting organisations, for instance broadcasting a cinematograph film, will be considered an example of broadcasting in which there is no scope for editing by a director.

---

[29] Handa M, 'Shin-jidai ni muketa Housou-chosakuken no Kadai to Tenbou: Kentou Hitsuyou na Housou-jigyousha no Kenri Hogo' [July 1999] *Gekkan Minpou,* 4, 8 [trans: 'The Tasks and Prospects of Copyright in Broadcasts toward a New Age: The Need for Examination of the Protection of the Rights of Broadcasting Organisations in *Monthly Commercial Broadcasting*].

[30] Oyama Y et al, *Copyright Law of Japan*. <http://www.cric.or.jp/cric_e/clj/clj.html>.

Broadcasting a programme which is made by others has simply been regarded in the past as disseminating a work of others.[31] Broadcasting certainly has such an aspect. Copyright is recognised in the creation of a work. Copyright cannot be recognised in dissemination, the act of broadcasting. However, broadcasting a programme which has been made by others still involves a programme director thinking and deciding which programme should be broadcast, in what order and when, and implementing that practically.[32] If so, broadcasting seems to be considered as editing by a programme director (or directors). It would then be possible to extend the application of the idea of compilation for broadcasts generally in order to recognise copyright in broadcasts as such compilations.

Although grounds for recognising copyright in broadcasts in Japan cannot avoid being different from those of the common law approach, copyright in broadcasts as compilations is virtually the same as copyright in broadcasts of the common law approach in its effect. It can prevent the same act – i.e. re-rebroadcasting or deferred broadcasting – as copyright in broadcasts of the common law approach can prevent.

4.3. Potential Issues regarding Copyright in Broadcasts

Even though the nature of broadcasts can be recognised as works – broadcasts as compilations – there still remain other problems to be considered. One is the problem of determining the author and the other is the obligations imposed by the Rome Convention.

4.3.1. *Authorship*

In Australia, copyright in broadcasts is categorised in Part IV of the *Copyright Act* 1968 (Cth), which deals with subject-matter other than works and is independent of Part III of the Act, which deals with copyright in works. Professor Sam Ricketson explains that the rationale for the distinction is the difficulty in specifying an individual author for Part IV subject-matter, so consequently a maker has to be recognised as a copyright owner.[33]

---

[31] Yoshida D, 'Chosaku-rinsetsuken no Keisei to Hatten' (1996) 4 *Yokohama Kokusai-keizai-hougaku* 213, 217 [trans: 'Formation and Development of Neighbouring Rights' in the *Yokohama Law Review*].

[32] There is an opinion which recognises a kind of editing in scheduling broadcasts by a programme director although it does not recognise the creativity in it. See, Yoshida D, 'Chosaku-rinsetsuken no Kanousei' (1996) 36 *Kopiraito* 2, 7 [trans: 'Potential of the Neighbouring Rights Regime' in *Copyright*].

[33] Ricketson S, *The Law of Intellectual Property: Copyright, Designs & Confidential Information*, (2nd ed, Sydney, LBC Information Services, 1999) [8.5].

The Japanese *Copyright Law* also assumes that an author is an individual since it defines an author as 'a person who creates a work' (Art. 2(1)(ii)). However, the *Copyright Law* of Japan contains a provision concerning authorship of a work made by an employee in the course of his or her duties (Art. 15(1)). The Copyright Law states that:

> The authorship of a work (except a program work) which, on the initiative of a legal person or other employer (hereafter in this Article referred to as "legal person") is made by its employee in the course of duties and is published under the name of such legal person as the author shall be attributed to that legal person unless otherwise stipulated in a contract, work regulation or the like in force at the time of the making of the work.[34]

Because the Japanese *Copyright Law* can recognise a legal person as an author, a broadcasting organisation is also capable of being an author. Accordingly, deciding the author cannot be an obstacle to allowing copyright in broadcasting.

Where an author is a broadcasting organisation, a problem as to the time of the creation of the work can arise. Where an author is a broadcasting organisation, the duration of its copyright 'shall begin with the creation of the work' (Art. 51(1)) based on the general principle of the term of protection of copyright. In addition, it 'shall continue to subsist until the end of a period of fifty years following its creation' (Art. 53), by the provision for 'works bearing the name of a corporate body'. Hence, there is a problem as to the time of the creation of the work. Again, separately considering broadcasting a programme edited by a director and broadcasting a programme made by others (or a programme which a director does not edit) will be useful.

In terms of broadcasting a programme edited by a director, the time of creation may be the time when the selection or arrangement is practically done, since compilations which constitute intellectual creations by the selection or arrangement of the content are protected. Accordingly, copyright seems to be recognised before broadcasting.

On the other hand, as regards broadcasting a programme made by others (or a programme which a director does not edit), copyright will be recognised in the scheduling of programmes by programme directors. Therefore, the time of creation is when the editing, that is programme scheduling, is actually exercised. A schedule of programmes is a mere idea, thus, copyright should be recognised at the time when the schedule is practically expressed. It must mean the time of broadcasting.

[34] Art. 15 of the *Copyright Law*.

4.3.2. *Obligations Imposed by the Rome Convention*

Since Japan is a member country of the Rome Convention, the obligations under that Convention (Art. 26) have to be considered in order to recognise copyright in 'broadcasts'. The rights that the Rome Convention requires its member countries to protect are explained in Chapter Three.

The Rome Convention clearly states in 'Protection by Other Means' (Art. 21 of the Rome Convention) that the Convention does not prejudice other protections. The Convention stipulates a minimum level of protection and does not impede additional protection by domestic legislation or other means.[35] Accordingly, protections implemented by a member country which surpass the protection required by the Rome Convention will satisfy that country's obligation under the Rome Convention.

As examined above, copyright in Japan is generally more than the protection of the rights of broadcasting organisations as neighbouring rights. The only situation in which neighbouring rights protection is more favourable for the rights owners than copyright is where there is communication of a broadcast to the public for non-profit making purposes and without charging any fees to the audience.

In this regard, the Rome Convention provides for 'Permitted Exceptions' (Art. 15). Member countries are allowed to create exceptions as to: (a) private use; (b) reporting news; (c) ephemeral fixation for broadcast; and (d) teaching or scientific research, and exceptions other than those that are equivalent exceptions to copyright where domestic laws allow such exceptions to copyright.[36] Accordingly, even were Japan to recognise copyright in broadcasts with more exceptions than provided for in the Rome Convention for the rights of broadcasting organisations, that would not constitute an avoidance of the obligations imposed by the Rome Convention.

4.4. Feasibility of Copyright in Broadcasts

As discussed above, it is not difficult to recognise copyright in broadcasts under the Japanese *Copyright Law*. There rarely is a problem in terms of domestic legislation and the international convention even if the social-oriented rationale were given up and copyright, which is the creator-oriented right,

---

[35] WIPO, *Guide to the Rome Convention and to the Phonograms Convention*, World Intellectual Property Organisation, (WIPO Publication No. 617(E), Geneva, WIPO, 1981) 69.

[36] WIPO, *Guide to the Rome Convention and to the Phonograms Convention*, World Intellectual Property Organisation, (WIPO Publication No. 617(E), Geneva, WIPO, 1981) 38.

were to be recognised for protecting the rights of broadcasting organisations.[37] Recognising copyright in broadcasts makes it possible to upgrade the protection of the rights of broadcasting organisations in the digital environment. Furthermore, it makes the protection of broadcasters' rights virtually equivalent to that of countries that take the common law approach.

5. Conclusion

In Japan, in contrast to Australia, broadcasting piracy was already a problem in 1998 when the first session of the WIPO Standing Committee of Copyright and Related Rights was held. Despite its enthusiasm to upgrade the protection of broadcasters' rights, Japan has been unable to make an effective amendment to its *Copyright Law* since then. All that could be done is a minor amendment which has not been able to resolve the problem fundamentally.

The difficulty was caused by the maintenance of the social-oriented rationale for the protection of broadcasters' rights. Japan has protected the rights of broadcasting organisations having regard to the act of broadcasting by broadcasters, which is the protection by recognising neighbouring rights. Japan does not protect what is broadcast since the protection of production or a creation is for copyright, the rationale for which is creator-oriented.

Japan has aimed at strengthening the rights of broadcasters within the framework of neighbouring rights. As discussed above, it is impossible to upgrade the protection of broadcaster's rights since the rationale for protection cannot help but be transformed to one that is creator-oriented in order to strengthen the protection. Just like Australia which has been experiencing the unsettled transition of the rationale for the protection of broadcasters' rights, it seems that the time has come for Japan to consider the possibility of introducing copyright in broadcasts.

---

[37] In order to recognise copyright in broadcasting, copyright in performance and phonograms might also need to be recognised although it seems easier since creativity has been assumed more in performances and phonograms than in broadcasting.

Chapter 8

Rationale for the Protection of the Rights of Broadcasting Organisations

1. Introduction

As discussed in the previous two Chapters, both a country of the common law approach and a country of the civil law approach, having been affected by digital technology, showed the tendency to shift their rationale for the protection of the rights of broadcasting organisations from a purely socially oriented one to a new one that accommodates both the social-oriented rationale and the creator-oriented rationale. The trend, as analysed in Chapter Five, coincides with the course of discussions at the WIPO Standing Committee of Copyright and Related Rights which demonstrated that the rationale for the protection of broadcasters' rights was in transition.

One of the objectives of this research is to demonstrate that the traditional understanding, which is that the protection of broadcasters' rights is based on the social-oriented rationale in both countries of the common law and civil law approaches, is no longer satisfactory. The recent phenomena of the transition of the rationale for protection were discussed in the previous Chapters. It is true that these phenomena were triggered by the development of digital technology. However, adaptation to the development of digital technology, as examined in Chapter Five, is not the only reason for this transition of the rationale at the WIPO Standing Committee. Where the technological advancement is not the only reason for the transformation of the rationale, the original understanding of the rationale should be questioned.

In this Chapter, the traditional understanding, that is that the rationale for protection is socially oriented under both the common law and civil law approaches, will be reviewed by analysing the reports of Australia and Japan that introduced provisions for the protection of the rights of broadcasting organisations in these countries.

2. Rationale for the Protection of Broadcasters' Rights in Australia

In Australia, copyright in broadcasts was introduced for the first time by the *Copyright Act* 1968 (Cth). This Act was enacted based on the recommendations of the so-called Spicer Committee Report,[1] which introduced the notion of copyright in broadcasts into Australia. The Spicer Committee Report resulted from the so-called Gregory Committee Report[2] in the United Kingdom which recommended the enactment of the *Copyright Act* 1956 in that country.[3] Therefore, the review below will be extended to the Gregory Committee Report in addition to the Spicer Committee Report.

2.1. The Gregory Committee Report

The Gregory Committee was appointed in 1951 in order to consider and report on what changes to the Copyright Act were desirable with particular reference to:

(1) the technological developments after 1911 when the *Copyright Act* 1911, that is the Copyright Act of the time, was enacted; and
(2) the International Convention for the Protection of Literary and Artistic Works (the Berne Convention) as revised at Brussels in 1948.[4]

The Gregory Committee published its report (Gregory Committee Report) in 1951.[5]

As described in the Introductory part of the Gregory Committee Report, amongst 'modern technical development' the impact of broadcasting was considerable.[6] Therefore, issues related to broadcasting were one of the core items for consideration (and also the recommendations) by the Committee.

---

1 The Report of the Copyright Law Review Committee, 1959 (Spicer Committee).

2 Report of the Copyright Committee, 1951 (Gregory Committee) Cmd 8662.

3 Bentley L & Sherman B, *Intellectual Property Law*, (Oxford, Oxford University Press, 2001) 30.

4 Report of the Copyright Committee, 1951 (Gregory Committee) Cmd 8662, 1.

5 Report of the Copyright Committee, 1951 (Gregory Committee) Cmd 8662.

6 Report of the Copyright Committee, 1951 (Gregory Committee) Cmd 8662, 5–6, [12].

The Report made a recommendation in relation to broadcasting that the right of broadcasting, which had not been clear, should be the exclusive right of an author. In addition to that, the issue as to whether the rights of rebroadcasting and fixation should be recognised for broadcasting organisations was considered. The Report stated that broadcasting organisations occupied the position which was 'not, in principle, very different from that of a gramophone company or a film company'[7] because broadcasting organisations assembled programmes and transmitted them at considerable cost and skill.[8] The Report went on to state that it seemed 'nothing more than natural justice that it should be given the power to control any subsequent copying of these programmes by any means.'[9]

In the Report, issues such as 'social needs' or 'the incentive for broadcasting organisations' were not touched upon. Only the natural justice of protecting the rights of broadcasting organisations was advocated. The Report appears to have considered that broadcasting organisations deserved protection because they broadcast. This idea cannot be classified as a social-oriented rationale.

