



ELECTRONIC FRONTIER FOUNDATION POSITION PAPER ON THE PROPOSED WIPO BROADCASTING TREATY JANUARY 2007

Signal Protection

At its 2006 meeting, the WIPO General Assembly gave a clear mandate to the January and June 2007 Special Sessions of the Standing Committee on Copyright and Related Rights: to agree on and finalize the objectives, specific scope, and object of protection of a signal-based approach to a Broadcasting Treaty. As currently drafted, the July 31, 2006 draft of the Treaty for the Protection of Broadcasting Organizations (WIPO Document SCCR/15/2/) is not focused on signal protection. Instead, it is premised on the creation of intellectual property rights in the recording and subsequent use of fixed transmissions.

Because the current treaty draft is not limited to signal protection, it threatens to restrict the public's access to knowledge and consumers' existing rights under national copyright law, will harm competition regulation, chill technological development, and endanger the innovation environment for communication on the Internet.

Overbroad Scope of Protection

The current treaty draft would create intellectual property rights over the recording or fixation (Article 11), and subsequent uses of recorded programming content (Articles 12-15). Creating a new layer of rights independent of, and additional to, copyright law, will allow broadcasters and cablecasters to restrict access to public domain works and uses of information that would be lawful under copyright law. This will harm all entities that rely on the public domain and the balanced set of exceptions and limitations in national copyright law to access information for legitimate purposes including consumers, educators, researchers, libraries and ICT companies.

EFF recommends that the treaty's object of protection should be the live broadcast signal, not the content it transmits. The scope of the Treaty should be limited to measures to protect against theft or intentional misappropriation of signals, up until the point of fixation.

Exceptions and Limitations

Article 17 of the draft treaty permits, but does not require, signatory countries to create exceptions and limitations to the new rights that mirror those in national copyright law for certain classes of copyrighted works (literary and artistic works, but not phonograms, film or audio visual content). The permissive nature of the exceptions and limited eligible classes of works creates an unmanageable level of uncertainty for many legitimate users because they cannot assume that exceptions and limitations equivalent to those in the copyright regime would apply to broadcasters, cablecasters and netcasters' new rights when the treaty's new rights are transposed into national law.

EFF recommends that, at a minimum, the treaty should require mandatory equivalent exceptions to those that exist under national copyright law for all classes of works, and permit creation of new exceptions appropriate to the digital network environment

Technological Protection Measures

The treaty requires legal protection for technological protection measures (TPMs) used on broadcasters' and cablecasters' transmissions over traditional distribution channels and on the Internet (Article 19). The inclusion of legally-enforced TPMs in support of the broad rights granted by the current treaty draft has two distinct impacts. First, it may restrict the public's access to knowledge by limiting or precluding access to digital content that might otherwise be in the public domain, permissively licensed under a Creative Commons licence, or otherwise accessible under national copyright regimes.

Second, it raises a separate set of issues for ICT companies in relation to the regulation of devices that can receive transmitted content. The obligation to provide legal protection for TPMs may result in technology mandate laws, which raise concerns about competition policy. While the treaty does not mandate the use of broadcaster/cablecaster TPMs generally, nor particular TPMs, in order to be effective, national implementation may require "technology mandate laws" over device design where broadcasters and/or cablecasters choose to use TPMs, in order to ensure that all devices in the national market will look for and respond to those TPMs.

Technology mandate laws harm technological innovation. They require technology companies to seek permission from broadcasters, cablecasters, and possibly netcasters, before releasing innovative new technologies to market, reversing the current innovation environment. In addition, as the experience with the currently stalled U.S. Broadcast Flag regulation has made clear, the type of technology mandate laws and compliance regulations that would be needed to implement the treaty could preclude the development and use of free and open source software and devices.¹ This is because technology mandate laws usually require manufacturers to create devices that cannot be modifiable by end users, and free and open source software cannot satisfy that requirement

Even apart from technology mandate laws, the combination of the treaty draft's broad post-fixation rights and legally-enforced TPMs raises concerns for technology developers. The treaty's TPM provision would allow broadcasters and cablecasters to use technological measures to control use *after* a signal has been lawfully received in the home and recorded. Content transmitters could use the Treaty's broad new rights and TPMs backed by technology mandate laws to control the market for technologies and devices that interoperate with their transmitted content. The ability to use a TPM on

¹ Electronic Frontier Foundation Briefing Paper on Technological Protection Measures Prepared for the WIPO Inter-Sessional Intergovernmental Meeting on the Development Agenda Proposals and Fourth Session of the Permanent Committee on Cooperation Related to Intellectual Property Development, April 2005, Section V, Part (6).

<http://www.eff.org/IP/WIPO/dev_agenda/EFF_WIPO_briefing_041205.pdf>

content to lock content reception to particular devices is well understood in many countries where cable television is viewable only on proprietary set top boxes. The draft treaty threatens to expand this practice to new types of devices that receive broadcasts, cablecasts and Internet transmissions. Thus it is likely to threaten development of future home and personal networking technologies such as digital video recorders and devices that can retransmit lawfully-acquired programming from a consumer's home to another location over the Internet. This has significant implications for competition and innovation.

