

**Statement by Mr. Shozo Uemura,
Deputy Director General,
World Intellectual Property Organization (WIPO)**

**SOFTIC SYMPOSIUM
Tokyo, November 20 and 21, 2001**

**"WIPO INITIATIVES MEETING THE CHALLENGES
OF DIGITAL TECHNOLOGY AND NETWORKS"**

I. INTRODUCTION

II. COPYRIGHT AND RELATED RIGHTS

1. Software Protection

Computer software is at the very heart and soul of the digital revolution—there would, in fact, be no digital revolution without computer software. The importance of computer software is found and echoed in many of the events, programs and activities which are currently taking place under the auspices of WIPO, and which have historically taken place under WIPO leadership.

As a subject matter to be protected under the international (and national) laws of Intellectual Property, since its creation in the middle of the 20th century, many felt that computer software should be protected under the umbrella of Copyright Law. It was, in fact, at a WIPO meeting, in 1985, in which the international IP community took the decisive decision that computer software was to be protected as a literary work.

Following that clarification, the negotiators of the TRIPS Agreement decided to formalize the IP status of computer software, and did so in TRIPS Article 10(1); the TRIPS provision protects software in "source or object code."

2. WCT/WPPT

Does computer software exist in something other than source or object code? It's an interesting question, but one which has become moot. When WIPO hosted a Diplomatic Conference in 1996, the issue of the protection of computer (software) programs was negotiated by the worldwide IP community. That Diplomatic Conference adopted the WIPO Copyright Treaty (WCT); its Article 4 states that "computer programs are protected... whatever may be the mode or form of their expression."

I am pleased to inform you that the WCT (and its companion legislation, the WIPO Performances and Phonograms Treaty (WPPT)), will come into force in the near term—there are currently 28 and 26 ratifications and accessions, respectively. Thirty are needed for the WCT and the WPPT to come into force, and several countries are in the last stages of their national processes to join that important piece of international legislation.

3. WIPO Digital Agenda

A major plank in WIPO's response to the challenges of digital technology was issued by the Director General in September of 1999, at the conclusion of WIPO's first International Conference on Electronic Commerce and Intellectual Property: WIPO's *Digital Agenda* (<http://ecommerce.wipo.int.agenda/index.html>).

In addition to bringing the WCT and the WPPT, into force during the year 2001, the Digital Agenda also called for focus on several other areas which all have as their underpinnings the intent and objective to assist the world in adapting the international IP systems, and by extension, the national IP systems,

to the changing environment and to the challenges posed by digital technology, and to better establish the equitable sharing of the many, many benefits being created as a result of the digital revolution.

One can not help but read between the lines of each item contained in the Digital Agenda: the protection, enhancement and evolution of computer software are integral to the success of each.

4. Enforcement Issues

The issue of piracy is very much a problem today, both in the analog world, and in the digital world. If one looks to the numbers and percentages of pirate copies around the world, it is clear that computer software is, unfortunately, up there at the top of this list.

The issue of piracy used to be much easier. Illegal physical copies were made and sold. There was a simplified, linear flow to the operations, but most importantly, the illegal copies were detectable, and capable of seizure.

Advisory Committee

One of WIPO's responses to this challenge is our Advisory Committee on Enforcement. This committee will hold its next meeting in December of this year, and it will be a joint meeting of the second session of Industrial Property Rights Committee on Enforcement (ACE/IP), and the third session of Copyright and Related Rights in Global Information Networks Committee on Management and Enforcement (ACMEC).

Piracy is a much different animal today from what it was before. With a few strokes on the keyboard of a computer connected to the Internet, millions of illegal, digital copies can be made available and downloaded in a matter of seconds. The entire potential market for an otherwise valuable (and profitable) product can be ruined through such an event.

WCT/WPPT Provisions

Seeing this potential problem, the Delegates to the 1996 WIPO Diplomatic Conference which adopted the WCT, negotiated key provisions into the WCT which have and will help to meet the challenges posed by digital technology in networked, global environments.

The WCT's right of communication of works to the public, including the right of making works available over the Internet, is being implemented into national legislation as more and more Member States join the WCT family. The most prominent case to date, the case against Napster in the United States, has clearly supported rightholders against massive, unauthorized usage of works over the Internet in violation of this provision.

The provisions on protection of technological measures is another groundbreaking tool encompassed in the WCT and the WPPT. Here is a sound basis upon which technological and legal protection can create a fusion, a protective net, serving not only rightholders' interests, but also the interests of the public, the private sector and Member States. WIPO's efforts in this area will also focus on the various Exceptions and Limitations, and Fair Uses of works, which are both essential to the widespread acceptance of the treaties and their implementation, and which, as well, are necessary to create the fair balance among the different interested circles affected by these provisions. Exceptions

and limitations can present tricky problems. Towards that end, WIPO offers the international forum at which reasonable, workable solutions to such problems can be discussed and resolved.