According to the traditional understanding, the copyright approach takes the position of protecting the rights of broadcasting organisations as social-oriented rights. However, the United Kingdom, a country of the common law approach, did not take this position in relation to the *Copyright Act* 1956 as the Gregory Committee apparently did not take this position.

2.2. The Spicer Committee Report

The Spicer Committee was appointed in 1958 to consider what amendments to the United Kingdom copyright law, which were made following the Gregory Committee Report, should be incorporated into Australian copyright law. The Spicer Committee published its report (Spicer Committee Report) in 1959.[10]

Although the *Copyright Act* 1956 (U.K.) repealed the *Copyright Act* 1911 in the United Kingdom, the 1956 Act preserved the operation of the 1911 Act in the former British colonies including Australia.[11] Because the Australian *Copyright Act* 1912 did not affect the operation in Australia of the provisions of the British 1911 Act, the British 1911 Act still formed part of

---

7 Report of the Copyright Committee, 1951 (Gregory Committee) Cmd 8662, 41, [117].

8 Report of the Copyright Committee, 1951 (Gregory Committee) Cmd 8662, 41, [117].

9 Report of the Copyright Committee, 1951 (Gregory Committee) Cmd 8662, 41, [117].

10 The Report of the Copyright Law Review Committee, 1959 (Spicer Committee).

11 The Report of the Copyright Law Review Committee, 1959 (Spicer Committee), 10. Ricketson S & Creswell C, *The Law of Intellectual Property: Copyright, Designs & Confidential Information*, (2nd ed, Sydney, Lawbook Co., 2001) [3.370].

Australian law.[12] In this circumstance, the objectives of the Spicer Committee were to examine the same issues as had been considered by the Gregory Committee.[13] In this sense, the Spicer Committee can be said to have followed the Gregory Committee. However, as explained below, the position which the Spicer Committee adopted appears to have been different from that of the Gregory Committee.

The Spicer Committee Report stated in its Introductory part that 'the primary end of the law on this subject is to give to the author of a creative work his just reward for the benefit he has bestowed on the community and also encourage the making of further creative works.'[14] The expressions, reward for the community benefit and also encourage the making of further creative works, clearly articulated the social-oriented rationale for copyright. In contrast to the Gregory Committee in the United Kingdom, the Spicer Committee seems to have founded its recommendations upon the social-oriented rationale.

As for sound and television broadcasts, the Spicer Committee Report recommended that copyright, which had been recognised in works in a permanent form, should be extended to subsist in broadcasts which had a transitory nature.[15] Although the Report stated that 'there is something to be said against the importation of this new conception'[16] as a result of consideration of the issue by the Committee of Experts on the International Protection of Performers, Recorders and Broadcasters[17] and the International Labour Office,[18] that had considered the neighbouring rights, the Report added that 'there can be no doubt that broadcasting authorities are properly entitled to protection against the pirating of their broadcasts'.[19] (The bases for these statements were not, however, stated in the Report.) The Committee recommended the introduction of the rights of: re-broadcasting; communicating to a paying audience; making a cinematograph film or a copy of such a film in a television broadcast; and making a sound recording or a record of such a recording in a sound broadcast.[20]

---

[12] The Report of the Copyright Law Review Committee, 1959 (Spicer Committee), 10.

[13] Ricketson S & Creswell C, *The Law of Intellectual Property: Copyright, Designs & Confidential Information*, (2nd ed, Sydney, Lawbook Co., 2001–) [3.370].

[14] The Report of the Copyright Law Review Committee, 1959 (Spicer Committee), 8–9, [13].

[15] The Report of the Copyright Law Review Committee, 1959 (Spicer Committee), 54, [282].

[16] The Report of the Copyright Law Review Committee, 1959 (Spicer Committee), 55, [286].

[17] 'Draft Agreement on the Protection of Certain Rights called Neighbouring on Copyrights' (1957) X *Copyright Bulletin* 12. 'Explanatory Statement accompanying the Draft Agreement' (1957) X *Copyright Bulletin* 16.

[18] See 'Annex: Draft Convention of the Committee of Experts of ILO' (1957) X *Copyright Bulletin* 32.

[19] The Report of the Copyright Law Review Committee, 1959 (Spicer Committee), 55.

[20] The Report of the Copyright Law Review Committee, 1959 (Spicer Committee), 55–56 [291].

The Report did not say anything against the importation of broadcasters' rights as a result of consideration of the issue by the Committee of Experts on the International Protection of Performers, Recorders and Broadcasters, which consideration later formed the Monaco Draft. However, it is not surprising that the Spicer Committee which took the social-oriented rationale for protection disagreed with the Monaco Draft over the point that the Monaco Draft focused on the protection of the programmes that broadcasters had created.[21] The Report also did not mention why broadcasting authorities were entitled to be protected against piracy. However, there is little doubt that broadcasting organisations would face difficulties in obtaining a reward for their social benefit if piracy were allowed.

2.3. Misunderstanding concerning the Rationale for Protection in Australia

As examined above, the original rationale for the protection of broadcasters' rights has been correctly understood in Australia. It was indeed the social-oriented rationale upon which copyright in broadcasts in Australia stood when introducing copyright in broadcasts. Nevertheless, this does not appear to mean that there was no misunderstanding concerning the rationale for the protection of broadcasters' rights in Australia. It is because the Gregory Committee Report which was supposed to have provided the basis of the Spicer Committee Report[22] had in fact taken a different rationale from that taken by the Spicer Committee Report. As explained above, the Spicer Committee examined the same issues as the Gregory Committee but made the examination and the recommendations independently.

This seems to have complicated Australia's position regarding the protection of broadcasters' rights. As discussed in Chapter Six, Australia, since the enactment of the Digital Agenda Act, has been facing confusion in relation to the rationale for the protection of the rights of broadcasting organisations. Australia introduced protection for broadcasters' rights following the recommendations of the Spicer Committee based on the social-oriented rationale. The Digital Agenda Act drew the essence of the creator-oriented rationale into the existing rationale in order to keep the balance between the rights owners and the users of copyright material. *The Panel* Case has reverted to the situation where the rationale for protection is purely socially oriented. However, the High Court did so by relying on the Gregory Committee Report which did not adopt the social-oriented rationale for protection of the rights of broadcasting organisations.

---

[21] See Chapter Three.

[22] *Network Ten Pty Ltd v TCN Channel Nine Pty Ltd* 59 IPR 1, para 24.

3. Rationale for the Protection of Broadcasters' Rights in Japan

Turning to Japan, it was the current *Copyright Law* that first introduced the rights of broadcasting organisations into Japan.[23] This code was based on the Report of the Copyright Regime Committee.[24] Accordingly, the Report of the Copyright Regime Committee will be reviewed.

3.1. Report of the Copyright Regime Committee

The Copyright Regime Committee was appointed in 1962 to consider the issues concerning the then *Copyright Law*,[25] which had no provisions for neighbouring rights and the issues in relation to protecting performers, phonogram producers and broadcasting organisations.[26] The recommendation by the Committee was made in 1966 and published as this Report in the same year.[27]

The Committee seemed to presuppose the domestic implications of the Rome Convention. For example, the Minister of Education mentioned the establishment of the Rome Convention in his speech at the first session of the Copyright Regime Committee,[28] and the Explanatory Memorandum of the Report of the Copyright Regime Committee stated that the Committee decided to recommend the introduction of neighbouring rights with reference to the Rome Convention as a guideline.[29]

The rights that the Report recommended should be recognised for broadcasting organisations were the rights of: re-broadcasting by means of both cable and wireless; fixation including fixing into a phonograph; reproduction of their broadcasts or the fixation of their broadcasts; and communication to

---

[23] Chosakuken-hou Kenkyuu-kai, 'Shin Chosakueken-hou seminah (12)' (1971) 480 *Jurisuto* 134, 174 [trans: Copyright Law Study Group, 'A Seminar of the New Copyright Law (12)' in the *Jurist*].

[24] Sakka F, *Shoukai: Chosakuken-hou*, (2nd ed, Tokyo, Gyousei), 61 [trans: *Explication: Copyright Law*].

[25] The Old *Copyright Law*.

[26] See, 'Hashigaki', *Chosakuken-seido-shingikai Shingi-kiroku (1),* (Monbu-sho, 1966) [trans: 'Preface' in the *Report of the Copyright Regime Committee (1)*].

[27] See, 'Chosakuken-seido-shingikai Toushin', *Chosakuken-seido-shingikai Shingi-kiroku (1),* (Monbu-sho, 1966) [trans: 'Recommendation of the Copyright Regime Committee' in the *Report of the Copyright Regime Committee (1)*].

[28] 'Dai-ikkai Chosakuken-seido-shingikai ni okeru Monbu-daijin Aisatsu', *Chosakuken-seido-shingikai Shingi-kiroku (1),* (Monbu-sho, 1966), 5 [trans: 'Speech by the Ministry of Education at the first session of the Copyright Regime Committee' in the *Report of the Copyright Regime Committee (1)*].

[29] 'Chosakuken-seido-shingikai Toushin Setsumeisho', *Chosakuken-seido-shingikai Shingi-kiroku (1),* (Monbu-sho, 1966), 94 [trans: 'The Explanatory Memorandum of the Recommendation of the Copyright Regime Committee' in the *Report of the Copyright Regime Committee (1)*].

the public of their television broadcasts for commercial purposes.[30] These rights would be considered appropriate to be recognised for a broadcasting organisation which had its head office in Japan or where a broadcast was emitted from a transmitter situated in Japan.[31]

The Report summarised its own interpretation of the Rome Convention that the neighbouring rights of the Rome Convention were to provide protection for broadcasting organisations by recognising the equivalent mental effort in their act as that which is found in the act of creating a work.[32] The Report stated that it was appropriate to protect the rights of broadcasting organisations as neighbouring rights in Japan because of programming and other acts of broadcasting organisations.[33] It is apparent that the rationale for protecting the rights of broadcasting organisations was creator-oriented.

3.2. Professor Koji Abe's Article

As discussed above, the Japanese *Copyright Law* includes the rights of broadcasting organisations because of their creativity in programming their broadcasts. Despite that, the rights of broadcasting organisations have been understood in Japan as the protection of broadcasters' rights based on social factors and the creativity in the broadcasters' act has been denied. Why did this happen? In order to formulate the traditional understanding that the Japanese *Copyright Law* recognises the rights of broadcasting organisations according to the social-oriented rationale, Professor Koji Abe's article on neighbouring rights seems to have played a key role.

Professor Abe published an article entitled 'Neighbouring Rights',[34] which was the initial research on neighbouring rights in Japan in 1965, before the

---

30 'Chosakuken-seido-shingikai Kaku-shou-iinkai Shingi-kekka Houkoku: Dai-go shou-iinkai', *Chosakuken-seido-shingikai Shingi-kiroku (1),* (Monbu-sho, 1966), 269–270 [trans: 'Report of the Fifth Subcommittee, the Copyright Regime Committee' in the *Report of the Copyright Regime Committee (1)*].

31 'Chosakuken-seido-shingikai Kaku-shou-iinkai Shingi-kekka Houkoku: Dai-go shou-iinkai', *Chosakuken-seido-shingikai Shingi-kiroku (1),* (Monbu-sho, 1966), 270 [trans: 'Report of the Fifth Subcommittee, the Copyright Regime Committee' in the *Report of the Copyright Regime Committee (1)*].

32 'Chosakuken-seido-shingikai Kaku-shou-iinkai Shingi-kekka Houkoku: Dai-go shou-iinkai', *Chosakuken-seido-shingikai Shingi-kiroku (1),* (Monbu-sho, 1966), 255 [trans: 'Report of the Fifth Subcommittee, the Copyright Regime Committee' in the *Report of the Copyright Regime Committee (1)*].

33 'Chosakuken-seido-shingikai Kaku-shou-iinkai Shingi-kekka Houkoku: Dai-go shou-iinkai', *Chosakuken-seido-shingikai Shingi-kiroku (1),* (Monbu-sho, 1966), 256 [trans: 'Report of the Fifth Subcommittee, the Copyright Regime Committee' in the *Report of the Copyright Regime Committee (1)*].