Technology mandate laws also harm consumers. They reduce devices' features and increase design costs, which are passed on to consumers. They are also likely to override many rights that consumers currently enjoy under national copyright law, including timeshifting and in-home retransmission of television programming they have lawfully received.

EFF recommends that the TPM provisions in Articles 19 and 20 be excluded from the treaty.

Webcasting, Netcasting, Internet Transmissions and Intermediary Liability

At the 14th session of the SCCR, in May 2006, in response to concerns raised by many Member States about extension of the treaty to "webcasting" and various references in the treaty that would have encompassed Internet transmissions, it was agreed that references to "simulcasting" over the Internet would be removed and be the subject of a separate, later instrument.

The current draft does not include "webcasting". However, the treaty continues to give broadcasters and cablecasters control over who can make both simultaneous and deferred Internet retransmissions of broadcasts and cablecasts, and on what terms. Broadcasters and cablecasters would be given an exclusive right to:

- (a) authorize the simultaneous retransmission by another of their broadcasts and cablecasts over computer networks, including the Internet (Articles 3,5 and 9);
and
- (b) control deferred transmissions of fixed broadcasts and cablecasts over the Internet (Article 14).

Although Article 14, unlike Article 9, does not include the phrase "including over computer networks", it does include the phrase "by any means, wired or wireless", which would encompass transmissions over computer networks, including the Internet. Explanatory Comment 14.02 confirms this.

These provisions create potential liability for Internet intermediaries that transmit content across computer networks, whether it is a simultaneous or deferred transmission. As a technical matter, so-called simultaneous retransmissions of broadcasts and cablecasts over computer networks generally require transitory or ephemeral copies to be

transmitted by third party Internet intermediaries. Broadcasters and cablecasters or their authorized retransmitters could assert their new rights against innocent Internet intermediaries under Article 14, and also under Article 9 if simultaneous retransmission requires a transitory or ephemeral recording to be made and transmitted by third party intermediaries.

Articles 10, 11 and 14 create potential liability concerns, but for a different reason. The treaty would give broadcasters and cablecasters the right to control recording (or fixation) of broadcasts and cablecasts (Article 11), the right to control retransmission of those recordings after fixation (Article 14) and the right to control the “making available” to the public of fixations of those recordings (Article 10). Here again, third party intermediaries could face potential secondary liability for their unknowing participation in unauthorized reproductions or retransmissions by end-users.

Creating new rights over Internet retransmissions will have a detrimental impact on communication and the innovation environment

The Internet is a flourishing world of user-generated rich media content. The rapid deployment of broadband connection combined with relatively inexpensive content creation technology has made possible such activities as user-created audio files that can be downloaded to portable music players or “streamed” from a computer (podcasting), and websites (such as YouTube) that host millions of user-generated audiovisual works created by individuals with digital cameras who talk, dance and sing for others’ enjoyment. The immense popularity of these activities across different countries and cultures reflects the fact that they are essential manifestations of freedom of expression in the online world.

These activities have thrived without the new exclusive rights that the treaty would give broadcasters and cablecasters, and potentially, netcasters, over Internet transmissions. However, extending the treaty to the Internet could endanger the innovation environment that has made this world possible for two reasons. First, because it would add further complexity to already difficult copyright clearance regimes faced by podcasters. Second, it could imperil the development of the next generation of technologies and devices that have made this part of the Internet so successful. As above, the treaty’s new rights may lead to claims of secondary liability against Internet intermediaries and manufacturers of technologies and devices that might be used by others to infringe those rights. In addition, the treaty is likely to lead to technology mandate laws governing the design of broadcast-receiving devices, which will stifle technological innovation.

In these conditions, it is not clear that the devices and software technologies that make podcasting possible would have developed, nor that there would now be video search engines to enable users to locate material created and made available online by others on YouTube and similar services.

This is an issue of great concern to many in the Internet community. At SCCR 15 and the WIPO General Assembly in September 2006 EFF delivered a joint statement from over

200 individual podcasters and national podcasting organizations representing thousands of podcasters from across the world, expressing their concern about the impact of the treaty on the future of podcasting.²

The new exclusive rights over Internet transmissions created by this Treaty will have unpredictable effects for many years to come. The treaty's impact on future technologies is not clear. Entirely new monopoly rights over Internet transmissions should not be created on the basis of a notion of parity, but only after undertaking a fundamental analysis of the necessity for such rights and the implications of their impact for the entire Internet community, including intermediaries, the educational community and the Internet users that generate content.

EFF recommends that the Treaty not be extended to the Internet, whether by creation of a right for "webcasting" as proposed in previous treaty drafts, or "netcasting" as proposed in August 2006. EFF also recommends the removal from Articles 5,6, 9 and 14 of the current treaty draft of all references to control over simultaneous and deferred retransmissions "by any means" including "over computer networks".

Conclusion

All of these concerns, and the protection of broadcasters' legitimate interests, could be addressed by a treaty specifically focused on signal protection, following the approach taken in the 1974 Brussels' Satellite Convention. For this reason, the Electronic Frontier Foundation respectfully recommends that Member States should continue their efforts to explore a signal theft-based approach during the two 2007 Special Sessions of the SCCR.

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² See <http://www.eff.org/IP/WIPO/broadcasting_treaty/podcasting.php>