

Intervention Statement - WIPO General Assembly

I. A claim to reject the adoption of a potential Broadcast Treaty

Taken the fact that technology allows to make perfect digital copies of television programs, there is an increasing issue today concerning signal theft and piracy, that is to say unauthorized recordings of broadcasts or redistribution of signals. Facing this issue, the World Intellectual Property Organization (WIPO) has proposed to adopt a treaty to protect broadcasting organizations from the reproduction and retransmission of their programs by giving them copyright-like control over them.

The question is whether it is necessary to update existing international 1961 Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations. Some consider that additional legal provisions about signal theft are not necessary and that current laws are sufficient to address such disputes. Thus, no further rights should be granted to broadcasters. IP Justice supports this position and stands against the adoption of WIPO proposed Broadcasting Organizations Treaty.

Indeed, it would have adverse impacts for both copyright owners and the public (A). Second, there is a risk that broadcasting organizations would privatize copyrighted materials (B). Third, the risk is to put U.S. home based broadcasters in a situation of hegemony over others (C).

A. Adverse impacts for copyright owners and the public

The adoption of WIPO Broadcasting Organizations Treaty would allow broadcasters to acquire copyright-like control over the content they broadcast and especially the ability to prevent their reproduction, retransmission and other forms of public usages. Such situation would have adverse impacts for both copyright owners and the public.

Concerning copyright owners, their exclusive rights would be affected if broadcasting organizations could determine conditions to be respected to use their works.

Concerning the public, people willing to use a broadcast or elements of it would have to ask for the authorization of both the copyright owner of the program object of the broadcast and of the broadcaster. Therefore, the process of clearing rights would become more complex and it would impose new costs on the public.

The search for balance between providing broadcasting organizations adequate means to prevent signal theft, protecting the public access to copyrighted works and preserving copyright owners' exclusive rights, must be conducted with the common objective of disseminating knowledge. As a result if the treaty was to be adopted, it would be necessary to include exceptions and limitations to broadcasters' copyright-like control such as digital preservation, research, educational activities, libraries and archives for examples.

B. The risk of privatization by the broadcasters

Granting copyright-like control to broadcasting organizations is likely to give them a monopoly over original copyrighted materials based on the mere fact that they broadcasted them. By extension, they

will be able to control the public's access to knowledge if they have to be consulted and to give their permission for the works to be used.

Therefore, the risk is for broadcasting organizations to abuse of their power to give discretionary permission to access such copyrighted works. Article 18(1) of WIPO proposed Broadcasting Organizations Treaty provides that « *broadcasting organizations may enforce any copyright or related rights that exist in the programmes carried by the signal against the unauthorized retransmission, to the extent that they are authorized to do so by the owners of those copyright or related rights as permitted by the Contracting Party's domestic law.* » Then, Article 18(2)(ii) includes the possibility for Contracting States to comply with this obligation by inserting in their domestic law a presumption « *that in the absence of proof to the contrary the broadcasting organization is authorized to enforce those rights against the unauthorized retransmission.* »

Therefore, the principle is for broadcasting organizations to presumably have legal power to enforce rights in the original copyrighted programs they broadcast. By exception and only with a proof to the contrary, they will not be authorized to do so by the copyright owners. As a result, broadcasting organizations will not only acquire copyright-like control over the broadcast itself, but also over the original copyrighted work object of the broadcast. IP Justice argues that extending the scope of broadcasters' rights is not advisable.

The risk that broadcasters could privatize works in the public domain represents another concern. Indeed, if they acquire copyright-like control over the broadcast itself, it means that regardless of whether the original work is still protected under Copyright Law, they will be able to control its use by others. Therefore in order to protect the public domain, IP Justice considers that WIPO Broadcasting Organizations Treaty should not be adopted in order to protect the public domain. A downstream user must remain free of re-using a work in the public domain without having to request the authorization of the broadcaster.

