



**ELECTRONIC FRONTIER FOUNDATION BRIEFING PAPER ON THE PROPOSED
WIPO BROADCASTING TREATY
SECOND SPECIAL SESSION OF SCCR, 18-22 JUNE 2007**

The Non-Paper Is Not Limited To 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 SCCR Chair’s second “non-paper” dated April 20, 2007 does not meet that objective because it is not focused on signal protection. Instead, it would create intellectual property rights in the simultaneous (unfixed) transmission, and delayed transmission of fixed transmissions of content “by any means”, including over the Internet.

Because the Chair’s non-paper 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, stifle technological development, and endanger the environment for Internet innovation.

Overbroad Scope of Protection

The Chair’s non-paper requires WIPO Member States to grant broadcasters and cablecasters two types of legal protection.

First, the exclusive rights to authorize both simultaneous unfixed retransmissions of their broadcast and cablecast content, and transmissions of fixed broadcast and cablecast content, “by any means”, including over computer networks such as the Internet (Article 7).

When read together Articles 2, 3 and 7 make it clear that the non-paper grants broadcasters and cablecasters the exclusive right to authorize the terms on which a third party can make simultaneous retransmissions and deferred transmissions of fixed content over computer networks such as the Internet. Article 3(4) contain a set of exclusions to these rights, No rights are granted to (a) retransmitters in respect of “mere retransmissions” (meaning unfixed simultaneous retransmissions), (b) to persons in respect of transmissions of “on demand” content, and (c) to persons in respect of transmissions over computer networks.

Although Article 7 no longer grants an express right to control fixations, as the non-paper’s explanatory notes made clear, the exclusive right to authorize deferred transmissions encompasses fixation. Hence broadcasters and cablecasters will effectively have control over temporary and permanent fixations and also reproductions of fixations of their transmissions, as part of the right to control deferred (fixed) transmissions of their content. As the non-paper also makes clear, these are minimum rights and signatory countries can elect to protect a greater set of rights for their national broadcasters and cablecasters, and for foreign broadcasters and cablecasters under Article 6 by using the principles of national treatment and reciprocity.

Second, the non-paper requires Contracting Parties to provide legal protection to broadcasters’ and cablecasters’ “pre-broadcast signals” (Article 8), which is not defined.

From the policy perspective, the rights and legal protections granted by the non-paper create concerns both for the public interest and innovation. 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, permissively licensed works (such as Creative Commons-licensed copyrighted 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.

Article 7 will also be detrimental for innovation. It will create new liability risks for telecommunications intermediaries, software developers and manufacturers of innovative and currently lawful devices such as the SlingBox (which simultaneously transmits a consumer's lawfully acquired television programming) and TiVo digital video recorders (which makes post reception fixations of lawfully received content).

EFF recommends that the treaty's object of protection should be the live broadcast signal, not the content it transmits, nor the "broadcast" that results from it. 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. EFF also recommends that Member States should not support Alternative K in Article 6 concerning national treatment.

Technological Protection Measures

Article 9 includes a newly-expanded provision on Technological Protection Measures (TPMs). It now fuses two conceptually distinct notions – first, regimes intended to prevent unauthorized access by those who have not paid to receive an encrypted television service (Conditional Access regimes), and second, technological protection measures that are enforced through devices and used to restrict content use after its lawful reception in the home. The inclusion of legally enforced technological protection measures in Article 9 raises serious concerns for the public interest and innovation policy.

- **Broadcasters do not need TPMs to protect their signals**

Many countries' laws already ban the manufacture, importation and distribution of decoders and other equipment that permit unauthorized access to encrypted cable and satellite transmissions. Such Conditional Access regimes protect broadcast and cable *signals*. Technological Protection Measures are different because they apply to programming after it has been lawfully received. Copyright owners in the content of any broadcast can already use TPMs to protect their *content* under the WIPO Copyright Treaty and Performances and Phonograms Treaty.