34 Abe K, 'Rinsetsu-ken' (1965) 329 *Jurisuto* 29 [trans: 'Neighbouring Rights' in *Jurist*].

recommendation of the Copyright Regime Committee was made. In the article, Professor Abe explained what neighbouring rights were and clarified that neighbouring rights provided protection for the acts of three parties as follows. Neighbouring rights were:

> 'the appellative for the rights, that have been advocated to be granted to a person who performs, records or broadcasts a literary work, music or the like which has been traditionally protected by copyright based on their such act. The advocacy for these rights has particularly been getting intense as the development of the media along with the advancement of a technological civilisation.'[35]

Professor Abe subsequently analysed the nature of the acts of three parties – performers, phonogram producers and broadcasting organisations. According to his analysis, the common element between the three parties was only a media function.[36] For example, performance is the medium by which the performer's individuality and personality is made perceivable or expressed. Because it involves economic value, the recognition of rights in it is required.

Professor Abe explained that the equivalent contribution to mental effort was recognised in broadcasting as performance to some extent, however, 'the more decisively important thing was maintenance of enterprise. The protection against financial loss of business caused by easy fixing or reproducing recordings and broadcasts and distributing them is important.'[37] The protection of the rights of broadcasting organisations has 'its basis in originality of enterprise. It is understood that the rights should be approved for the purpose of protecting the financial value in broadcasts against the socially undesirable piracy.'[38]

Professor Abe concluded that, from the analysis of the nature of the three parties protected by neighbouring rights, the rationale for protecting performers' rights and the rationale for protecting phonogram producers' and broadcasters' rights were different.[39] Professor Abe's article suggested that the protection of performers' rights was based on the creator-oriented rationale and the protection of the rights of phonogram producers and broadcasters was based on the social-oriented rationale. This understanding of the rationale for the protection of broadcasters' rights accords with the recognition of those rights by the Rome Convention.[40]

[35] Abe K, 'Rinsetsu-ken' (1965) 329 *Jurisuto* 29–30 [trans: 'Neighbouring Rights' in *Jurist*].
[36] Abe K, 'Rinsetsu-ken' (1965) 329 *Jurisuto* 30 [trans: 'Neighbouring Rights' in *Jurist*].
[37] Abe K, 'Rinsetsu-ken' (1965) 329 *Jurisuto* 30 [trans: 'Neighbouring Rights' in *Jurist*].
[38] Abe K, 'Rinsetsu-ken' (1965) 329 *Jurisuto* 30–31 [trans: 'Neighbouring Rights' in *Jurist*].
[39] Abe K, 'Rinsetsu-ken' (1965) 329 *Jurisuto* 31 [trans: 'Neighbouring Rights' in *Jurist*].
[40] See Chapter Three.

Because this article, which was the initial research on neighbouring rights in Japan,[41] was published before the Report of the Copyright Regime Committee and the Report was also based on the Rome Convention, it does not seem that sufficient attention was drawn to the fact that the Copyright Regime Committee adopted a different rationale for the rights of broadcasting organisations from that of the Rome Convention. This is considered to be the reason why the rationale for the protection of the rights of broadcasting organisations had traditionally been understood as social-oriented although the Copyright Regime Committee adopted a creator-oriented rationale.

3.3. Misunderstanding concerning the Rationale for Protection in Japan

It was believed that the rights of broadcasting organisations had been granted based on the social-oriented rationale in Japan. However, as discussed above, the protection of the rights of broadcasting organisations was introduced in Japan as a result of the recommendation of the Copyright Regime Committee which took the creator-oriented rationale for protection. The rationale for the protection of broadcasters' rights in Japan was and is, in reality, creator-oriented.

The misunderstanding concerning the rationale, which is that the rights of broadcasting organisations in Japan are based on the social-oriented rationale, was formulated by an influential article published earlier than the Copyright Regime Committee Report. The article considered the rationale for protection of neighbouring rights but the focus of which was the discussions held by international organisations. The subsequent reference by the Copyright Regime Committee to the same considerations by international organisations seems to have helped the formulation of the misunderstanding.

From the time when Japan began to consider upgrading the protection of broadcasters' rights in light of technological developments, Japan has been struggling to find a way to strengthen the protection of broadcasters' rights within a framework of neighbouring rights or in other words, based on the social-oriented rationale. This approach to upgrading broadcasters' rights, however, must be said to be unproductive.

---

[41] There is an article by Professor Abe regarding neighbouring rights published even earlier but the focus of which was the formation of the Rome Convention. See, Abe K, 'Iwayuru Rinsetsuken no Hogo: Kokusai-kaigi wo Megutte' (1961) XXV *Hougaku* 128 [trans: 'Protection of So-Called Neighbouring Rights: International Conferences' in the *Journal of Law and Political Science*].

4. Conclusion

Traditionally, the rationale for protecting the rights of broadcasting organisations has been considered to be social-oriented under both the common law and civil law approaches. The recent shifting of the rationale for the protection of broadcasters' rights to the direction of a more creator-oriented approach, as discussed in the previous two Chapters, has been caused to a certain extent by the advancement of technology. However, the transition of the rationale for protection cannot be fully explained by technological developments. It is because the traditional understanding of the rationale for protection includes misunderstanding in respect of both the common law approach and the civil law approach.

Australia, a country adopting the copyright approach, decided to protect the rights of broadcasting organisations based on the social-oriented rationale although the United Kingdom adopted the protection of broadcasters' rights via a creator-oriented rationale. Australia referred to the provisions of the United Kingdom Act; however, the rationale for introducing the provisions was altered to match the discussions which led to the establishment of the Rome Convention.

Japan, a country of the civil law approach, introduced the protection of broadcasters' rights based on the provisions of the Rome Convention. However, Japan's rationale for protecting the rights of broadcasting organisations was different from the rationale advocated at the discussions leading to the Rome Convention. Despite the creator-oriented rationale, an academic theory was discussed based on the discussions held to establish the Rome Convention and the general understanding (or in fact, misunderstanding) of the rationale for broadcasters' protection being social-oriented was formulated.

Thus, the traditional understanding that both the common law and civil law approaches protect broadcasters' rights according to the social-oriented rationale is historically not accurate. Nevertheless, this understanding has long existed as a common view and has adversely affected consideration of the effective upgrading of the protection of the rights of broadcasting organisations at both the international and domestic levels.

Chapter 9
Future Directions

1.1. From the Past

Broadcasting organisations meet digital technology. Digital technology has brought various new ways of broadcasting while making it possible for more people to exploit broadcasting in more ways. When broadcasting organisations began to claim more protection for their rights in order to prevent people from exploiting their broadcasts, the question arose as to why more protection should be given to broadcasting organisations.

It was assumed that broadcasting organisations required more protection as a result of technological advances after the Rome Convention. However, contrary to this assumption, the Rome Convention, from its outset, has never provided comprehensive protection for broadcasting organisations due to its social-oriented rationale. The reality is that the development of technology did nothing more than merely add to the list of problems by creating new varieties of broadcasting which do not fall within the protection provided under the Rome Convention.

Notwithstanding this, discussions were commenced at WIPO in order to upgrade the protection of the rights of broadcasting organisations for the misconceived purpose of catching up with technological developments. As a matter of course, the proposals for the update of the protection put forward for discussion could not be explained by the social-oriented rationale. Due to this, the rationale has been silently shifting to accommodate the natural rights theory, the creator-oriented rationale. Although having not been overtly perceived,

the transition of the rationale for protection has been taking place and has been causing confusion.

Similar confusion has also been observed at the domestic level. In Australia, the protection of broadcasters' rights was considered subsequent to the UK Act which had set out the provisions for broadcasters' rights based on the creator-oriented rationale. However, Australia did not simply follow the UK but introduced protection for broadcasters' rights based on the social-oriented rationale. The protection worked sufficiently but Australia updated its copyright law in accordance with its policy to maintain the balance between access to copyright material by users and control over copyright material by the rights owners in the digital environment. This update which was based on the social-oriented rationale ended up with the introduction of the creator-oriented rationale, which rationale the highest court in Australia subsequently refused to accept relying on the UK Act which was, however, based on the creator-oriented rationale.

In the case of Japan, the understanding of the rationale for the protection of broadcasters' rights was, from the start, wrong. The protection was introduced based on the creator-oriented rationale. An influential article which convinced people of the social-oriented rationale for protection had, in fact, been focused on the discussions at the international level, not the Japanese situation. Nonetheless, Japan has adhered to the social-oriented rationale for protecting the rights of broadcasting organisations and the attempts to upgrade its protection of broadcasters' rights has not been successful. Yet, Japan is pressing for the upgrading of the protection of broadcasters' rights at WIPO.

Just as Professor Ginsburg proved that the common understanding of the rationale for the protection of copyright in the common law and the civil law approaches was inaccurate, this research may be said to have established that the common understanding of the rationale for the protection of broadcasters' rights in the common law and the civil law approaches is also inaccurate.

2.2. To the Future

The rationale for the protection of the rights of broadcasting organisations is under transformation to one that is creator-oriented. To date, neither WIPO, Australia nor Japan has positively shown their intention to give up the social-oriented rationale for protecting the rights of broadcasting organisations. However, the rationale for that protection is steadily moving towards a creator-oriented rationale.

The question posed at the outset of this book – What is the rationale for protecting the rights of broadcasting organisations? – can be answered in this way. The rationale for protection is currently transforming and the end result will be a creator-oriented rationale. The research undertaken however does not

answer whether this transition is desirable. The appropriateness of the creator-oriented rationale is a matter which has long been debated ever since Locke presented his theory of property. In this research, it can be said at least that the current effort at WIPO to strengthen the protection of the rights of broadcasting organisations cannot be achieved without the idea of creator-oriented protection and attempting to preserve the social-oriented rationale will only create confusion.

Bibliography

Books

Alber A, *Videotex/Teletext: Principles and Practices*, (New York, McGraw-Hill Book, 1985)

Baldwin T & McVoy D, *Cable Communication*, (2nd ed, New Jersey, Prentice Hall, 1988)

Bate S, *Television by Satellite: Legal Aspects*, (London, ESC Publishing, 1987)

Bently L & Sherman B, *Intellectual Property Law*, (Oxford, Oxford University Press, 2001)

Blakeney M, *Trade Related Aspects of Intellectual Property Rights: A Concise Guide to the TRIPS Agreement*, (London, Sweet & Maxwell, 1996)

Butler D & Rodrick S, *Austrtalian Media Law*, (2nd ed, NSW, Lawbook Co, 2004)

Choi S & Whinston A, *The Internet Economy: Technology and Practice*, (Austin, SmartEcon Publishing, 2000)

D'Amato A & Long D (eds), *International Intellectual Property Law* (Kluwer Law International, London, 1997)

Dean M, *Japanese Legal System*, (2nd ed, London, Cavendish Publishing, 2002) 129

Dizard W, *Old Media New Media: Mass Communications in the Information Age*, (3rd ed, New York, Longman, 2000)

Drahos P, *A Philosophy of Intellectual Property*, (Aldershot, U.K., Dartmouth, 1996)

Elbert B, *The Satellite Communication Applications Handbook*, (Boston, Artech House, 1997)

Fitzgerald A & Fitzgerald B, *Intellectual Property in Principle*, (Sydney, Lawbook Co., 2004)

Gendreau Y, *The Retransmission Right: Copyright and the Rediffusion of Works by Cable*, (Oxford, ESC Publishing, 1990)

Garnett K, Davies G & Harbottle G, *Copinger and Skone James on Copyright*, (15th ed, London, Sweet & Maxwell, 2005)

Geller P, *International Copyright Law and Practice Vol.2*, (NJ, USA, Matthew Bender, 2004)

Goldstein P, *International Copyright: Principles, Law, and Practice*, (New York, Oxford University Press, 2001)

Grace R, *The Protection of Intellectual Property under the NAFTA: A Model for the Future*, (The Customs Intellectual Property Information Center)

Hamada J, *Jouhou-hou*, (Tokyo, Yuuhikaku, 1993) [trans: *The Law of Information*]