C. The risk to create a situation of hegemony over Intellectual Property ownership

Adopting WIPO Broadcasting Organizations Treaty is likely to create a situation of hegemony for broadcasters which are home based in the U.S. Indeed, most beneficiaries of the proposed provisions are based in the U.S. and granting them rights to control the access to copyrighted content will not only have consequences for the American public, but also for users in other countries. Adverse impacts are not limited to the American scale and occur at the international level, impeding communities in need to access to the content at issue. A situation of American legal hegemony over intellectual property ownership based on the fact that those companies broadcast copyrighted content is not advisable.

II. Domain Name and Country names issue

The Standing Committee on the Law of Trademarks, Industrial Designs and Geographical Indications (SCT) published a Report on May 13, 2022, written in preparation of WIPO General Assembly which will take place in July 2022. It refers to three proposals among other documents, concerning the Protection of Country Names. They are identified as followed:

- Document SCT/41/6 REV.

- Document SCT/43/6
- Document SCT/43/9

Considering those proposals, the issue for WIPO is to decide whether governments should own exclusive rights over the use of country names in general and more specifically in domain names. A domain name is composed of two parts: the second-level domain (SLD) on the left of the dot and the top-level domain (TLD) on its right, as it is presented in the following example:

google.com
SLD TLD

TLDs can be of three types: generic top-level domains (gTLDs), country code top-level domains (ccTLDs) or sponsored top-level domains (sTLDs). The distinction between gTLDs and ccTLDs is based on the fact that the former category follows the Internet Corporation for Assigned Names and Numbers (ICANN) processes and policies, while the latter is subject to governmental policies.

The first proposal concerns the use of country names as gTLDs. The issue should be treated as a two-step question. First, should country names ever be able to be registered as gTLDs. If the answer is positive, the next question is whether governments should own exclusive rights on them. Domain names can be subject to trademark registration, so it would provide governments trademark-like rights over country names. Such eventuality is questionable.

This brief argues against the allowance of such exclusive rights to governments and recommends WIPO General Assembly to reject those proposals based on two arguments: the risk is to create a monopoly for governments on country names and to potentially violate legal protection on free speech (B). As a prerequisite, governments' arguments in favor to protect country names' are summarized by proposal (A). The last part of the brief is a dedicated to a small conclusion (C).

A. Governments' arguments to protect country names

1. Proposal SCT/41/6 REV.

Proposal SCT/41/6 REV. requests the creation of exclusive rights for governments to register country names as gTLDs.

The first argument is the risk for country names to be appropriated by private entities. Indeed, it would give them an undesirable monopoly depriving « *the concerned community from the possibility of using such names.* » The proposal is drafted as followed: « *THE WIPO General Assembly recommends: 1. to protect the country names and geographical names of national significance against their delegation as top-level domain names in the DNS, except if the delegation application counts with the explicit support or non-objection of the relevant public authority concerned.* »

The second argument is based on the idea that granting such exclusive rights to governments would allow « *countries' sovereign rights to protect their identities and reputations as well as their legitimate public policy interests.* » It reflects the signatories' fear that country names could be used by private entities to mislead websites' users as to the connection and affiliation of the available content with the

country itself and/or its government. They argue that it could confuse users because geographic names could allegedly evoke the related geographical site and its population although no actual link between them would exist.

Last, the proposal recommends protection for country names as listed by the United Nations Group of Experts on Geographical Names (UNGEGN) and ISO 3166-1 and ISO 3166-2 standards established by the International Organization for Standardization (ISO).

2. Proposal SCT/43/9

Proposal SCT/43/9 « *aims at harmonizing the examination and determination of applications for the registration of trademarks which consist of or contain country names.* » It focuses on protecting country names against conflicting marks. Article 3 provides a list of situations in which a mark would qualify as conflicting and therefore be refused registration. Sections (a)(i) and (ii) correspond to circumstances of confusion or deception to the public and false connection. Such provisions seem necessary to secure the objective of any Trademark Law, namely to provide reliable source identifiers for goods and services within the marketplace.