At WIPO, we are constantly monitoring the developments, such as those mentioned above, which parallel our efforts to promote the so-called "Internet Treaties." We are assisting Member States not only with the task of crafting the right legislation to allow ratification or accession to these treaties, but also with the more difficult tasks associated with effective implementation of the provisions of the treaties, into the national IP fabric, into the national institutions and into the national infrastructures.

WIPO, in association with the local Member States, recently organized important meetings focused on the WCT and the WPPT. From September 17 to 19, 2001, WIPO organized a meeting in Rio de Janeiro on the Internet Treaties and Digital Technology; and from October 22 to 24, WIPO organized a regional meeting in Manila on the Internet Treaties and E-Commerce. More of such meetings are under discussion.

5. Digital Rights Management (DRM)

Digital Rights Management (DRM) is an area which is evolving quite quickly, and has a large impact on many sectors, including in respect to E-commerce, and collective management of works in the digital, globally networked arena.

This issue was included in the WIPO Digital Agenda, to which I referred before, and the Advisory Committee on Management and Enforcement of Copyright and Related Rights has already discussed it at two sessions, in 1998

and in 1999. Most of the developments in this area are undertaken in the private sector, but an important government-sponsored project is also in preparation, the Japan Copyright Information System (J-CIS).

While it is generally recognized, also in Japan, that each system should be under private control, there is an important question of securing interoperability between the different systems. In this respect, WIPO has been asked by the private sector to function as an observatorium, where information can be relayed between the different players. We have taken up that challenge, and we intend to continue such informal information exchange meetings in the near future.

Another WIPO response has been the Caribbean Collective Management Initiative, in which, as a result, the island-nations of the Caribbean will be able to collectively manage their musical works for the first time, hopefully bringing remuneration to artists, songwriters and composers, publishers and recording companies. WIPO expended considerable resources, both financial and human, to help develop the critical computer software and necessary infrastructure support, which will enable that initiative to achieve success. Similar assistance has been extended to many other developing countries and countries in transition.

6. Internet Service Providers (ISP's) Liability

The potential liability of Internet Service Providers (ISP's) is another issue ripe for consideration. WIPO is aware of different approaches evolving in different countries and is engaged in an on-going review of this issue, and the challenges associated with it. Subsequent to the Workshop on Service Provider Liability which WIPO organized in December 1999, our recent Conference on

E-Commerce and Intellectual Property, held in Geneva from September 19 to 21, 2001, also focused on this issue, among many others.

7. Private International Law

Questions of private international law have assumed an increasing importance for intellectual property as markets have become global. With the advent of the Internet, these questions have become more complex, in particular for applying territorial factors, and determining with reasonable certainty which courts will have jurisdiction and which law will apply.

WIPO has already dealt with issues of private international law in various fields of its work. It organized a meeting in 1998 of a Group of Consultants on the Private International Law Aspects of the Protection of Works and Objects of Related Rights Transmitted through Global Digital Networks.

In June 1999, the WIPO Standing Committee on Trademarks, Industrial Designs and Geographical Indications (SCT) discussed a comprehensive Study Concerning the Use of Trademarks on the Internet which addressed aspects of jurisdiction, choice of law and enforcement.

In November 1999, information regarding the Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters, prepared by the Hague Conference on Private International Law, was presented to the SCT to evaluate the possible implications on trademark law.

At a consultation with non-governmental Organizations organized by the WIPO Copyright Division in October 1999, applicable law was identified as one

of the private sector's top three priorities for WIPO's ongoing work in the digital arena.

In May 2000, WIPO published a Primer on Electronic Commerce and Intellectual Property Issues (WIPO/OLOA/EC/Primer) which *inter alia* provides an overview of topical issues concerning jurisdiction, enforcement and applicable law.

WIPO has organized a WIPO Forum on Private International Law and Intellectual Property in January 2001 that provided Member States and the international intellectual property community to hear from prominent thinkers in both fields and exchange views on this topic of increasing importance.

WIPO has been following with great attention the work of the Hague Conference and participated as an observer in the Diplomatic Conference organized in June 2001.

The question of relationship between intellectual property and private international law has been also largely evoked in the WIPO International Conference on Electronic Commerce and Intellectual Property in September 2001, with the two aspects of jurisdiction and applicable law.

Another response to the uncertainty arising from the territoriality of intellectual property law is the development of alternative dispute resolution procedures. Since 1994, the World Intellectual Property Organization (WIPO) has offered arbitration and mediation services for the resolution of international commercial disputes between private parties. The Center has focused significant resources on establishing an operational and legal framework for the administration of disputes relating to the Internet and electronic commerce. For

example, today the Center is recognized as the leading dispute resolution service provider for disputes arising out of the registration and use of Internet domain names and has recently developed, jointly with the Application Provider Industry Consortium (ASPIC), a set of best practises and guideline for dispute avoidance and resolution for the ASP industry, which are tailored to meet the needs of the ASP community.

WIPO will continue to closely follow the issues of private international law that effect copyright and industrial property rights, as well as electronic commerce.