Handa M, *Chosakuken-hou Gaisetsu*, (8th ed, Tokyo, Ichiryuusha, 1997) [trans: *Copyright Law Compendium*]
Handa M, *Chosakuken-hou no Kenkyuu*, (Tokyo, Ichiryuu-sha, 1971) [trans: *A Consideration of the Copyright Law*]
Head S, *World Broadcasting System: A Comparative Analysis*, (California, Wadsworth Publishing Company, 1985
Hunada M & Hasebe Y, *Housou-seido no Gendai-teki Tenkai*, (Tokyo, Yuuhikaku, 2001) [trans: *Modern Development of the Broadcasting Regime*]
Hybels S & Vlloth D, *Broadcasting: Radio and Television*, (New York, D.Van Nostrand Company, 1978)
Inglis A, *Behind the Tube: A History of Broadcasting Technology and Business*, (Boston, Focal Press, 1990)
Institute of Intellectual Property, *Exposure '94: A Proposal of the New Rule on Intellectual Property for Multimedia*, (Tokyo, Institute of Intellectual Property, 1994)
Ishimura Z & Horibe M, *Jouhou-hou Nyuumon*, (Kyoto, Houritsu-bunka-sha, 1999) [trans: *Introduction to the Law of Information*]
Koizumi N, *Amerika Chosakuken-seido: Genri to Seisaku*, (Koubundou, 1997) [trans: *Copyright Regime in the United States of America: Principles and the Policy*]
Laddie H, Prescott P & Vitoria M, *The Modern Law of Copyright and Design*s, (2nd ed, London, Butterworths, 1995)
Llompart J, *Hotetsugaku An'nai,* (Tokyo, Seibundou, 1997) [trans: *Legal Philosophy Guide*]
Long C, *Telecommunications Law and Policy*, (2nd ed, London, Sweet & Maxwell, 1995)
McKeough J, Bowrey K & Griffith P, *Intellectual Property: Commentary and Materials*, (3rd ed, Sydney, Lawbook Co., 2002)
McKeough J & Stewart A, Intellectual Property in Australia, (2nd ed, Sydney, Butterworths, 1997)
McKinney J, *Created from NAFTA: The Structure, Function, and Significance of the Treaty's Related Institutions*, (New York, M.E. Sharpe, 2000)
Miller A & Davis M, *Intellectual Property: Patents, Trademarks, and Copyright*, (3rd ed., MN, U.S.A., West Group, 2000)
Mirabito M, *The New Communications Technologies*, (2nd ed, Boston, Focal Press, 1994)
Morimura S, *Rokku Shoyuu-ron no Saisei*, (Tokyo, Yuuhikaku, 1998) [trans: *The Revival of Locke's Property Theory*]
Morimura S, *Zaisan-ken no Riron*, (Tokyo, Koubundou, 1995) [trans: *Theory of Property*]
Nihon Housou Kyoukai, *Kaitei-ban Eisei Housou no Jushin Nyuumon*, (Tokyo, Nihon Housou Shuppan Kyoukai, 1994) [trans: NHK (ed), *Introduction to Satellite Broadcasting Reception*, (revised ed)]
Nihon Minkan Housou Renmei, *Housou Hando Bukku*, (Tokyo, Touyou Keizai Shinpou-sha, 1991) [trans: *Broadcasting Handbook*]
Nordemann W, Vinck K & Hertin P (English Version by Meyer G based on the translation of Livingston R), *International Copyright and Neighbouring Rights Law: Commentary with Special Emphasis on the European Community*, (VCH Verlagsgesellschaft, Weinheim with VCH Publishers, New York, 1990)
Nygh P & Butt P (eds), *Australian Legal Dictionary*, (Sydney, Butterworths, 1997)
Oyama Y (et al), *Copyright Law of Japan*, (Tokyo, Copyright Research and Information Centre, 1997)
Pichler M, *Copyright Problems of Satellite and Cable Television in Europe*, (London, Graham & Trotman, 1987)
Reinbothe J & von Lewinski S, *The E.C. Directive on Rental and Lending Rights and on Piracy*, (London, Sweet & Maxwell, 1993)

Reynolds R & Stoianoff N, *Intellectual Property: Text and Essential Cases*, (2nd ed, Sydney, Federation Press, 2005)

Ricketson S & Creswell C, *The Law of Intellectual Property: Copyright, Designs and Confidential Information*, (2nd ed, Sydney, Lawbook Co., 2001)

Ricketson S & Richardson M, *Intellectual Property: Cases, Materials and Commentary*, (2nd ed, Sydney, Butterworths, 1998)

Ricketson S, *The Law of Intellectual Property: Copyright, Designs & Confidential Information*, (2nd ed, Sydney, LBC Information Services, 1999)

Rogers E, *Communication Technology: The New Media in Society*, (New York, The Free Press, 1986)

Saito H, *Chosakuken-ho*, (Tokyo, Yuuhikaku, 2000) [trans: *Copyright Law*]

Sakka F, *Shoukai:Chosakuken-hou*, (2nd ed, Tokyo, Gyousei, 2002) [trans: *Explication: Copyright Law*]

Sterling J, *World Copyright Law: Protection of Authors' Works, Performances, Phonograms, Films, Video, Broadcasts and Published Editions in National, International and Regional Law*, (2nd ed, London, Sweet & Maxwell, 2003)

Stewart S, *International Copyright and Neighbouring Rights*, (2nd ed, London, Butterworths, 1989)

Stewart T, *The GATT Uruguay Round: A Negotiating History* (Netherlands, Kluwer Law and Taxation Publishers, 1993)

Takakura S, *Chitekizaisan-housei to Kokusai-seisaku*, (Tokyo, Yuuhikaku, 2001) [trans: *Recent Development of Multilateral Agreement on Intellectual Property Rights*]

Tamura Y, *Chosakuken-hou Gaisetsu*, (Yuuhikaku, Tokyo, 1998) [trans: *Copyright Compendium*]

Tamura Y, Chosakuken-hou Gaisetsu, (Dai-2han, Tokyo, Yuuhikaku, 2001) [trans: *Copyright Compendium (2nd ed)*]

Veith R, *Television's Teletext*, (New York, Elsevier Science Publishing, 1983)

Verna E, *Global Television: How to Create Effective Television for the Future*, (Boston, Focal Press, 1993)

Walker S, *Media Law Commentary and Materials*, (Sydney, LBC Information Services, 2000)

Watt R, *Copyright and Economic Theory: Friends or Foes*?, (Cheltenham, U.K., Edward Elgar, 2000)

Articles, Working Papers and Reports

Anon., 'Disukasshon: Media no Tayouka to Chosakuken Housei' (1997) 6 *Juristo* 374 [trans: 'Discussion: The Diversification of Media and Copyright Legislation' in *Jurist*]

Abada S, 'Satellite Transmission, Cable Distribution and Copyright' (1989) *Copyright* 289

Abe K, 'Iwayuru Rinsetsuken no Hogo: Kokusai-kaigi wo Megutte' (1961) XXV *Hougaku* 128 [trans: 'Protection of So-Called Neighbouring Rights: International Conferences' in the *Journal of Law and Political Science*]

Abe K, 'Rinsetsuken' (1965) 329 *Jurisuto* 29, 31. [trans: 'Neighbouring Rights' in *Jurist*]

Aplin T, 'Contemplating Australia's Digital Future: The Copyright Amendment (Digital Agenda) Act 2000' [2001] *European Intellectual Property Review* 565

Bittner J, *Broadcasting: An Introduction*, (New Jersey, Prentice-Hall, 1980)

Blais J, 'The Protection of Exclusive Television Rights to Sporting Events Held in Public Venues: An Overview of the Law in Australia and Canada' (1992) 18 *Melbourne University Law Review* 503

Bradley J, 'Intellectual Property Rights, Investment and Trade in Services in the Uruguay Round: Laying the Foundation' (1987) 23 *Stanford Journal of International Law* 57
Brennan D, 'Copyright and Parody in Australia: Some Thoughts on Suntrust Bank v Houghton Mifflin Company' (2002) 13 *Australian Intellectual Property Journal* 161
Brown G, 'When the Screen Becomes a Billboard' (1992) 12(2) *Communications Law Bulletin* 5
Brown G, 'Rhetoric v Reality in Regulation of Pay TV Content in Australia' (1993) 3 *Arts and Entertainment Law Review* 1
Burckhardt Y, 'Satellite Television and Performers' Right' (1985) *Copyright* 252
Campbell E & Lee H, 'Criticism of Judges and Freedom of Expression' (2003) 8 *Media and Arts Law Review* 77
Catanzariti T, 'If You Think Digital Watches Are a Pretty Neat Idea . . .' (1999) 18 Communications Law Bulletin 12
CCH, 'Copyright: Novel Decision on Television', *Australian Intellectual Property News* No 199, 27 March 2001, 1
Cheer U, 'Recent Development in Australian Defamation Law' (1998) 6 *Tort Law Review* 15
Cheer U, 'Recent Development in Suppression, Pre-trial Publicity and Privacy Law' (2000) 5 *Media and Arts Law Review* 277
Chisholm H, 'The Stuff of Which Political Debate Is Made' (2003) 31 *Federal Law Review* 225
Chosakuken-hou Kenkyuu-kai, 'Shin Chosakueken-hou seminah (12)' (1971) 480 *Jurisuto* 134 [trans: Copyright Law Study Group, 'A Seminar of the New Copyright Law (12)' in the *Jurist*]
Christie A, 'Towards a New Copyright for the New Information Age' (1995) 6 *Australian Intellectual Property Journal* 145
Cockburn T, 'Interlocutory Injunctions: Restraining Publication of Unlawfully Obtained Information' (2002) 23 *Queensland Lawyer* 40
Corker J, 'Sharing the Burden of Providing Local Content in Regional Television' (2002) 21(3) *Communications Law Bulletin* 4
Costelloe R, 'The New Digital Copyright Law in the Media, Entertainment and Communications Industires' (2001) 12 *Australian Intellectual Property Journal* 19
Costelloe R, 'Median Ownership Bill Jumps First Hurdle' (2002) 6 *Telemedia* 85
Cunard J, 'Broadcast Regulation in Turmoil: the North American Experience' (1987) 7 *Communications Law Bulletin* 2
Davison M, 'Australian Proposals for Copyright Reform: Some Unresolved Issues and Some Lessons from America' (1999) *Digital Technology Law Journal*
Davison M, 'Parallel Importation of Copyright Material in the Digital Age: Why It Should Be Lawful and Why It May Never Be (1997) 25 *Federal Law Review* 263
Dembert H, 'Securing Authors' Rights in Satellite Transmissions: U.S. Efforts to Extend Copyright Protection Abroad' (1985) 24 *Columbia Journal of Transnational Law* 73
De Zowart M, 'Copyright in Television Broadcasts: Network Ten v TCN Channel Nine – 'A Case Which Can Excite Emotions' (2004) 9 *Media and Arts Law Review* 277
De Zowart M, 'Seriously Entertaining: *The Panel* and the Future of Fair Dealing' (2003) 8 *Media and Arts Law Review* 1
Dietz A, 'Copyright and Satellite Broadcasts' (1989) 20 *International Review of Industrial Property and Copyright Law* 144
Dillenz W, 'Legal System Goverining the Protection of Works Transmitted by Direct Broadcasting Satellite' (1986) *Copyright* 386
Fabiani M, 'Copyright and Direct Broadcasting by Satellite' (1988) *Copyright* 17
Fairbairn J, 'Hitchcock v TCN Channel Nine Pty Limited' (2000) 3 *Telemedia* 153
Flint D, 'Defamation Law Revised' (1997) 9 *Australian Press Council News* 8
Freehills, *Media in Australia: A Regulatory Guide*, (2002)

Freeman J, 'Towards the Free Flow of Information Direct Television Broadcasting via Satellite' (1979) 13 *Journal of International Law and Economics* 329

Gamertsfelder L, 'Digitising Copyright Law: An Australian Perspective' (2001) 6 *Media and Arts Law Review* 13

Ginsburg J, 'A Tale of Two Copyrights: Literary Property in Revolutionary France and America' (1990) 64 *Tulane Law Review* 991

Given J, 'Foreign Ownership of Media and Telecommunications: An Australian Story' (2002) 7 *Media and Arts Law Review* 253

Gordon W, 'A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property' (1993) 102 *Yale Law Journal* 153

Hamada J, 'Jouhou-ka to Kenpou-riron: Touron no Gaiyou to Kansou' (1994) 1043 *Jurisuto* 97 [trans: 'Information Age and Constitutional Theories: Sumnary of Discussions and Comments' in *Jurist*]

Hamer D, 'Thomson v Australian Capital Television Pty Ltd' (1996) 3 *Australian Media Law Reporter* 136

Handa M, 'Shin-jidai ni muketa Housou-chosakuken no Kadai to Tenbou: Kentou Hitsuyou na Housou-jigyousha no Kenri Hogo' [July 1999] *Gekkan Minpo,* 4 [trans: 'The Tasks and Prospects of Copyright in Broadcasts toward a New Age: The Need for Examination of the Protection of the Rights of Broadcasting Organisations in *Monthly Commercial Broadcasting*]

Handler M & Rolph D, '"A Real Pea Souper": *The Panel Case* and the Development of the Fair Dealing Defences to Copyright Infringement in Australia; (2003) 27 *Melbourne University Law Review* 381

Handler M, '*The Panel* Case and Television Broadcast Copyright' (2003) 25 *Sydney Law Review* 391

Hartridge D & Subramanian A, 'Intellectual Property Rights: The Issues in Gatt' (1989) 22 *Vanderbilt Journal of Transnational Law* 893