However, sections (a)(iii) and (iv) raise an issue. They provide that a mark would be conflicting if it is « *likely to impair or dilute the distinctive character, reputation, country name and/or nation brand of the relevant Member State identifiable by the country name* », or « *would take unfair advantage of the distinctive character, reputation, country name and/or nation brand of the relevant Member State identifiable by the country name.* » These sections are problematic in light of First Amendment considerations and should not be adopted by WIPO General Assembly. Indeed, it is one thing to want to prevent consumers' confusion, but it is another to want to prevent the expression of trademark owners by restraining the choice of their trademarks to avoid consequences on the country reputation, for example.

3. Proposal SCT/43/6

Proposal SCT/43/6 provides examination guidelines to reject trademark applications if it consists solely or contains among other distinctive elements a country name. Sections 4 and 5 both establish as a principle the rejection of these applications. They also provide exceptions to allow registration if the trademark is « *not likely to be perceived by the public as a country name* » or is not misleading, deceptive or false in relation to the true geographical origin of the goods or services.

The issue here is that no criteria are provided by the proposal to reject a trademark application, except the sole basis of using a country name. The argument will be later developed but preventing the use of country names by principle may be seen as a violation of the freedom of expression protected by the First Amendment. A too strong protection of country names could have adverse impacts in terms of restraining free speech.

With respect to the content of the three proposals, the brief aims henceforth to present the issues they present (B).

B. Why are those arguments problematic?

The arguments sustained by the proposals are problematic for two main reasons. First, the risk is to allow governments to acquire a monopoly over country names (1). Second, it could violate legal protections of free speech (2).

1. Risk to create a monopoly for governments over country names

Proposal SCT/41/6 is based on the refusal to create a monopoly that would allow private entities to control the use of country names. However, if governments can own exclusive rights over those names, they will be the ones benefiting from a monopoly. In both cases, creating a situation of monopoly will have the adverse impact of preventing others from using the country names. Therefore, the same reasons that were alleged by the governments to refuse granting such rights to private entities should be opposed to them and explain why they should not own them either.

From a technical perspective, the number of available gTLDs is limited because each is unique and can be owned only by one person. Thus, if a government owns rights on it, it will have to approve any use. As mentioned before, gTLDs and ccTLDs are not subject to the same regulations. The former fall under ICANN processes while the latter are regulated by national entities. Therefore, if a monopoly is granted to governments, it would extend their power within the Domain Name System (DNS). Indeed, gTLDs are supposed to be solely subject to international regulation. As a result, allowing governments to do so would create undesirable interferences within the DNS and modify its existing structure and processes. For this reason, ICANN Governmental Advisory Committee (GAC) has continuously considered that country names should not be allowed in the gTLD space. Indeed in March 2007, it stated in its Principles regarding new gTLDs that « *ICANN should avoid country, territory or place names, and country, territory or regional language or people descriptions, unless in agreement with the relevant governments or public authorities.* » (section 2.2). Additionally, section 2.4 of the document provided that « *In the interests of consumer confidence and security, new gTLDs should not be confusingly similar to existing TLDs. To avoid confusion with country-code Top Level Domains no two letter gTLDs should be introduced.* »

To determine the scope of country names which should be excluded from the gTLD space the UNGEGN list and the ISO 3166 standard could serve as references.

In addition to the risk to create a monopoly, the issue is to violate freedom of expression's legal protection (2).

2. Risk to violate freedom of expression's legal protection

The question of whether governments should own exclusive rights on country names raises contradictory interests opposed as follows:

- 1) The owner of the rights in the country name and the public's interests in avoiding confusion about the source or sponsorship of the available content on websites identified by domain names and,
- 2) The defendant and the public's interests in protecting freedom of expression.