- **Broadcaster TPMs will harm consumers, students, researchers and libraries**

As the experience with legally enforced TPMs in the copyright regime has made clear, legally-enforced TPMs on fixed transmissions are likely to override national exceptions and limitations that would otherwise permit consumers, libraries and students to make non-infringing uses of transmitted works and restrict or block access to public domain works. This is particularly true of Article 9, which requires no linkage between the ban on decryption or circumvention of a TPM, and infringement of broadcaster and cablecaster rights.

- **Broadcaster TPMs are harmful for innovation**

Implementing Article 9 is likely to require technology mandate laws like the failed U.S. Broadcast Flag regulation that harm consumers and innovation. This is because Article 9 requires legal protection not only for encrypted content, but also for "technological protection measures having the same effect as encryption". This would cover TPMs other than encryption, such as "broadcast flags" that signal how transmitted content can be used.

Broadcaster TPMs are enforced through broadcast-receiving devices. While Article 9 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. These laws direct manufacturers to design broadcast-receiving devices to look for and respond to those TPMs, such as "broadcast flags". They also ban any devices that do not do so from the marketplace.

Technology mandate laws harm consumers by increasing the cost of device design, which is passed on to consumers, and by reducing the range of permissible features. Technology mandate laws also harm innovation. They require technology companies to seek permission from broadcasters, cablecasters before releasing innovative new technologies to market, reversing the current innovation environment. In addition, as the experience with the 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.¹

- **Broadcaster TPMs raise competition policy concerns**

The combination of TPMs with the proposed retransmission rights will also harm competition by allowing broadcasters and cablecasters to use TPMs to control the market for transmission receiving devices such as digital video recorders and networked in-home entertainment devices. This will be detrimental for innovation and competition policy.

The explanatory notes in the Chair's non-paper state (in relation to Article 7) that "*as the protection against retransmission and deferred transmission is confined to transmissions to the public only, the protection of broadcasting organizations would in no case interfere in the activities of the recipients in the private sphere, eg. In the use of broadcasts in the home or personal network environment.*"

Unfortunately that fails to take account of the impact of Article 9. Broadcasters and cablecasters could use TPMs or encryption, together with their exclusive right under Article 7 to "authorize" simultaneous and fixed transmissions of their content, to control the types of devices that can receive their transmissions, including transmissions received over the Internet, and ban any other receiving devices that they do not specifically authorize.

The ability to use a TPM or encryption to lock content reception to particular devices is well understood in many countries where cable television is viewable only on proprietary set top boxes provided by the cable content provider. Including TPMs in the treaty would expand this practice to new types of devices that receive broadcasts, cablecasts and Internet transmissions. Thus it is likely to threaten existing technologies and the future development of home and personal networking technologies such as mobile phones, TiVos and other digital video recorders and devices that can retransmit lawfully-acquired programming from a consumer's home to another location over the Internet such as the Slingbox. This will also preclude consumer activity that is currently lawful under WIPO Member States' national copyright law, such as recording and retransmission within the home of content that a consumer has paid for.

Contrary to the explanatory notes in the Chair's non-paper, the inclusion of the words "to the public" in Article 7 would not stop the treaty from encroaching upon consumers private uses

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>

in their homes, nor innovation in the personal networking device market. This can only be done by removing Article 9 or any equivalent provision from the treaty.

- **Article 9 is overbroad**

Article 9 contains an overbroad device ban. It requires no nexus between decryption and infringement of broadcaster or cablecaster rights. It would prohibit the making available of a device that could decrypt or circumvent a TPM for *any* reason, including making an otherwise lawful use, such as a fair use home recording of television programming that a consumer had paid for. Paragraph (i) bans personal computers and other common devices capable of decryption but which have many lawful uses. This could render meaningless any limitations and exceptions created under Article 10 because exception beneficiaries would have no practical ability to circumvent to make permitted uses.

Paragraph (ii) contains no knowledge requirement and creates a broader ban than the equivalent copyright regime RMI provisions. It appears to ban the common practice of transcoding content lawfully received in one format into another format that does not have the identical metadata.