Hasebe Y, 'Jouhou-ka to Kenpou-riron: Houkoku' (1994) 1043 *Jurisuto* 89 [trans: 'Information Age and Constitutional Theories: Presentation' in *Jurist*]

Heath W, 'Possum Processing, Picture Pilfering, Publication and Privacy: Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd' (2002) 28 *Monash University Law Review* 162

Hodge M 'Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd' (2002) 22 *University of Queensland Law Journal* 138

Hogan J, 'The News Is Shocking: But Is There Anyone Responsible?' (1998) 142 *Communications Update* 20

Hughes J, 'The Philosophy of Intellectual Property' (1988) 77 *Georgetown Law Journal* 287

Hyuuga H & Moriya M, 'WIPO Shimpojiumu ni Sanka shite' [6/1997] *Kopiraito* 11 [trans: 'The Discussion at the WIPO World Symposium' in *Copyright*]

Inoue T, 'Jouhou-ka to Kenpou-riron: Komento' (1994) 1043 *Jurisuto* 94 [trans: 'Information Age and Constitutional Theories: Comments on Professor Hasebe's Presentation' in *Jurist*]

Ishiguro K, 'Chiteki-zaisan-ken no Kokusai-mondai' (No. 918, 1998) *Jurisuto* 43 [trans: 'International Issues on Intellectual Property Rights' in *Jurist*]

Jehoram H, 'The Nature of Neighbouring Rights of Performing Artists, Phonogram Producers and Broadcasting Orgranizations' (1990) 15 *Columbia-VLA Journal of Law and the Arts* 75

Jipguep J, 'The International Telecommunication Union and the Regulation of Satellite Broadcasting', Bate B (ed), *Television by Satellite: Legal Aspects* (Oxford, ESC publishing, 1987) 7

Kawasaki M, 'Nihon ni okeru Housou-seisaku no Genjou to Kadai', Negishi T & Horibe M (eds), *Housou Tsuushin Shin-jidai no Seido Dezain*, (Tokyo, Nihon Hyoron-sha, 1994) 115.

[trans: 'The Current State and Tasks of Broadcasting Policy in Japan' in *The System Design in the Broadcasting Communication New Age*]

Kern P, 'The EC "Common Position" on Copyright Applicable to Satellite Broadcasting and Cable Retransmission' (1993) 15 *European Intellectual Property Review* 276

Kirby M, '25Years of Evolving Information Privacy Law' (2003) 105 *Freedom of Information Review* 34

Kitamura Y, 'Jouhou-ka Shakai to Chosakuken' [1999 nen 3 gatsu] *Kopiraito* 2, 15. [trans: 'The Information-Oriented Society and Copyright' [March, 1999] *Copyright*]

Knight P, 'The Copyright Amendment (Digital Agenda) Bill 1999' (1999) 5 *Computerlaw Newsletter* 1

Krever A, 'Satellite Broadcasting and Copyright' (1990) XXIV *Copyright Bulletin* 6

Lea G, 'The Term Directive and Its Implementation', Barendt E.M & Firth A (eds), *The Year Book of Copyright and Media Law 1999*, (Oxford, Oxford University Press, 1999)

Leiboff M, 'TV and Radio Standards' (2003) 8 *Media and Arts Law Review* 127

Lindsay D, 'Playing Possum? Privacy, Freedom of Speech and the Media Following *ABC v Lenah Game Meats Pty Ltd* Part I' (2002) 7 *Media and Arts Law Review* 1

McKenna A, 'Emerging Issues Surrounding the Convergence of the Telecommunications, Broadcasting and Information Technology Sectors' (2000) 9 *Information and Communications Technology law* 98

McKnight E, 'Exclusive Licensing of Television Programmes: The Cable and Satellite Directive' (1995) 7 *Entertainment Law Review* 287

Middleton G, 'Copyright Beyond the Digital Frontier: Australia's Proposed Digital Agenda Reforms' (1999) 56 *Journal of Law and Information Science* 52

Monta R, 'The Concept of "Copyright" versus the "Droit d'Auteur"' (1959) 32 *Southern California Law Review* 177

Mrsnik A, 'Shopping Centres and the Investigative Way: Unbalanced and Partial, But Not in Contempt' (1992) 12(3) *Communications Law Bulletin* 9

Nomura Y, 'Eisei-hoso Hogo no tame no Kokusai-chiteki-kyoryoku no Seisei to Hatten' [1974nen 2gatsu] *Denpa Jiho* 17 [trans: 'The Formation and Development of International Intellectual Co-operation for Protecting Satellite Broadcasting' [February 1974] in the *Radio Wave Report*]

Nomura Y, 'Eisei-housou to Chosaku-ken-mondai' [1978nen 1gatsu] *Housou Bunka* 60 [trans: 'Satellite Broadcasting and the Issues of Copyright' [January 1978] in the *Culture of Broadcasting*]

Nomura Y, 'Eisei ni yori Soushin sareru Bangumi-densou-shingo no Hampu ni kansuru Kokka-kan Kokusai-kaigi ni Shusseki shite' [1974nen 3gatsu] *Denpa Jihou* 20 [trans: 'From an Attendant of the International Conference of States on the Distribution of Programme-Carrying Signals Transmitted by Satellite' [March 1974] in the *Radio Wave Report*]

Nomura Y, 'Eisei ni yoru Housou-bangumi no Kokusai-kouryuu to Sono Touyou no Boushi narabini Chosakuken-mondai', Chosakuken Shiryou Kyoukai (ed), *Housou ni kansuru Chosakuken Seido no Sho-mondai no Kenkyuu* (Chosakuken Shiriizu 57, Tokyo, Chosakuken Shiryou Kyoukai, 1979) 56 [trans: 'International Exchange of Broadcasts by Satellites, the Prevention of Its Piracy and Copyright Issues' in *Study on Issues of Copyright Regime in relation to Broadcasting* (Copyright Series 57)]

Nomura Y, 'Eisei-tsushin no Chosakuken, Rinsetsuken Mondai ni kansuru Seihu-senmonka-kaigi ni Shusseki shite (1)' [1971nen 7gatsu] *Denpa Jihou* 6 [trans: 'From an Attendant of the Government Expert Committee in Relation to Copyright and the Neighbouring Rights regarding Satellite Communication' [July 1971] in the *Radio Wave Report*]

Nomura Y, 'Eisei-tsuushin no Chosakuken, Rinsetsuken Mondai ni kansuru Seihu-senmonka-kaigi ni Shusseki shite (2)' (1971nen 8gatsu) *Denpa Jihou* 6 [trans: 'From an Attendant of the Government Expert Committee in Relation to Copyright and the Neighbouring Rights regarding Satellite Communication' [August 1971] in the *Radio Wave Report*]

Nomura Y, 'Seiritsu Chikaki Eisei-housou Shingou Hogo Jouyaku (ge)' [1973nen 11gatsu] *Denpa Jihou* 2 [trans: 'The Proposed Convention for Protecting Satellite Broadcasting Signal' [Nov 1973] in the *Radio Wave Report*]

Nomura Y, 'Uchuu-tsuushin no Bunya ni okeru Kokusai-torikime ni kansuru Seihu-senmonka-kaigi ni Shusseki shite' [1970nen 3gatsu] *Denpa Jihou* 2 [trans: 'From an Attendant of the Government Expert Committee concerning the International Agreement in the area of Space Communication' [March 1970] in the *Radio Wave Report*]

O'Brien J, Heindl S & Wintermantel D, '"The Panel" Decision of the Full Federal Court' (2002) 21 *Communications Law Bulletin* 1

O'Brien J, Heindl S & Wintermantel D, 'The "Panel" decision: the whittling down of fair dealing defences in the face of heightened risks of copyright infringement' (2003) 15 *Australian Intellectual Property Law Bulletin* 135

O'Dwyer E, 'Qualified Privilege and Public Leaders in Political Debate: Diverging Defamation Law after Lange, Reynolds and Atkinson' (2003) 8 *Media and Arts Law Review* 91

Ogawa M, 'Copyright in Broadcasts: Japan Strays' (2001) 6 *Media and Arts Law Review* 123

Ogawa M, *Eisei-housou ni kakaru Chosakuken Shori,* (master's thesis submitted to Yokohama National University, 1999) [trans: *Copyright Clearance for Satellite Broadcasting*]

Ogawa M, 'Ohsutoraria "Shin" Chosakuken-ho to Hoso-jigyosha no Kenri' (2001) 11 *Joho Chishiki Gakkai-shi* 11 [trans: 'The 'New" Australian *Copyright Act* 1968' in the *Journal of Japan Information and Knowledge*]

Ogawa M, 'Substantiality of Television Broadcasts in Australia' (2003) 14 *Entertainment Law Review* 144

Ogawa M, 'The Destination of Australia's Digital Agenda: Implications of the Panel Case' (2004) 15 *Entertainment Law Review* 221

Ogawa M, 'The Panel Case High Court Decision' (2004) 26 *European Intellectual Property Review* 517

Ogawa M 'The Possibility of Copyright in Broadcasts in Japan' (2001) 19 *Copyright Reporter: Journal of the Copyright Society of Australia* 89

Ogawa M, 'WIPO Housou Jigyousha Shin-jouyaku ni muketeno Giron to Nichi-gou Kokunaihou no Taiou' (2000) 41 *Jouhou-shori Gakkai Ronbunshi* 3099 [trans: 'The WIPO Background Discussion of the Proposed 'Broadcasters' Treaty and Its Implications for the Domestic Law of Australia and Japan' in the *Transactions of Information Processing Society of Japan*]

Okamoto K, 'Housou Jigyousha no Kenri ni Kansuru Shi-jouyaku no Hiitsuyousei wo Kentou suru WIPO Sekai Shimpojiumu ni tsuite: Dappi wo Semarareru Nihon no Housou-jigyousha' (1997) 37 *Kopiraito* 2 [trans: 'WIPO World Symposium to Discuss the Necessity of a Possible New WIPO Treaty on the Rights of Broadcasting Organisations: Urgent Necessity for Japanese Broadcasters to Change Their Basic Attitude toward Copyright Issues as a Whole' *Copyright*]

Port K, 'Application of ACPA and Its Problems', Matsuo K & Satoh K, *Domain Name Dispute*, (Tokyo, Kohbundo, 2001) 131

Potts D & Matthews C, 'Procedural Concerns in Broadcast Libel' (1990) 11 *Journal of Media Law and Practice* 124

Reinbothe J, Martin-Prat M & von Lewinski S, 'The New WIPO Treaties: A First Résumé' (1997) 4 *European Intellectual Property Review* 171

Rimmer M, 'Precious Images: Copyright Law and Television Broadcasts' [November 2003] *InCite* 10

Ross D, 'Telecommunications: Satellite Regulation' (1985) *Annual Survey of American Law* 439

Rumphorst W, 'Neighbouring Rights Protection of Broadcasting Organisations' (1992) 14 *European Intellectual Property Review* 339

Rumphorst W, 'Protection of Broadcasting Organisations under the Rome Convention' (1993) XXVII *Copyright Bulletin* 10

Sauer G, 'Where Possums Fear to Tread: Invasion of Privacy and Information Obtained Illegally' (2002) 21(1) *Communications Law Bulletin* 5

Sauer G, 'Malice, Qualified Privilege and Lange' (2003) 22(1) *Communications Law Bulletin* 5

Schaumann N, 'Copyright Protection in the Cable Television Industry: Satellite Retransmission and the Passive Carrier Exemption' (1983) 51 *Fordham Law Review* 637

Schricker G (Japanese translation by Doi K), *Keiburu-housou to Chosakuken-hou*, (Tokyo, Shinzan-sha, 1995) [trans: *Cable Distribution and Copyright Law* (German original is *Urheberrechtliche Probleme des Kabelrundfunks: Studie im Auftrag der Medienkommission der Länder zur wissenschaftlichen Begleifung der vier Kabelpilotprojecte*, (Baden-Baden, Nomos Verlagsgesellschaft, 1986)

Schulze E, 'Protection against Cable Television and Earth Satellite' (1986) 13 *Copyright Law Journal* 1

Spector H, 'An Outline of a Theory Justifying Intellectual Property Rights' (1989) 8 *European Intellectual Property Review* 270

Sterling J, 'Harmonisation of Usage of the Terms "Copyright", "Author's Right" and "Neighbouring Rights"' (1989) 1 *European Intellectual Property Review* 14

Stone A & Williams G, 'Freedom of Speech and Defamation: Developments in the Common Law World' (2000) 26 *Monash University Law Review* 362

Suzuki T, 'Tayouka suru Minsei-you Kiroku Media no Genjou ni tsuite' [2000 nen 5 gatsu] *Kopiraito* 22 [trans: 'Current Situation of Diversifying Recording Media for the Public' [May 2000] *Copyright*]