Under U.S. Law, domain names are protected under the First Amendment. The standard established by the courts is whether it is communicative or serves as an identifier of the source of the communication¹. Protection applies to domain names falling within the first category². A domain name is unlikely to be recognized as communicative if it does not provide commentary nor criticism. These principles have been recently reaffirmed in *Doe v. Pa. State Univ.*³ Additionally, the Second Circuit has provided some factors to determine whether a domain name qualifies for First Amendment protection. They include the registrant's intentions, the website's contents and the technical protocols governing the DNS. The goal is to decide if the mix of functionality and expression is « *sufficiently imbued with the elements of communication.* »⁴

Under International Law, the right to freedom of opinion and expression is protected by the Article 19 of the Universal Declaration of Human Rights (UDHR). According to the convention, « *this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.* »

The freedom of expression's issue is often involved in suits challenging unauthorized uses of marks in domain names. A trademark owner brings an infringement or dilution claim in court based on the fact that his mark was incorporated into a domain name without his authorization. If such use was to be prohibited, it could allegedly raise First Amendment or UDHR Article 19 issues. Therefore, if trademark-like rights were granted to governments on country names, they would be able to behave as trademark owners to prevent using them in domain names. This brief argues to limit the expansion of trademark-like rights on the Internet. Domain names for websites providing noncommercial speech are comparable to titles of expressive works. They are similar to books, magazines or movies' titles which are fully protected speech⁵. Indeed, it seems acknowledged that « *Under the Rogers line of cases, if book, movie and song titles are fully protected speech, then domain names identifying websites that serve as forums and do not see goods or services surely must be too.* »⁶ In fact, websites can be seen as repositories for expressive information including operators' opinions or ideas.

Therefore, if a government owning rights in its country name sues a defendant for having incorporated it in a domain name, right to freedom of expression considerations would probably prevail. Assuming that no further action is taken by the defendant to mislead consumers, such use should be immune from any type of dilution or infringement, or more generally confusion claims. This reasoning supposes to admit that consumers are only temporarily confused by the domain name, thinking that the website they use is somehow related to the government or country whose name is at issue. Here, the use of the domain name faces the issue of respecting the freedom of expression. Thus, First Amendment or UDHR Article 19 protections allegedly outweigh trademark concerns about what would only constitute a minor and temporary confusion. Therefore, confusion for websites' users is not disputed but it does not prevail over free speech, considering the limited extent of such confusion.

¹ *Web-adviso v. Trump*, 927 F. Supp. 2d 32, 47 (E.D.N.Y. 2013).

² *Jews For Jesus v. Brodsky*, 993 F. Supp. 282, 286 n.1 (D.N.J. 1998)

³ *Doe v. Pennsylvania State University* (U.S. Dist. M.D. Pennsylvania 2022)

⁴ *Name.Space v. Network Solutions* 202 F.3d 573, 585 (2d Circ. 2000)

⁵ *Rogers v. Grimaldi* 875 F. 2d. 994, 998 (2d Circ. 1989)

⁶ *Domain names, trademarks and First Amendment: searching for meaningful boundaries*, Connecticut Law Review (2007)

In addition to the two major issues raised by the proposals, three other concerns should be mentioned (3).

3. Additional concerns

The creation of trademark-like rights over country names to be owned by governments raises two additional concerns.

First, such exclusive rights could infringe already established trademark rights. Indeed, domain names consisting of or comprising country names have already been registered in good faith. If governments were to register country names as domain names, they will probably fall within the scope of the Anticybersquatting Consumer Protection Act (ACPA) under U.S. law. Amending the Lanham Act, it protects against the act of cybersquatting, namely « *the unauthorized registration and use of Internet domain names that are identical or similar to trademarks, service marks, company names, or personal names.* »⁷ 15 U.S.C. §1125(d)(1)(A) provides a three-factor test to determine the chances of success of a cybersquatting claim. The plaintiff must have a valid trademark entitled to protection, defendant's domain name must be identical or confusingly similar, or in the case of famous marks dilutive of plaintiff's mark, and the defendant must use or have registered the domain name with a bad faith intent to profit from that mark.

Second, concerning the risk of confusion for a website's user who could be misled by a domain name, national Trademark Law provisions already exist to prevent the misuse of a country name. For example under U.S. law, 15 U.S.C. §1125 provides rules to be applied with respect to false designations of origin, description or representation. Another example is the article L. 711-2 of the French Intellectual Property Code which goes along with section 1125. Therefore, an additional protection consisting of exclusive rights to governments over country names does not seem necessary. Instead, making sure that rules are established to prevent misleading uses of country names is important. Wanting to completely forbid the use of country names by any third party to the benefit of governments appears as an extreme measure which can be mitigated.

