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ISSUES CONCERNING "WEBCASTER" IN NEW WIP
ORGANIZATION TREATY

Communications submitted by Japan

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I. INTRODUCTION

1. As the Delegation of Japan pointed out at the last Standing Committee on Copyright and Related Rights (SCCR), the question of “webcaster,” particularly whether or not to include “webcaster” as a subject matter of protection, is the most significant issue in considering overall structure of the new instrument. If “webcast” is an object of protection, there are quite a few issues to be considered as stated below.

2. The Delegation of Japan considers that at the SCCR needs to examine and discuss in detail critical and specific questions of “webcast,” before making any political decision with respect to “webcast.”

3. This document intends to highlight several points, which the Delegation of Japan believes are essential in considering “webcaster” as a subject matter of protection. The Delegation of Japan hopes that this document will contribute to the acceleration of the discussion at the SCCR, and as a result, to the earliest possible conclusion of the new instrument for broadcasting organizations. The issues taken up in this document are as follows:

- (a) Differences between “Webcaster” and “Traditional Broadcasting Organization” as a Communication Medium;
- (b) Definition and Concept: “Webcast” and “Webcaster”;
- (c) Exploitation of Phonograms for “Webcasting” Purpose;
- (d) Large Number of Newly Emerging Beneficiaries;
- (e) Possible Change in Concept of “Broadcasting” under Neighboring Rights;
- (f) Enforcement Issues.

II. ISSUES TO BE CONSIDERED WITH RESPECT TO ‘WEBCAST’

(a) Differences between “Webcaster” and “Traditional Broadcasting Organization” as a Communication Medium

4. The issues of “webcaster” should be carefully dealt with, since they have different characteristics in nature in comparison with those of “traditional broadcasting organization.” The following differences should be fully taken into account, in considering “webcaster.”

5. In many states, “traditional broadcasting organizations” are regulated regarding their transmission of information because, to some extent, they have a public role to play. It might be possible to understand that, in exchange for being regulated by legislation, their broadcast signals are protected under neighboring rights. On the contrary, in many cases, “webcasters” are not imposed any regulations at this stage. There are various grounds for granting neighboring rights, however, if “public role” is considered to be one of the criteria of providing protection, careful consideration would be necessary on whether or not to include “webcaster” as a subject matter of protection under the new instrument.

6. In case of “traditional broadcasting,” viewers can enjoy broadcasts, with equal quality, as long as they can receive radio waves regardless of the number of viewers. However, “webcasting” has limitation in the number of viewers who can access them simultaneously. This means that, in transmitting “webcast” signals, it is necessary to strengthen backbone capacity in accordance with the number of accesses in order to conduct the transmission with

equal quality. In reality, many “webcasters” might not be able to conduct a transmission without difficulty when there are a large number of access seats at one time. This fact leads to a difference in social function to play between “webcaster” and “traditional broadcasting organization” as a medium of transmission of information to the public.

(b) Definition and Concept

7. In case that “webcast” is an object of protection under the new instrument, it is essential to make clear the scope and definitions relating to “webcast.” Among them, the concepts of “webcast” and “webcaster” have special importance.

(i) Webcast

8. It is the starting point for discussion to clarify the definition of “webcast” as an object of protection; for example, whether “webcast” is to be limited to “real-time streaming” or “on demand transmission (making available of images and/or sounds) over the Internet” be included. In addition, in case that “on demand transmission” is an object of protection, there are a number of questions to be examined. For example, whether or not it is appropriate to understand “on demand transmission” in such a way that viewers enjoy images and/or sounds transmitted over the Internet at the time of downloading, with the information being copied or not being copied into hard disk drives. There is also a question on whether or not it is appropriate to understand “on demand transmission” as to cover mere transmission of music files or patch files (which are used to update computer programs installed in individual PC) over the Internet. Application of the concept of “pre-broadcast signal” is also the issue of clarification, and should be discussed carefully at SCCR.

(ii) Webcaster

9. In the process of “webcasting,” a number of stakeholders are involved. They include both individual persons and legal entities who created a homepage, an Internet Service Provider (ISP) who provides Internet access, a conduit provider and so on. All of them play very important roles in transmission of signals. Since the new instrument concerns not the protection of contents (works) transmitted but the protection of signals transmitted, all of them are possible candidates for beneficiaries at least in theory. Therefore, it is also important to specify the scope of “webcasters” as beneficiaries.

