

# Protection of Broadcasters' Rights

Megumi Ogawa



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*by*

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## 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

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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

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 <i>Copyright Amendment (Digital Agenda) Act 2000</i> (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 con- cerning 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

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# 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,<sup>1</sup> 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

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<sup>1</sup> 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.<sup>2</sup> Cable television became prevalent<sup>3</sup> after 1966 when the Federal Communications Commission (FCC) prepared regulations for cable television.<sup>4</sup> Teletext was started in 1976 by the British Broadcasting Corporation (BBC) and ITV<sup>5</sup> of the United Kingdom.<sup>6</sup> In 1978 the first broadcasting satellite, the 'Yuri' of Japan started direct broadcasting.<sup>7</sup> 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.<sup>8</sup> 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.<sup>9</sup> 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).<sup>10</sup> 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.

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<sup>2</sup> Head S, *World Broadcasting System: A Comparative Analysis*, (California, Wadsworth Publishing Company, 1985) 37.

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

<sup>4</sup> 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.

<sup>5</sup> Commercial television services in the United Kingdom.

<sup>6</sup> 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.

<sup>7</sup> Head S, *World Broadcasting System: A Comparative Analysis*, (California, Wadsworth Publishing Company, 1985) 44.

<sup>8</sup> Standing Committee on Copyright and Related Rights.

<sup>9</sup> 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.

<sup>10</sup> 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.<sup>11</sup>

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.<sup>12</sup> More complexities are anticipated as WIPO seeks to accommodate the differences of view of the member states.<sup>13</sup>

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.<sup>14</sup> 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

<sup>11</sup> 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*].

<sup>12</sup> 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.

<sup>13</sup> 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*].

<sup>14</sup> Jehoram H, 'The Nature of Neighbouring Rights of Performing Artists, Phonogram Producers and Broadcasting Organizations' (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*].