Szilágyi I, 'Question of Broadcasting by Satellite with Special Reference to Authors' Rights' (1981) *Copyright* 222

Tagaya K, 'Kokkyou wo Koeru Eisei-Densou Keiburu-Densou to Chosakuken-Housei' [September, 1996] *Kopiraito* 13 [trans: 'Satellite and Cable Transmission over National Boundaries and the Copyright Regime' in *Copyright*]

Tamai K, 'Chiteki-Zaisanken ni kansuru Aratana Kokusaiteki Wakugumi no Hossou' (1995) 1071 *Jurisuto* 44 [trans: 'Setting Afloat of the New International Framework on Intellectual Property: TRIPS Agreement' in *Jurist*]

Turner C, 'Collective Administration of Rights', Christie A & Ricketson S (eds), *Intellectual Property, 23 Laws of Australia* (NSW, LBC, 1996) [544]

Towse R, 'Copyright as an Economic Incentive' (1999) 17 *Copyright Reporter* 15

Usaki M, 'Yuuji-hosei to Hohdou no Jiyuu' (2003) 386 *Gekkan Minpo* 5 [trans: 'Legislation for the National Emergency and Freedom of the Press' in *Monthly Commercial Broadcasting*]

Van Caenegem W, 'The Public Domain: Scientia Nullius?' [2002] *European Intellectual Property Review* 324

Van Loon A, 'The End of the Broadcasting Era: What Constitutes Broadcasting and Why Does It Need to Be Regulated?' (2004) 9 *Communications Law* 172

Watanabe H, 'Chosakuken-tou wo meguru Kokusaiteki na Ugoki: WIPO Shin-Jouyaku-tou' (1998) 1132 *Jurisuto* 58 [trans: 'International Movement around Copyright: WIPO New Treaties' in *Jurist*]

Weatherall K, 'An End to Private Communications in Copyright?: The Expansion of Rights to Communicate Works to the Public: Part 1' (1999) 21 *European Intellectual Property Review* 342

Westerway P, 'Regulation of Pay TV' (1990) 10 *Communications Law Bulletin* 25

Williamson M, 'Broadcasting by Satellite: Some Technical Considerations', Negrine R (ed), *Satellite Broadcasting*, (London, Routledge, 1988) 23

Wineberg J, 'Cable Television and Copyright in the United States' (1988) 15 *Copyright Law Journal* 23

Yamanaka S, 'Taiyo-ken, Kashidashi-ken, Rinsetsu-ken ni kansuru EC Shirei ni tsuite' (1994) 33/12 *Kopiraito* 2 [trans: 'EC Directive on rental right and lending right and on certain rights related to copyright' in *Copyright*]

Yen A, 'Restoring the Natural Law: Copyright as Labor and Possession' 51 *Ohio State Law Journal* 517

Yoshida D, 'Chosakuken Seido no Kanousei' (1996) 36 *Kopiraito* 2 [trans: 'Potentiality of the System of Neighbouring Rights' in *Copyright*]

Yoshida D, 'Chosaku-rinsetsuken no Keisei to Hatten' (1996) 4 *Yokohama Kokusai-keizai-hogaku* 213 [trans: 'Formation and Development of Neighbouring Rights' in the *Yokohama Law Review*]

Documents

Attorney General's Department, *Copyright Reform: Copyright Amendment (Digital Agenda) Act 2000* (Australia)

Attorney General's Department and the Department of Communications and the Arts, *Copyright Reform and the Digital Agenda: Proposed Transmission Right, Right of Making Available and Enforcement Measures*, (Canberra, Australian Government Publishing Service, 1997)

Berne Union & ILO, Joint Committee of Experts, 'La session du comite mixte d'experts pour la protection internationale de certains droits voisins ou derives de droit d'auteur (Rome, 12–17 novembre 1951)' (1951) *Le droit d'auteur* 137

Bogsch A, 'Report of the Study Group on Neighbouring Rights' (1956) IX *Copyright Bulletin* 151

Bureau of Transport and Communications Economics, *Communications Futures Project, Work in Progress Paper No. 2, Delivery Technologies in the New Communications World*, (Canberra, Australian Government Publishing Service, 1994)

Chosakuken Shingikai, 'Chosakuken Shingikai Maruchimedia Shou-iinkai Housou-jigyousha no Kenri ni kansuru Wahkingu Guruupu (Dai 1-kai Giji Youshi)' (1999) [trans: Copyright Committee, 'Working Group on the Rights of Broadcasting Organisations, Sub-committee of Multimedia, Copyright Committee (The First Session Minutes)'] (Japan)

Chosakuken Shingikai, 'Chosakuken Shingikai Maruchimedia Shou-iinkai Housou-jigyousha no Kenri ni kansuru Wahkingu Guruupu (Dai 2-kai Giji Youshi)' (1999) [trans: Copyright Committee, 'Working Group on the Rights of Broadcasting Organisations, Sub-committee of Multimedia, Copyright Committee (The Second Session Minutes)'] (Japan)

Chosakuken Shingikai, 'Chosakuken Shingikai Maruchimedia Shou-iinkai Housou-jigyousha no Kenri ni kansuru Wahkingu Guruupu (Dai 3-kai Giji Youshi)' (1999) [trans: Copyright Committee, 'Working Group on the Rights of Broadcasting Organisations, Sub-committee of Multimedia, Copyright Committee (The Third Session Minutes)'] (Japan)

Chosakuken Shingikai, 'Chosakuken Shingikai Maruchimedia Shou-iinkai Housou-jigyousha no Kenri ni kansuru Wahkingu Guruupu (Dai 4-kai Giji Youshi)' (1999) [trans: Copyright Committee, 'Working Group on the Rights of Broadcasting Organisations, Sub-committee of Multimedia, Copyright Committee (The Fourth Session Minutes)'] (Japan)

Chosakuken Shingikai, 'Chosakuken Shingikai Maruchimedia Shou-iinkai Housou-jigyousha no Kenri ni kansuru Wahkingu Guruupu (Dai 5-kai Giji Youshi)' (1999) [trans: Copyright

Committee, 'Working Group on the Rights of Broadcasting Organisations, Sub-committee of Multimedia, Copyright Committee (The Fifth Session Minutes)'] (Japan)

Chosakuken Shingikai, 'Chosakuken Shingikai Maruchimedia Shou-iinkai Housou-jigyousha no Kenri ni kansuru Wahkingu Guruupu (Dai 6-kai Giji Youshi)' (1999) [trans: Copyright Committee, 'Working Group on the Rights of Broadcasting Organisations, Sub-committee of Multimedia, Copyright Committee (The Sixth Session Minutes)'] (Japan)

Chosakuken Shingikai, 'Chosakuken Shingikai Maruchimedia Shou-iinkai Housou-jigyousha no Kenri ni kansuru Wahkingu Guruupu (Dai 7-kai Giji Youshi)' (2000) [trans: Copyright Committee, 'Working Group on the Rights of Broadcasting Organiastions, Sub-committee of Multimedia, Copyright Committee (The Seventh Session Minutes)'] (Japan)

Chosakuken Shingikai, 'Chosakuken Shingikai Maruchimedia Shou-iinkai Housou-jigyousha no Kenri ni kansuru Wahkingu Guruupu (Dai 8-kai Giji Youshi)' (2000) [trans: Copyright Committee, 'Working Group on the Rights of Broadcasting Organisations, Sub-committee of Multimedia, Copyright Committee (The Eighth Session Minutes)'] (Japan)

Chosakuken Shingikai, 'Chosakuken Shingikai Maruchimedia Shou-iinkai Housou-jigyousha no Kenri ni kansuru Wahkingu Guruupu (Dai 9-kai Giji Youshi)' (2000) [trans: Copyright Committee, 'Working Group on the Rights of Broadcasting Organisations, Sub-committee of Multimedia, Copyright Committee (The Ninth Session Minutes)'] (Japan)

Chosakuken Shingikai, 'Chosakuken Shingikai Maruchimedia Sho-iinkai Housou-jigyousha no Kenri ni kansuru Wahkingu Guruupu (Dai 10-kai Giji Youshi)' (2000) [trans: Copyright Committee, 'Working Group on the Rights of Broadcasting Organisations, Sub-committee of Multimedia, Copyright Committee (The Tenth Session Minutes)'] (Japan)

Chosakuken Shingikai, 'Chosakuken Shingikai Maruchimedia Shou-iinkai Housou-jigyousha no Kenri ni kansuru Wahkingu Guruhpu (Dai 11-kai Giji Youshi)' (2000) [trans: Copyright Committee, 'Working Group on the Rights of Broadcasting Organisations, Sub-committee of Multimedia, Copyright Committee (The Eleventh Session Minutes)'] (Japan)

Copyright Convergence Group, *Highways to Change: Copyright in the New Communications Environment*, (Canberra, Australian Government Publishing Service, 1994)

Director General of WIPO, 'Activities of the Standing Committee on the Law of Patents (SCP), the Standing Committee on the Law of Trademarks, Industrial Designs and Geographical Indications (SCT) and the Standing Committee on Information Technologies (SCIT)', WO/GA/23/1

Fisher A, 'Work of the Interim Copyright Committee: Report' (1955) VIII *Copyright Bulletin* 147

High Court of Australia, 'Transcript of Proceeding, *Network Ten Pty Ltd v TCN Channel Nine Pty Ltd*, S213/2002'

ILO, 'Draft Convention of the Committee of Experts of ILO' (1957) X *Copyright Bulletin* 32

ILO, 'Report of the Committee on Industrial Committees' (1955) XXXVIII *International Labour Office Bulletin* 332

ILO, UNESCO & the Berne Union, 'Document submitted jointly by the International Labour Office, the Unesco Secretariat and the Bureau of the Berne Union' (1960) XIII *Copyright Bulletin* 51

ILO, UNESCO & the United International Bureaux for the Protection of Intellectual Property, *Records of the Diplomatic Conference on the International Protection of Performers, Producers of Phonograms and Broadcasting Organizations*, (Ceuterick, Louvain, 1968)

Intergovernmental Committee of the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations, 'Model Law Concerning the Protection of Performers, Producers of Phonograms and Broadcasting Organisations' [1974] *Copyright* 163

Kaminstein A, 'Report of the Rapporteur-General', International Labour Organisation, United Nations Educational, Scientific and Cultural Organization, and the United International

Bureaux for the Protection of Intellectual Property, *Records of the Diplomatic Conference on the International Protection of Performers, Producers of Phonograms and Broadcasting Organizations*, (Ceuterick, Louvain, 1968)

Monbu-sho, *Chosakuken Kankei Shiryo (C-dai 5 gou) Bun'gaku-teki oyobi Bijutsu-teki Hogo-joyaku Kaitei Rohma-kaigi Houkokusho, Showa 26 nen 10gatsu*. [trans: Ministry of Education, *Materials regarding Neighbouring Rights No.C(5), Report of the Berne Convention Revision Conference in Rome in October 1928*, (Reprint, October 1951)]

Monbu-sho, *Chosakuken-seido-shingikai Shingi-kiroku (1),* (1966) [trans: Ministry of Education, *Report of the Copyright Regime Committee (1)*]

Parliament of Australia, *Bills Digest No.102 1999–2000, Copyright Amendment (Digital Agenda) Bill 1999*

Parliament of Australia, House of Representatives, *Copyright Amendment (Digital Agenda) Bill 1999 Explanatory Memorandum*

Parliament of Australia, House of Representatives, *Hansard*, 2 September 1999

Parliament of Australia, House of Representatives, Standing Committee on Legal and Constitutional Affairs, *Advisory Report on Copyright Amendment (Digital Agenda) Bill* 1999

Parliament of Australia, *Report of the Committee Appointed by the Attorney-General of the Commonwealth to Consider What Alterations Are Desirable in the Copyright Law of the Commonwealth* (22 December 1959)

Ringer B, 'Report, Brussels Diplomatic Conference on the Distribution of Programme-Carrying Signals Transmitted by Satellite' (1974) *Copyright* 267

UNESCO & the Berne Union, 'Committee of Experts on the International Protection of Performers, Recorders and Broadcasters' (1957) X *Copyright Bulletin* 11

UNESCO & the Berne Union, 'Draft Agreement on the Protection of Certain Rights called Neighbouring on Copyrights' (1957) X *Copyright Bulletin* 12

UNESCO & the Berne Union, 'Explanatory Statement accompanying the Draft Agreement' (1957) X *Copyright Bulletin* 16

UNESCO, Interim Copyright Committee, 'Work of the Interim Committee' (1955) VIII *Copyright Bulletin* 145