(c) Exploitation of Phonograms for “Webcasting” Purpose

10. Exploitation of phonograms for “webcasting” purpose is also an issue of consideration. In Article 15 of the WIPO Performances and Phonograms Treaty (WPPT), “traditional broadcasting organizations” can exploit phonograms for their “traditional broadcasting” purpose without authorization of phonogram producers, as long as they pay equitable remuneration to phonogram producers. If the new instrument covers not only “traditional broadcast” but also “webcast” as objects of protection, one might argue to apply the remuneration right to the exploitation of phonograms for “webcasting” purpose, considering the balance with “traditional broadcasting.” At present, however, there seem to be no consensus on this issue among stakeholders.

(d) Large Number of Newly Emerging Beneficiaries

11. Every individual can conduct “webcasting” if he/she has digital equipment such as PC, and as a result, a significant number of new beneficiaries would emerge if the new instrument covers “webcast” as an object of protection.

12. By the way, there might be no regulations imposed on “webcasters.” In addition, there also exists anonymity in transmission over the Internet. Because of these factors, it can be considered that, in case of “webcasters,” a deterrence against transmitting infringed/harmful information might not work adequately, compared to the case of “traditional broadcasting organizations.” Then, one might argue that beneficiaries should be limited to certain legal entities.

13. However, broadcasting organizations are considered to be granted neighboring rights because of their quasi-creativity and their intellectual value as communication media. From this viewpoint, it would not be appropriate to exclude individuals from the scope of beneficiaries simply because they are individuals, even though they satisfy the same criteria as traditional broadcasting organizations. Careful consideration would be necessary on this issue.

(e) Possible Change in Concept of “Broadcasting” under Neighboring Rights

14. In the Rome Convention, the definition of “broadcasting” is “the transmission by wireless means for public reception of sounds or of images and sounds” (Article 3(f)) and this idea is basically maintained in the WIPO Copyright Treaty (WCT) and the WPPT. This definition of “broadcasting” is generally understood to imply simultaneous transmission of the same content to the public, not including point-to-point transmission, based upon the physical and characteristic nature of “broadcasting.”

15. On the other hand, “webcasting” can basically be regarded as the point-to-point transmission, which might not be considered as “transmission for public reception.” If “webcasting” is added to the concept of “broadcasting” under the new instrument, the definition of “broadcasting” which has been maintained as one of the important concepts of neighboring rights since the adoption of the Rome Convention would need to be changed.

(f) Enforcement Issues

16. It is not difficult for “webcasters” to change the location of initial transmission. Their information is transmitted to all over the world without affected by the shift of the location. Different from “traditional broadcasting organizations” which have geographical limitation for transmission of signals as well as own large scale facilities to conduct their broadcasting, “webcasting” has no geographical limitation in terms of distribution of information, nor needs to have large scale facilities for their transmission of information. These factors make enforcement and implementation of the new instrument difficult.

17. If “webcast” is an object of protection, it would be very difficult to identify nationality of “webcaster” as a beneficiary of the new instrument. Internet environment is borderless and it might be also possible that the nationality of a person who transmits information, the location of initial transmission, the nationality of an ISP, the location of a server and the

location where information is actually received, are located in different states. Therefore, when a state becomes a member of the new instrument, certain ambiguity remains for which "point of attachment" is applied by the state in deciding the nationality of "webcaster" to be protected.

18. In addition, as mentioned in paragraph 16, since it is not difficult for "webcasters" to shift the location of initial transmission, they might shift the location to the states where they can enjoy further protection with respect to their "webcasts." There is a concern that this flexibility of "webcasters" would create unstable situations in legal terms all over the world.

III. CONCLUSION

19. It is at least necessary that the issues raised above should be discussed in detail when "webcast" is included as an object of protection and that Member States of WIPO have to have consensus on them. The Delegation of Japan strongly expects that the future discussion at the SCCR will take them fully into account.

20. At this stage, the Delegation of Japan considers that the gap between "traditional broadcasting organization" and "webcaster" is too broad to be dealt with under a single instrument. Of course, this does not mean to oppose the protection of "webcaster." However, the Delegation of Japan believes that the most practical way of dealing with the issue of "webcaster" is to separate it from the scope of the new instrument which is now being discussed at the SCCR, and to start an independent discussion at the SCCR aiming at establishing another instrument specialized for the protection of "webcaster."

21. The discussions on WIPO Internet treaties were originally initiated with a view to protecting and updating the rights of existing right holders in order to cope with the development of digital technologies and Internet. In this sense, it is appropriate to deal with the issues of new beneficiary separately from the current discussions for WIPO Internet treaties in order to avoid any confusion with them.

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