

**STATEMENT OF ELECTRONIC FRONTIER FOUNDATION TO USPTO
ROUNDTABLE ON PROPOSED WIPO BROADCASTING TREATY
SEPTEMBER 5, 2006**

EFF is a non-profit organization with more than 11,000 members, dedicated to protecting civil liberties, technological innovation and the public interest in the digital environment. We thank you for the opportunity to meet with you this afternoon to discuss our concerns about the proposed Broadcasting Treaty.

We note, for the record, that we have previously provided the Copyright Office and US Patent and Trademark Office with the detailed comments we submitted to the WIPO Standing Committee on Copyright and Related Rights in June 2004 and November 2005. We also note that EFF is one of the signatories on the Joint Statement from 35 corporations, industry bodies and public interest groups provided to the USPTO today.

EFF is concerned that the proposed treaty will endanger consumers' existing rights, restrict the public's access to knowledge, stifle technological innovation, preclude free and open source software, and limit competition in the next generation of broadcast and Internet technologies. We believe that Congressional hearings should be held to address the following concerns:

- **No justification for creation of new treaty:** First and most fundamentally, we remain unconvinced of the need for a treaty. Before creating a brand new set of exclusive rights for broadcasters, cablecasters, and netcasters, there should be a demonstrated need for such rights, and a clear understanding of how they will impact the public, educators, existing copyright holders, online communications, and new Internet technologies. Treaty proponents have not provided a clear statement of the particular problems that justify the need for the new treaty, and why they are not able to be addressed adequately under current treaties and law.

The United States has a flourishing and well-capitalized broadcasting and cablecasting sector, notwithstanding its decision not to accede to the 1961 Rome Convention for the Protection of Broadcasting Organizations. We see no necessity for the creation of new rights to stimulate economic activity in this area. We are aware that discussions have been underway on this topic for over eight years at the World Intellectual Property Organization. However, that fact alone does not justify the creation of rights that would be exceedingly novel in US. law and that are likely to harm consumers' existing rights, and stifle technology innovation.

- **Scope of the Treaty:** Although the Treaty's ostensible goal is protection against broadcast signal theft, the treaty goes far beyond that by creating broad new intellectual property rights over the recording or fixation, and subsequent uses of, recorded programming content. Creating a new layer of rights that apply on top of, and in addition to, copyright law, would allow broadcasters to restrict access to public domain works and uses of information that would be lawful under copyright law. This will directly impact all entities that rely on the balanced set of exceptions and limitations in national copyright

law and the public domain to access information for legitimate purposes, such as consumers, educators, researchers, libraries and the technology sector. Extending the treaty's intellectual property rights to Internet transmissions will exacerbate these concerns because transmitters could use legally-enforced technological protection measures to restrict access to public domain content and lawful uses of copyrighted works transmitted over the Internet.

The Internet is a flourishing world of user-generated rich media content. Podcasting, MySpace and YouTube have all thrived without these new exclusive rights. Extending the treaty to the Internet could endanger the innovation environment that has made this world possible for two reasons. First, it will add further complexity to already difficult copyright clearance regimes. Second, because the treaty would create secondary liability for Internet intermediaries and manufacturers of technologies and devices that might be used to infringe the new rights, and will require technology mandates over device design, it will stifle the development of the very technologies and devices that have made this part of the Internet so successful, from affordable portable audio players and web-syndication technologies like RSS, to video search engines that enable users to locate material created by others. Accordingly, EFF opposes the extension of the proposed treaty to Internet transmissions, including both simulcasts and the broader concept of "netcasting" proposed by the U.S. delegation to WIPO. Entirely new monopoly rights over Internet transmissions should not be created merely on the basis of a formalized notion of parity, but instead only after undertaking a more fundamental analysis of the necessity for such rights and the implications for the entire Internet community, including the educational community and users that generate content.

- **Exceptions and Limitations:** The treaty permits signatory countries to create exceptions and limitations to the new rights that mirror those in national copyright law. That 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. EFF believes that at a minimum, the treaty should require mandatory equivalent exceptions and permit creation of new exceptions appropriate to the digital network environment.

Could treaty proponents please state for the record whether they would support an equivalent set of exceptions and limitations to the new rights as currently apply under U.S. copyright law in any domestic implementation legislation?

- **Technological Protection Measures:** The treaty requires legal protection for technological protection measures used by broadcasters, cablecasters and under the U.S. delegation's proposal, netcasters' Internet transmissions. This will require technology mandate laws like the FCC Broadcast Flag regulation over a broad range of commonplace devices including radios, televisions, personal video recorders, set top boxes and software players.

TPM mandates are likely to harm both consumers and the technology industry. They increase design costs, which are passed on to consumers, and reduce the feature set available to consumers. They are also likely to override many rights that consumers

currently enjoy under American Copyright law, such as timeshifting and in-home retransmission of television programming they have lawfully received.

Technology innovation would also suffer. This would result in a radical redrawing of the U.S. innovation environment, by requiring technology companies to seek permission from broadcasters, cablecasters and netcasters, before releasing innovative new technologies to market. In addition, the technology mandates that would be needed to implement the treaty are also likely to preclude free and open source software technologies.

The new broadcaster Technological Protection Measures have little to do with signal protection. U.S. law already protects against unlawful reception of cable and satellite television services in 47 USC 605 and 18 USC 2511-20. There is a key distinction between these existing unauthorized access regimes and the new concept of Broadcaster Technological Protection Measures introduced by this Treaty. Unlike the existing conditional access regime, Broadcaster Technological Measures would allow broadcasters, cablecasters and netcasters to use technological measures to control use *after* a signal has been lawfully received in the home and recorded.

The combination of Technological Protection Measures with post-fixation rights is directed at control of the program content carried by the signal, and not signal theft. It is also about control of the devices on which consumers can watch broadcasts, cablecasts and netcasts that they have lawfully acquired. Content transmitters could use the Treaty's broad new rights and TPMs backed by technology mandates to control the market for technologies and devices that interoperate with their transmitted content. This has significant implications for competition and innovation.

Could the USPTO or Copyright Office please state whether it or they have undertaken any analysis of the changes that the treaty would require to U.S. law, and the potential anti-competitive implications of the technological protection measures in the treaty. Could they please state for the record whether they would support an express exception in the treaty language to preserve the U.S. government's ability to regulate potential anti-competitive implications of the broad technology mandate that would be required to implement the treaty in U.S. law.

- **Inadequate Public Consultation:** Finally, EFF wishes to reiterate our concern about the inadequate level of public consultation by the USPTO and Copyright Office on the proposed treaty. While we appreciate the opportunity to comment today, we note that roundtable participation was limited to 40 persons and allocated merely two hours. We remain troubled by the fact that no analysis appears to have been undertaken of the significant changes that the proposed Treaty would entail for U.S. law, the public domain, consumers' rights and the technology sector. Given the significant policy issues raised by the treaty, we strongly support the holding of Congressional hearings to hear from the full range of constituencies that will be impacted by this treaty.

Thank you for your consideration.