Wallace W, 'Report of the Committee of Experts concerning International Protection of Performers, Phonogram Producers and Broadcasting Organisations (Japanese translation)', Monbu-sho, *Chosakuken Kankei Shiryo (No.14) Jitsuenka, Rekohdo Seizosha oyobi Hosojigyosha no Kokusaiteki Hogo ni kansuru Semmonka-iinkai Hokoku: Heigu, 1960nen 5gatsu*. [trans: Ministry of Education, *Materials regarding Neighbouring Rights (No. 14) Report of the Committee of Experts concerning International Protection of Performers, Phonogram Producers and Broadcasting Organisations: The Hague, May 1960*]

WIPO, 'Committee of Experts on Model Provisions for Legislation in the Field of Copyright, First Session, (Geneva, February 20 to March 3, 1989)', [1989] *Copyright* 146

WIPO, 'Committee of Experts on a Possible Protocol to the Berne Convention for the Protection of Literary and Artistic Works, First Session' (1992) *Copyright* 30

WIPO, 'Existing International, Regional and National Legislation Concerning the Protection of the Rights of Broadcasting: Memorandum Prepared by the International Bureau' (1998), SCCR/1/3

WIPO, *Guide to the Rome Convention and to the Phonograms Convention*, WIPO Publication No.617 (E), (Geneva, WIPO, 1981)

WIPO, 'Standing Committee on Copyright and Related Rights, 1st Session, Report' (1998), SCCR/1/9

WIPO, 'Standing Committee on Copyright and Related Rights, 2nd Session, Submissions Received from Member States of WIPO and the European Community by March 31, 1999' (1999), SCCR/2/5

WIPO, 'Standing Committee on Copyright and Related Rights, 2nd Session, Submissions Received from Non-Governmental Organisations by March 31, 1999' (1999), SCCR/2/6
WIPO, 'Standing Committee on Copyright and Related Rights, 2nd Session, Submission by Mexico' (1999), SCCR/2/7
WIPO, 'Standing Committee on Copyright and Related Rights, 2nd Session, Submission by Cameroon' (1999), SCCR/2/12
WIPO, 'Standing Committee on Copyright and Related Rights, 2nd Session, Report' (1999), SCCR/2/11
WIPO, 'Standing Committee on Copyright and Related Rights, Third Session, Report of the Regional Roundtable for African Countries on the Protection of Databases and on the Protection of the Rights of Broadcasting Organisations, Held in Cotonou, from June 22 to 24, 1999' (1999), SCCR/3/2
WIPO, 'Standing Committee on Copyright and Related Rights, 3rd Session, Proposal by Argentina' (1999), SCCR/3/4
WIPO, 'Standing Committee on Copyright and Related Rights, Third Session, Statement Adopted at the Regional Roundtable for Countries of Asia and the Pacific on the Protection of Databases and on the Protection of the Rights of Broadcasting Organisations, Held in Manila, from June 29 to July 1, 1999 Submitted by Bangladesh, China, Fiji, India, Indonesia, Mongolia, Pakistan, Philippines, Singapore, Sri Lanka, Thailand and Viet Nam' (1999), SCCR/3/6
WIPO, 'Standing Committee on Copyright and Related Rights, 3rd Session, Report' (1999), SCCR/3/11
WIPO, 'Standing Committee on Copyright and Related Rights, 4th Session, Report' (2000), SCCR/4/6
WIPO, 'Standing Committee on Copyright and Related Rights, Fifth Session, Proposal by the Delegation of Kyrgyzstan' (2001), SCCR/5/2
WIPO, 'Standing Committee on Copyright and Related Rights, Fifth Session, Proposal by the Delegation of Sudan' (2001) SCCR/5/3
WIPO, 'Standing Committee on Copyright and Related Rights, Fifth Session, Proposal by the Delegation of Japan' (2001) SCCR/5/4
WIPO, 'Standing Committee on Copyright and Related Rights, Fifth Session, Protection of the Rights of Broadcasting Organisations: Comparative Table of Proposals Received by April 30, 2001' (2001) SCCR/5/5
WIPO, 'Standing Committee on Copyright and Related Rights, Fifth Session, Report', SCCR/5/6
WIPO, 'Standing Committee on Copyright and Related Rights, Sixth Session, Protection of the Rights of Broadcasting Organisations Submitted by the European Community and Its Member States' (2001), SCCR/6/2
WIPO, 'Standing Committee on Copyright and Related Rights, Sixth Session, Proposal by Ukraine' (2001) SCCR/6/3
WIPO, 'Standing Committee on Copyright and Related Rights, Sixth Session, Report' (2001), SCCR/6/4
WIPO, 'Standing Committee on Copyright and Related Rights, Seventh Session, Proposal by the Eastern Republic of Uruguay' (2002), SCCR/7/7
WIPO, 'Standing Committee on Copyright and Related Rights, Seventh Session, Technical Background Paper' (2002) SCCR/7/8
WIPO, 'Standing Committee on Copyright and Related Rights, Seventh Session, Comparative Table of Proposals Received by May 6, 2002' (2002) SCCR/7/9
WIPO, 'Standing Committee on Copyright and Related Rights, Seventh Session, Report', (2002), SCCR/7/10

WIPO, 'Standing Committee on Copyright and Related Rights, Eighth Session, Protection of Broadcasting Organizations: Terms and Concepts' (2002), SCCR/8/INF/1

WIPO, 'Standing Committee on Copyright and Related Rights, Eighth Session, Proposal Submitted by Honduras' (2002), SCCR/8/4

WIPO, 'Standing Committee on Copyright and Related Rights, Eighth Session, Comparison of Proposals of WIPO Member States and the European Community and Its Member States Received by September 16, 2002' (2002), SCCR/8/5

WIPO, 'Standing Committee on Copyright and Related Rights, Eighth Session, Proposal Submitted by the United States of America' (2002), SCCR/8/7

WIPO, 'Standing Committee on Copyright and Related Rights, Eighth Session, Report' (2002), SCCR/8/9

WIPO, 'Standing Committee on Copyright and Related Rights, Ninth Session, Proposal Submitted by Kenya' (2003), SCCR/9/3 and SCCR/9/3 REV

WIPO, 'Standing Committee on Copyright and Related Rights, Ninth Session, Revised Proposal Submitted by the United States of America' (2003), SCCR/9/9/4 and SCCR/9/4 REV

WIPO, 'Standing Committee on Copyright and Related Rights, Ninth Session, Proposal Submitted by Egypt' (2003), SCCR/9/8 REV

WIPO, 'Standing Committee on Copyright and Related Rights, Ninth Session, Issues concerning "Webcaster" in WIPO New Broadcasting Organizations Treaty: Commuication Submitted by Japan' (2003), SCCR/9/9

WIPO, 'Standing Committee on Copyright and Related Rights, Ninth Session, Proposal Submitted by Canada' (2003), SCCR/9/10

WIPO, 'Standing Committee on Copyright and Related Rights, Ninth Session, Report' (2003), SCCR/9/11

WIPO, 'Standing Committee on Copyright and Related Rights, Ninth Session, Corrigendum to the Report Submitted by India' (2003), SCCR/9/11 Corr

WIPO, 'Standing Committee on Copyright and Related Rights, Ninth Session, Proposal Submitted by the European Community and Its Member States' (2003), SCCR/9/12

WIPO, 'Standing Committee on Copyright and Related Rights, Tenth Session, List of Preparatory Documents' (2003), SCCR/10//NF/1

WIPO, 'Standing Committee on Copyright and Related Rights, Tenth Session, Comparison of Proposals of WIPO Member States and the European Community and Its Member States Received by September 15, 2003' (2003), SCCR/10/3

WIPO, 'Standing Committee on Copyright and Related Rights, Tenth Session, Comparison of Proposals of WIPO Member States and the European Community and Its Member States Received by September 15, 2003 (Document SCCR/10/3), Corrigendum' (2003), SCCR/10/3 Corr

WIPO, 'Standing Committee on Copyright and Related Rights, Tenth Session, Report' (2004), SCCR/10/5

WIPO, 'Standing Committee on Copyright and Related Rights, Eleventh Session, Document Submitted by Singapore' (2003), SCCR/11/2

WIPO, 'Standing Committee on Copyright and Related Rights, Eleventh Session, Consolidated Text for a Treaty on the Protection of Broadcasting Organizations' (2004) SCCR/11/3

WIPO, 'Standing Committee on Copyright and Related Rights, Eleventh Session, Report' (2004), SCCR/11/4

WIPO, *WIPO Intellectual Property Handbook: Policy, Law and Use*, (WIPO Publication No.489(E))

WIPO, *WIPO World Symposium on Broadcasting, New Communication Technologies and Intellectual Property (Manila, 1997)*, (WIPO Publication No.757(E), Geneva, WIPO, 1998)

WIPO, *Press Release*, PR/98/145

Working Group on the Rights of Broadcasting Organisations of the Subcommittee on Multimedia, Copyright Council, *A Summary on Discussions of the First Session by the Working Group on the Rights of Broadcasting Organisations of the Subcommittee on Multimedia*, Copyright Council (1999) (Japan)

Working Group of the Rights of Broadcasting Organisations and Others, Subcommittee of Multimedia, Council of Copyright, *A Summary of the Discussion of the Ninth Session by the Working Group on the Rights of Broadcasting Organisations of the Subcommittee on Multimedia*, Copyright Council (1999) (Japan)

Legislation

Acts Interpretation Act 1901 (Cth) (Australia)

Australian Broadcasting Corporation Act 1983 (Cth) (Australia)

Broadcasting Act 1942 (Cth) (Australia)

Broadcasting Services Act 1992 (Cth) (Australia)

Broadcasting Services (Transitional Provisions and Consequential Amendments) Act 1992 (Cth) (Australia)

Chosakuken-hou [trans: *Copyright Law*] (Japan)

Copyright Act 1968 (Cth) (Australia)

Copyright Amendment (Digital Agenda) Act 2000 (Cth) (Australia)

Copyright (International Protection) Amendment Regulations 2004 (No. 2) (Australia)

Copyright (International Protection) Regulations 1969 (Australia)

Council Directive No. 92/100/EEC of November 19, 1992, on rental right and lending right and on certain rights related to copyright in the field of intellectual property (the Rental Directive)

Council Directive (EEC) No. 93/83/EEC of September 27, 1993, on the Co-ordination of Certain Rules Concerning Copyright and Cable Retransmission (the Cable and Satellite Directive)

Council Directive No. 93/98/EEC of October 29, 1993, harmonising the term of protection of copyright and certain related rights (the Term Directive)

Decision No. 351 on Author's Right and Connected Rights (December 17, 1993) of the Commission of the Cartagena Agreement (Cartagena Decision 351)

Denpa-hou [trans: *Radio Law*] (Japan)

European Agreement on the Protection of Television Broadcasts

Housou-hou [trans: *Broadcasting Law*] (Japan)

International Telecommunication Union Convention

International Telecommunication Union Radio Regulations

Kyuu-chosakuken-hou [trans: *Old Copyright Law*] (Japan)

North American Free-Trade Agreement between the governments of Canada, the United Mexican States and the United States of America (NAFTA)

Parliamentary Proceedings Broadcasting Act 1946 (Cth) (Australia)

Radiocommunications Act 1992 (Cth) (Australia)

Special Broadcasting Service Act 1991 (Cth) (Australia)

Statute of Anne, 1710

U.S. Constitution

US Free Trade Agreement Implementation Act 2004 (Cth) (Australia)

Cases

Amalgamated Television Services Pty Ltd v Foxtel Digital Cable Television Pty Ltd (1995) 32 IPR 323 (Australia)

CIC Insurance Ltd v Bankstown Football Club Ltd (1997) 187 CLR 384 (Australia)

Feist Publications v Rural Telephone Service, 449 US 340 (1991) (US)

Mokume Kesho-gami Jiken, Tokyo Kohan Heisei 3.12.17, Heisei2(ne)2733 [trans: *The Engrained Paper Case*, Tokyo High Court Decision, 17 December 1991, Case Number Heisei2(ne)2733] (Japan)

Nationwide News Pty Ltd v Copyright Agency Ltd (1996) 34 IPR 53 (Australia)

Network Ten Pty Limited v TCN Channel Nine Pty Limited (2004) 59 IPR 1 (Australia)

Newcastle City Council v GIO General Ltd (1997) 191 CLR 85 (Australia)

Nikkei Shimbun Yoyaku Hon'an Jiken, Tokyo Chihan Heisei 6.2.18, Heisei4(wa)2085. [trans: *The Nikkei News Summary and Adaptation Case*, Tokyo District Court Decision, 18 February 1994, Case Number Heisei4(wa)2085] (Japan)