Last, domain names' speculation and reselling are legal. Therefore, if they were to be cancelled or transferred to governments, it could allegedly be assimilated as expropriating the original owners.

C. Conclusion

To conclude, IP Justice recommends WIPO General Assembly to reject the three Proposals in order to avoid any risk to create a monopoly that would benefit to governments over the use of country names and therefore will violate First Amendment or Article 19 of the UDHR protections of freedom of expression. It is in the interests of the society in general that country names remain free of use.

As the brief mentions several times, in order to determine which countries should not be registered, the UNGEEN list and ISO Standards seem to be the most relevant. The definition of a country name provided by Proposal SCT/43/9 could also be adequate to extend the scope of the exclusion « *the official name, the short name, the formal name, the historical name, translation, transliteration, denomination, international code, standard abbreviation and adjectives of any of those names of a Member State.* »

⁷ Winston & Strawn LLP - Legal Glossary

III. [An Intellectual Property waiver for COVID-19 vaccines and medicines](#)

The COVID-19 pandemic has strongly reinforced the inequitable distribution and access to vaccines among the countries. Indeed, the manufacture facilities that supply health products and technology are concentrated in a few developed countries. Thus, the least-developed countries' response to the pandemic depends on their decisions. In other words, a limited number of companies hold the know-how for COVID-19 vaccines, preventing low-income countries to access it. This assessment does not go along with the fundamental right to enjoy the standard of physical and mental health and its related objectives of universal health coverage and health for all without discrimination. According to a resolution submitted to the Human Rights Council whose 50th session will take place in July 2022, it is the responsibility of the States « *to ensure timely, equitable and unhindered access for all, without discrimination, to safe, affordable, effective and quality medicines, vaccines, diagnostics and therapeutics, and other health products and technologies, as well as access to immunization as a global public good (...)*. »⁸ Immunization from a worldwide disease should be considered as a public good.

To this aim, IP Justice strongly supports an unfettered access to the Intellectual Property covering those vaccines and medicines in order to intensify their production. This legal waiver would meet TRIPS Agreement's objectives to encourage developed countries to share and transfer technology to least-developed countries (A). Furthermore, such waiver would respond to the World Health Organisation's Solidarity Call to Action from May 2020 (B). A concrete example of Intellectual Property waiver can be found in the agreement recently reached by the National Institutes of Health, the COVID-19 Technology Access Pool and the Medicines Patent Pool (C). Finally, adopting an Open Source Dividend model would benefit the waiver (D).

A. TRIPS Agreement in favor of an Intellectual Property waiver

TRIPS Agreement supports the transfer and dissemination of technology by developed countries to least-developed ones in order to ensure the effectiveness of the right to enjoy the benefits of scientific progress and its applications to populations over the world. Countries' level of development and technological advancement should not constitute discriminatory barriers to enjoy the fundamental right to health.

First, article 7 of the Agreement provides that « *The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations*. » This provision highlights the need to find a balance between rewarding the people who contribute to scientific progress and the public interest in those scientific advances.

Second, article 66.2 states that « *Developed country Members shall provide incentives to enterprises and institutions in their territories for the purpose of promoting and encouraging technology transfer to least-developed country Members in order to enable them to create a sound and viable technological base*. » Therefore, it is the countries' responsibility to set up an economical context likely to incentivize national companies and institutions to share their technologies.

⁸Access to medicines, vaccines, and other health products in the context of the right of everyone to the enjoyment of the highest attainable standard of physical and mental health - Resolution drafted by the Core Group (Brazil, China, Egypt, India, Indonesia, Senegal, South Africa, Thailand) for considerations of the Human Rights Council (June 2022)

Thus, as one of the main references in international Intellectual Property Law, TRIPS does provide the legal basis to support an intellectual property waiver for COVID-19 vaccines and medicines.