8. Future Work

At the recently completed Meeting of the Assemblies of WIPO (September 24 to October 3, 2001), the Member States of WIPO took many decisions including the adoption of the Program and Budget for the 2002-2003 Biennium. Of the decisions and activities which may be of interest to those of you gathered here today, I just mention the following:

The Assemblies concluded that there was consensus that the protection of audiovisual performances was a very important issue, and it was a matter of concern that it had not been possible to reach an agreement overcoming the differences at the Diplomatic Conference which took place in December 2000. Members States agreed to continue their contacts and discussions in order to overcome those differences, and the International Bureau will render its assistance in that regard. The issue would remain on the agenda of the next session of the General Assembly in 2002.

The Standing Committee on Copyright and Related Rights (SCCR) will convene three meetings during the Biennium. Its primary focus will be on the rights of Broadcasting Organizations and the issue of the protection of databases on its agenda. It is an important international forum, in which issues relative to digital technology and networks can, and most likely will, be raised and reviewed in the future.

Further meetings will be organized concerning implementation of the WCT and the WPPT. When those treaties come into force, WIPO will organize the first ever meeting of their Assemblies, as provided in each of the treaties which will provide fora to share the implementation information to identify any issues problems and/or to work out solutions.

The issue of licensing IP rights in the digital world was one which was raised in the Digital Agenda. Our Copyright sector will deal with this issue by organizing two or three meetings of experts in this field, and then by producing a *WIPO Guide on the Licensing of Copyright and Related Rights*.

Two other publications of note are scheduled: a *WIPO Guide to International Treaty Provisions on Copyright and Related Rights*, and a *WIPO Glossary of Terms of the Law of Copyright and Related Rights*. WIPO has already issued a Guide to the Berne Convention in 1978. In view of a series of important developments in the international copyright norm settings, it is believed that the new WIPO Guide will be of significance and use to pack the rather complicate international copyright and RRs systems based on BC, RC, WCT, WPPT, TRIPs, UCRC, etc.

III. PATENTS

1. Substantive Patent Law Harmonization

After the successful conclusion of the Patent Law Treaty (PLT) on June 1, 2000, the Standing Committee on the Law of Patents (SCP) of WIPO has started to work on substantive harmonization of patent laws, and discussed first draft provisions for the so-called draft Substantive Patent Law Treaty (SPLT) in May and early November of this year, covering six basic legal principles underlying the grant of patents, namely, the definition of prior art, novelty, inventive step (non-obviousness), industrial applicability (utility), sufficiency of disclosure and the drafting and interpretation of claims.

The draft SPLT also contains a provision on patentable subject matter. At this stage, it would allow the patentability of inventions in all fields of human activity. This is particularly important in order to ensure that inventions related to new technologies, such as software patents, are not subject to different rules than inventions in other areas. The provision also provides the basis for exclusions from patentability to be introduced into the Regulations, for example in order to exclude purely mental activities. It has to be noted, however, that WIPO member States have not yet held an in depth discussion on the issue of patentable subject matter and related exclusions.

2. Internet disclosures as prior art

In the framework of its discussions on harmonization of prior art, the SCP also discussed the issue of Internet disclosures and their incidence on patentability. After having discussed the results of a questionnaire sent by

WIPO in February of this year to its member States on their practices in respect of Internet disclosures, the SCP agreed that it would first establish general principles concerning prior art, which would also cover disclosures on the Internet, and consider the need for special provisions specific to Internet disclosures at a later stage.

3. Questionnaire concerning the Internet and enforcement of patents

Together with the questionnaire on Internet disclosures, WIPO also submitted a questionnaire concerning the Internet and enforcement of patents. Although this issue was not discussed by the SCP, this topic is highly relevant for patent owners in an environment increasingly characterized by digital technologies and networks, and may well be on the agenda of WIPO's future work. Indeed, since the contents distributable on the Internet may be protected by patents relating for example to software and methods of doing business, enforcement of these patents would be crucial for e-business. Further, questions concerning applicable law and jurisdiction may arise also in the field of patents. For example, if a patent claims a telecommunication system the elements of which are located in several countries, what kind of acts would constitute an infringement of the patent and which national law would apply? Similarly, which national law would apply if a patented product or process is offered for sale on the Internet? In this context, it should be noted that, in the field of trademarks, the WIPO Assemblies, held in September 2001, adopted a Joint Recommendation concerning the protection of trademarks and other signs that are used on the Internet.

4. "WIPO Patent Agenda"

Finally, the Assemblies of WIPO held in September 2001 have approved a new initiative to be undertaken by WIPO, which is directed at the development and shaping of the future international patent system, by reviewing the current system, identifying challenges and shortcomings, and finding solutions. This work is intended to complement and even strengthen ongoing activities including substantive harmonization of patent law, the reform of the Patent Cooperation Treaty and, of course, the challenges related to new technologies and the Internet. It is an inclusive and comprehensive attempt to cover all areas including the administration, maintenance, exploitation and enforcement.

IV. CONCLUSION