Rasuto Messeiji in Saishu-go Jiken, Tokyo Chihan Heisei 7.12.18, Heisei6(wa)9532. [trans: *The Last Messages in the Final Issues Case*, Tokyo District Court Decision, 18 December 1995, Case number Heisei6(wa)9532] (Japan)

TCN Channel Nine Pty Ltd v Network Ten Pty Ltd (2001) 50 IPR 335 (Australia)

TCN Channel Nine Pty Ltd v Network Ten Pty Ltd (2002) 55 IPR 112 (Australia)

TCN Channel Nine Pty Ltd v Network Ten Pty Ltd (No.2) (2005) 216 ALR 631 (Australia)

TCN Channel Nine Pty Ltd v Network Ten Pty Ltd (No.3) [2005] FCAFC 194 (Australia)

Index

Agency for Cultural Affairs (Japan) *see also* Copyright Council (Japan), 2, 157
Agreement
Cartagena, 32, 53, 58
on the Protection of Television Broadcasts *see* European Agreement on the Protection of Television Broadcasts
North American Free-Trade *see* NAFTA
on Trade-Related Aspects of Intellectual Property Rights *see* TRIPS
Agreement on Trade-Related Aspects of Intellectual Property Rights *see* TRIPS
Attorney-General's Department (Australia) *see also* Copyright Convergence Group (Australia), 124–125, 129, 143
audio broadcast, audio broadcasting *see* sound broadcast

Berne
Convention *see* Berne Convention
Union, 33–34, 36–39, 41–42
Berne Convention
Committee of Experts on a Possible Protocol to, 16, 74–76
communication to the public, 98
ephemeral recording *see also* ephemeral right, 84
established at Berne, 55
exception to rights, 84
exclusive rights, 84
members of, 43, 51
right of reproduction, 84
reference to, 168
Revision Conference, 33
broadcast *see* programme
broadcasters' rights
current protection of, 11, 15–16, 17, 19, 31–32, 44–47
definition of, 14, 21, 22, 27–30
discussions on, 2, 11, 15–17, 72–113
nature of, 38
need for
a comprehensive study, 3–4
a new treaty for, 15, 32, 47, 80
proposal of, proposed, 3, 19, 74–75, 92–111
rationale for, 4, 8, 11, 18–19, 30, 111–113, 115, 167–179
two approaches to protecting, 4, 7–8, 19, 80–81, 115
broadcasting
cable *see* cable distribution
deferred, 35, 45, 77–79, 98–99, 101, 107, 127, 157–158, 163

broadcasting—*cont.*
definition of, 21–24, 49, 61, 70–71, 95–98, 100, 117, 149
freedom of *see also* freedom of speech, 28–29
free-to-air *see* wireless
Internet *see* webcasting
law, 14, 22–23, 26–29
legislation *see* broadcasting law
regime *see* broadcasting law
right, 33, 86
satellite *see* satellite
services, 2, 23, 118–122, 127
technology, technologies *see also* communication technologies, 1–2, 22, 25, 61–72
terrestrial, 64, 66, 70
wireless, 63, 98, 104, 107
web- *see* webcasting

Cable and Satellite Directive, 32, 53, 56–57, 65, 87
cable broadcasting *see* cable distribution
cable distribution, 2, 54–58, 62–64, 66–67, 70–71, 77, 87–88, 118–120, 149
cinematograph film, 118–119, 122–123, 131–132, 136–137, 139, 154, 160, 162, 170
civil law approach *see also* natural rights theory, 4–8, 10–11, 17, 80–83, 91, 111–113, 147–168, 176, 178
collective administration, 57, 83, 85–86, 91
common law approach *see also* incentive theory, 4–8, 10–11, 16, 75, 80–83, 91, 111–113, 115–146, 167–169, 178
communication technologies *see also* broadcasting technology, 14, 62–67, 141
continental law approach *see* civil law approach
copyright
Act *see* copyright law
approach *see* common law approach
Convergence Group (Australia) *see also* Attorney-General’s Department (Australia), 123–124
Council (Japan) *see also* Agency for Cultural Affairs (Japan), 147, 157
economic rights, 108, 154–155
in broadcasts in Australia, 115–146
in subject-matter (Australia) *see* subject-matter
in works in Japan, 152–155
law *see* copyright law
moral rights, 148, 154–155, 158
rationale for, 4–11
Regime Committee (Japan) *see* neighbouring rights
two approaches to protecting, 4–10,
copyright law
Australian, 11, 16, 115–146, 168–171, 176, 178
French, 8–10
Japanese, 11–14, 17, 147–166, 172–176, 178
UK, 116, 168–169, 178
US, 8–10, 81–82
Convention *see also* Treaty
Establishing the World Intellectual Property Organisation *see* WIPO Convention
for the Protection of Literary and Artistic Works *see* Berne Convention,
for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations *see* Rome Convention,
Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite *see* Satellite Convention,
Universal Copyright, 39, 42–43

decoding, decrypting, decryption *see also* encrypted, 24, 59, 66–67, 78–79, 94–96, 101, 104, 106–107, 126
digital, 1,66, 77, 88–89, 118–120, 156–158, 166–167, 177–178
Agenda (Australia) *see* Digital Agenda Act (Australia)
Digital Agenda Act (Australia), 116–118, 123–130, 141–146, 171
Diplomatic Conference
the proposed new Treaty for the Protection of Broadcasters’ Rights, 108–113
Rome Convention, 37, 41–43
Satellite Convention, 47
WPPT, 3, 105

Directive
Cable and Satellite *see* Cable and Satellite Directive
Rental, 32, 53, 55–56
Term, 32, 53, 57–58

encrypted
broadcast, 59, 79
signal *see* signal
ephemeral right, 45, 54, 56, 83–86, 91, 165
European Agreement on the Protection of Television Broadcasts, 32, 39, 53–55, 60

fair dealing, 126, 131, 140
freedom of speech *see also* broadcasting, 14, 28

ILO, 33–35, 37–38, 41
incentive theory *see also* common law approach, 4–11
International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations *see* Rome Convention
International Telecommunication Union *see* ITU
Internet broadcasting *see* webcasting
Internet Service Provider, 88–91, 126
ISP *see* Internet Service Provider
ITU, 22–23, 65

licence, licensing, 26, 85–86, 118–120

moral rights *see* copyright

NAFTA, 32, 53, 59
natural rights theory *see also* civil law approach, 4–11, 130, 145, 177
neighbouring rights
broadcasters' rights as, 4, 11, 76–81
Committee of Experts on, 37–39, 170
copyright and, 48, 57, 76
Copyright Regime Committee (Japan) considering, 172–173, 175
definition, 4, 148, 174
difference between copyright and, 10, 36, 39
need to review, 3
project for protecting, 33–34
rationale for, 10, 174–175
reasons for recognising, 3
related to copyright, 34
under the Japanese *Copyright Law*, 148–152, 155–159, 165–166, 173–175
Network Ten Pty Ltd v TCN Channel Nine Pty Ltd see The Panel case

on-demand *see also* webcasting, 67, 98–99, 122, 149

piracy *see also* signal theft, 1, 16, 25, 49, 77, 80, 89, 95, 102, 107, 109, 111, 145, 155–156, 166, 171, 174
performer's rights, 33, 123, 154, 166
phonogram *see also* sound recording, 3, 32, 37,-38, 41–44, 55, 75, 88, 101, 104, 148, 151–152, 166, 172, 174
Convention *see* International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations *see* Rome Convention
Treaty *see* WIPO Performances and Phonograms Treaty *see* WPPT
Programme, 1, 23, 26–27, 37, 47–50, 57–59, 63–65, 68, 70, 76, 80–82, 85, 87–88, 92, 94, 98, 100, 117–119, 121–122, 131–145, 151, 154, 162–164, 169, 171

radio *see also* sound broadcast, teletext, 21, 66, 80, 89, 122 123, 129, 134
Conference *see* World Administrative Radio Conference
Regulations *see* Radio Regulations
Radio Regulations (ITU) *see* RR
rebroadcasting, rebroadcast, 36, 40, 42, 44–45, 52, 54–55, 77–78, 96, 98, 101, 104, 107, 118, 122–123, 127, 131–132, 136–140, 144, 150, 157–158, 163, 169–170, 172
Regulations
Radio *see* Radio Regulations
Copyright, 122

Rome Convention
background to, 32–43
broadcasters' rights, 29–30, 44–46
broadcasting organisations, 27, 30
definition of broadcasting, 24, 30, 61, 68–69, 71
Diplomatic Conference, 41–43
draft, 34–41
exceptions to protection, 45
Intergovernmental Committee of, 68
limitation on broadcasters' rights, 46
model law for the implementation of, 68
national treatment, 46
origins of *see* background to
outline of, 43–44
participants of, 43, 47
reservation, 45
supplementary to, 15
term of protection, 46
RR, 22–23, 26, 65

satellite
broadcasting, 1–2, 24, 26, 56–59, 61–62, 64–72, 77–78, 86–88, 96, 122
Convention, 31, 43, 47–50, 52
Directive *see* Cable and Satellite Directive
signal
encrypted *see also* encrypted broadcast, 24, 59, 78, 95–96, 118
pre-broadcast, pre-broadcasting, prior to broadcasting, 96, 98, 102, 104, 106
programme-carrying, 47–52, 57–59, 68
theft *see also* piracy, 108
Standing Committee *see* WIPO Standing Committee on Copyright and Related Rights
streaming *see also* webcasting, 67, 100
subject-matter, 117, 126, 128, 132, 139, 149, 156, 163
sui generis right, 104
sound
broadcast, sound broadcasting, 80, 117, 120–122, 132–134, 136–139, 141, 144, 149, 151–152, 161–162
communication to the public of, 35
consisting of, 49, 81
fixation of *see* recording
recording, 81, 84, 122–123, 129, 136–137, 149, 151
rebroadcast, rebroadcasting, 137–139
transmission of *see also* sound broadcast, definition of broadcasting, 23–24, 26–27, 42, 61, 68, 134
source licensing *see* licensing

TCN Channel Nine Pty Ltd v Network Ten Pty Ltd see The Panel case
technology
communication *see* communication technologies
broadcasting *see* broadcasting technologies
telecommunications law, telecommunications legislation, telecommunications regime, 14, 22–24, 26, 27, 29–30, 50, 102, 104
teletext, 2, 62, 66–68, 71, 122
television
broadcast, broadcasting, 120–122, 130, 131
cable *see* cable distribution
The Panel case, 116, 130–146, 171
Treaty *see also* Convention
WIPO Copyright *see* WCT
WIPO Performances and Phonograms *see* WPPT
TRIPS, 31, 47, 51–52, 96, 105

UNESCO, 33–34, 36–38, 41, 60, 73, 96

WARC, 65
WCT, 2, 47, 92, 94, 124
webcasting, 15, 62, 66–67, 69, 71, 88–91, 95–96, 103, 106, 108, 112, 159
WIPO
Convention
establishing, 73–74
administered by, 43, 49, 112
Copyright Treaty *see* WCT
document prepared by the Secretariat of, document prepared by the International Bureau of, 92, 95, 99, 102, 108–109
Director-General, 75, 91–92, 112

discussions on protecting broadcasters' rights *see also* Standing Committee on Copyright and Related Rights, 2–3, 72–73, 157, 159, 166–167, 177–179
finance of, 74
function of, objectives of, 43, 73
General Assembly, 92, 110–113
information on the legislation of broadcasters' rights, 4, 7, 13, 15, 32, 92
member states, 4, 47
objectives of *see* function of
origin of, 74
Performances and Phonograms Treaty *see* WPPT
Standing Committee on Copyright and Related Rights *see also* discussions on protecting broadcasters' rights, 2, 11, 16–18, 35, 74, 92–112, 115–116, 145, 147–148, 157
Symposium for Latin American and Caribbean Countries on Broadcasting, New Communication Technologies and Intellectual Property, 92–93
website of, 13
World Symposium on Broadcasting, New Communication Technologies and Intellectual Property, 74, 76–92, 111

wire diffusion *see* cable distribution
WPPT
Committee preparing, 76, 92
committee's work resulted in, 75
definition of broadcasting, 24, 97
Diplomatic Conference for, 3, 105
extend the protection, 47
establishing, 2–3
for the implementation of, 159
Preamble, 76
proposal for a protocol under, 93
provision of, 97
right
granted, 101
not included in, 94, 103, 104
of distribution of fixations, 101
of making available of fixations, 101
of rental, 101
rights management information, 110
technological measures, 104, 110
updating of the other rights holders by, 94, 113
World Administrative Radio Conference *see* WARC
World Intellectual Property Organisation *see* WIPO
World Trade Organisation *see* WTO
WTO, 47, 51, 52