B. The waiver as a response to the Solidarity Call to Action

The World Health Organisation (WHO) has introduced the Solidarity Call to Action in May 2020 in order « *To realize equitable global access to COVID-19 health technologies through pooling of knowledge, intellectual property and data.* »⁹ The rationale behind this measure is to stop the pandemic by promoting a global access to health technology required for COVID-19 detection, prevention and treatment. According to WHO, « *Shared knowledge, intellectual property and data will leverage our collective efforts to advance scientific discovery, technology development and broad sharing of the benefits of scientific advancement and its applications based on the right to health.* »¹⁰ Restoring and ensuring a global health security for the future requires mechanisms of cooperation and solidarity between national governments, industries, civil societies, the United Nations and other international partners.

Concretely, WHO advocates to « *Take action to promote innovation, remove barriers, and facilitate open sharing of knowledge, intellectual property and data necessary for COVID-19 detection, prevention, treatment and response, including through national legal and policy measures, and international collaboration on regulatory practices, to ensure availability, affordability and assured-quality of the concerned products.* » A concrete example is to publish all research outcomes under open licenses to allow their free access and use.

Implementing an Intellectual Property waiver for COVID-19 vaccines and medicines complies with WHO Solidarity Call to Action. It would remove legal protections over scientific advances.

C. A concrete example of Intellectual Property waiver for COVID-19 technologies

The COVID-19 Technology Access Pool (C-TAP) was launched in May 2020 by WHO as a response to the Solidarity Call to Action in order to provide a « *single global platform for the developers of COVID-19 therapeutics, diagnostics, vaccines and other health products to share their intellectual property, knowledge, and data with quality-assured manufacturers through public health-driven, transparent, voluntary, non-exclusive and transparent licences.* It also provides support for technology transfer agreements. » This tool aims to provide manufacturers with « *the legal rights to manufacture and sell the products; the technological know-how required to develop high-quality products effectively and efficiently; and access to clinical data needed to obtain regulatory approval for their products.* »¹¹

The 2nd Global COVID-19 Summit took place in May 2022 where the U.S. government announced the agreement passed by the National Institutes of Health (NIH) on one hand, and C-TAP and the Medicines Patent Pool (MPP) on the other hand. In fact, two licenses have been entered with respect

⁹ World Health Organization's website - <https://www.who.int/initiatives/covid-19-technology-access-pool/solidarity-call-to-action#:~:text=Now%20more%20than%20ever%2C%20international,data%20necessary%20for%20COVID%2D19>

¹⁰ Id.

¹¹ President Biden announces agreement between the NIH and the WHO Covid-19 Technology Access Pool (C-TAP), KEI's website (May 2022) - <https://www.keionline.org/37782>

to 11 technologies concerning among others innovative therapeutics, early-stage vaccines and diagnostic tools for COVID-19.

Strongly supported by Knowledge Ecology International (KEI), those agreements are global, transparent and open. They aim to allow manufacturers to work with MPP and C-TAP to make health technology accessible, affordable and equitable for least-developed countries. IP Justice joins KEI's position and encourages more initiatives like this agreement.

D. The Open Source Dividend model

The Open Source Dividend is based on the idea of rewarding the persons and entities who openly and freely share their knowledge, data and material technology with drug developers if their contribution is helpful in the success of the end-product. Those contributors are entitled to receive a royalty on the product sales. This model falls within the open research concept which supports a cooperative approach of science by opening the access to each aspect of the scientific process.

On the contrary, closed research has the adverse impact of limiting scientific advancements by raising the costs for businesses willing to acquire rights in knowledge-based goods and services which are necessary to create and sell new products. Thus, this model seems to be less valuable than the open research one.

As a result, waiving Intellectual Property rights in the context of the COVID-19 pandemic would straighten the open research approach. In order to ensure the efficiency of the waiver, governments should develop and rely on incentives to share knowledge, data and technology such as the Open Source Dividend tool. It is likely to decrease product developers' net revenues after deducing the open source royalty. However, finding a balance between developers' interests and those of the contributors is a matter of policy for national governments. The issue is whether they want to contribute to the international solidarity movement to help and accompany least-developed countries to go through a global pandemic.