EFF recommends that the treaty not include any TPM provision (whether Article 9 of the non-paper or Article 19 of SCCR/15/2).

Exceptions and Limitations

The broad scope of the proposed retransmission rights underlines the need for commensurate exceptions and limitations to protect the public interest. Article 10 of the Chair's non-paper 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) and related rights. Unlike the Chair's first non-paper from March 2007 and the existing 1961 Rome Convention, the Chair's non-paper does not include a list of permitted exempt uses for educational and news reporting purposes. It permits signatory countries to create additional exceptions but makes them subject to the so-called "three step test" derived from the Berne Convention and the Agreement on Trade Related Aspects of Intellectual Property. In this regard it is more restrictive than the TRIPS Agreement. While TRIPS allows signatories to recognize certain non-exclusive broadcasting rights, it does not condition creation of exceptions to those non-exclusive rights on satisfaction of the three-step test.

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' and cablecasters' new rights when the treaty is transposed into national law.

EFF recommends that at a minimum, any treaty should include mandatory exceptions that are at least equivalent in scope to those in the Rome Convention and TRIPs, including a non-exhaustive enumerated list of exceptions necessary to facilitate freedom of expression, and the ability to create new exceptions appropriate to the digital network environment, as reflected in the Agreed Statement on Article 10 of the WIPO Copyright Treaty.

Webcasting, 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 the Internet, WIPO Member States agreed that references to "webcasting" and "simulcasting" over the Internet would be removed and be the subject of a separate, later instrument. The 2006 General Assembly's decision confirmed that and called for

the scope of the treaty to be confined to the protection of broadcasting and cablecasting organizations in the “traditional sense”.

The Chair’s non-paper does not include “webcasting”. However it clearly covers Internet retransmissions of broadcast and cablecast content. Read together, Articles 3 and 7 grant broadcasters and cablecasters exclusive rights over who can make authorized simultaneous and deferred transmissions over the Internet. In other words, the non-paper clearly extends to Internet retransmissions, and would grant broadcasters and cablecasters the exclusive right to control simulcasting.

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 7 if simultaneous retransmission requires a transitory or ephemeral recording to be made and transmitted by third party intermediaries.

Although the non-paper no longer explicitly grants a right to control recording (or fixation) of broadcasts and cablecasts, Article 7 implicitly grants broadcasters and cablecasters that right because it gives them exclusive rights over the retransmission of fixed broadcasts and cablecasts, thus allowing them to take action against use of any unauthorized fixations of transmitted content. 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), videobloggers that make available and provide commentary on small pieces of recorded media content, 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 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 and video bloggers. Second, it could imperil the development of the next generation of technologies and devices that have made this part of the Internet so successful. 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 and videoblogging 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.

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 without 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 by removing from Articles 2 and 7 of the current non-paper all references to control over simultaneous and deferred retransmissions "by any means" including "over computer networks".

Unauthorized Content on YouTube is Dealt with Under Existing Copyright Law

In their interventions this week several broadcaster NGOs referred to the presence of pirated content on YouTube and similar websites as a justification for granting broadcasters and cablecasters exclusive rights. This is misleading and inaccurate. Existing U.S. copyright law already deals with this situation. Under the "notice and takedown" procedure in U.S. copyright law, YouTube removes allegedly copyright-infringing material on a daily basis, upon receipt of a notice from the owner of the copyright in the content of recorded transmissions. The presence of *copyright-infringing* material on such sites provides no justification for granting *broadcasters and cablecasters* new exclusive rights.

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 carefully consider the impact of an exclusive rights-based treaty on consumers, citizen broadcasting on the Internet, competition and innovation, and not just protection of broadcasters' and cablecasters' investments, in discussions this week, and reject any treaty based on the creation of exclusive rights for broadcasters and cablecasters.

For further information, please contact:

Gwen Hinze
International Affairs Director
Electronic Frontier Foundation
Email: gwen@eff.org