



Electronic Frontier Foundation

Defending Freedom in the Digital World

STATEMENT OF THE ELECTRONIC FRONTIER FOUNDATION ON TECHNOLOGICAL PROTECTION MEASURES IN THE PROPOSED BROADCASTING TREATY AND W.I.P.O. DEVELOPMENT AGENDA

STANDING COMMITTEE ON COPYRIGHT AND RELATED RIGHTS, TWELFTH SESSION NOVEMBER 17-19, 2004

As the Standing Committee on Copyright and Related Rights convenes for the first time since the October 4, 2004, adoption of the Proposal for the Establishment of a Development Agenda for WIPO (document WO/GA/31/11, (DAP)), the Electronic Frontier Foundation (EFF) recommends that the Chairman remove Articles 16 and 17 of the proposed Broadcasting Treaty (SCCR/12/2) due to the requirement that the impact on developing nations of Technological Protection Measures be better understood.

As the Development Agenda Proposal (page 3) notes, the ongoing controversy surrounding the use of TPMs in the digital environment is of great concern to developing countries. Rather than expanding the reach of TPM regimes in new arenas with unforeseeable and potentially damaging results for developing countries, EFF respectfully recommends that the SCCR should undertake a systematic study of the likely impact of TPM regimes on developing nations and provide a report to the WIPO General Assembly July 2005 meeting for its discussion of the Development Agenda Proposal.

EFF believes that the broadcaster technological measures in Article 16 of the proposed Treaty are not required for the protection of broadcasters' signals and should not be incorporated in the proposed Treaty for five reasons:

1. They open the door to an unprecedented range of technology mandates which will constrain technology development.
2. They are ineffective to achieve their purpose but impose collateral damage on competition, technological innovation and consumers' traditional rights.
3. There is no evidence that they are necessary.
4. They harm the exchange of information in the public domain.
5. Alternative V poses additional threats to consumers, scientific research and technological innovation.

EFF has previously provided the Committee with detailed comments on these issues (http://www.eff.org/IP/WIPO/20040607_wipo_tpms.pdf). EFF appreciates the opportunity to provide these further comments to the Committee on the implications of TPM regimes for the development dimensions of WIPO's work.

Overbroad legal protection for rightsholders' TPMs has imposed significant economic and social costs, as illustrated in the attached report ("Unintended Consequences: Five Years Under the DMCA"). Based on the United States' experience with implementation of the WIPO Copyright Treaty TPM provisions, EFF is concerned that a broadcaster TPM regime is likely to pose the following dangers to developing nations:

1. TPM regimes may eliminate public interest flexibilities and override national policy goals.

As the Development Agenda Proposal notes, intellectual property protection is a policy instrument for achieving the transfer and dissemination of technology, knowledge growth and material progress, and not an end in itself. The appropriate level of intellectual property protection must be assessed on a country by country basis for its impact on national development goals [DAP, page 2]. TPM regimes, however, do not allow for national norm-setting. Instead, as the United States' experience demonstrates, legally protected TPMs are used to override exceptions and limitations in national copyright law because they allow rightsholders to set the boundaries for access and use of technologically protected works. In effect, overbroad TPM regimes may allow foreign rightsholders' preferences about the use of a work to trump national sovereignty and national goals for social and economic development.

The TPM provisions in the proposed Broadcasting Treaty are similarly likely to undermine Member States' ability to domestically regulate broadcasting. Accordingly, they should be removed from the proposed Treaty.

2. TPM regimes are likely to impair access to information.

TPM regimes are likely to increase the cost of accessing information. Increasingly, information is only available in technologically protected form. That means that fair dealing and personal copying exceptions that previously guaranteed access are often technologically precluded. In addition, TPMs have been used to curtail first sale rights and bypass national exhaustion regimes. This precludes the development of libraries of digital books and necessary resources for distance education and scientific research. For example, unlike an analogue book, the TPM permissions on a purchased e-book can prevent its sale, or loan, or restrict how many times it may be opened. As the use of TPMs become more widespread for electronic books and scientific journals, the potential for TPM regimes to restrict developing nations' access to essential information for education and scientific research should be closely examined.

Articles 16 and 17 of the proposed Broadcasting Treaty are of particular concern because they would give broadcasters the ability to restrict access to uncopyrightable information and material in the public domain, for the reasons set out in EFF's previous comments.

3. TPM regimes are likely to inhibit the transfer of technology and stifle technological innovation.

Technology transfer relies on direct licensing, and on the freedom to understand technologies and to manufacture locally appropriate add-ons, replacements and alternatives. This process relies on the lawfulness of investigation and reverse-engineering – of "lifting up the bonnet and looking at the engine."

TPM regimes inhibit the indirect transfer of technology in two ways. First, legally protected TPMs hamper investigation, because researchers are unwilling to expose themselves to liability for seeking to understand technologies that involve TPMs. In addition, TPM regimes harm knowledge transfer by imposing punitive civil and criminal sanctions on those who document the workings of technologies for the purposes of creating interoperable systems. TPM regimes treat these engineers and entrepreneurs as infringers.

In countries that do not have the necessary infrastructure and institutional capacity to absorb new technologies, the use of TPM regimes therefore precludes the establishment of such capacity. As the DAP notes, even in countries that have a high degree of absorptive technological capacity "higher standards of intellectual property protection have failed to foster the transfer of technology through foreign direct investment and licensing." [DAP page 3]. TPM regimes reinforce this tendency. In the United States, incumbents have used TPMs to block their competitors from creating and selling innovative new products that interoperate with the incumbents' copyrighted works. For instance, TPMs have been used in bids to ban competitors from selling refilled printer toner cartridges, universal garage door openers, and reverse-engineered computer software emulators, and to ban the creation of an open source game server.

In the context of the proposed Broadcasting Treaty, a TPM regime for broadcasts can be used to prevent a country's domestic technology sector from acquiring the technical know-how to create interoperable products and technologies that best serve its economic and social development goals and its citizens' needs.

4. TPM regimes may be used to restrict legitimate market competition and entrench the use of monopoly-priced proprietary products and technology.

"Particular attention should be paid to the need to ensure that enforcement procedures are fair and equitable and do not lend themselves to abusive practices by right holders that may unduly restrain legitimate competition." [DAP, page 4]

Aside from their potential harm to technology transfer, TPM regimes can be used to facilitate anti-competitive ends. First, they can be used to enforce the use of proprietary products or technology at monopoly prices. U.S copyright owners have used TPMs to extend their statutory rights to control technology that interoperates with their copyrighted works. For instance, Lexmark, the second largest printer distributor in the United States, has used a legally-sanctioned TPM to try to ban the sale of recycled Lexmark printer cartridges, which were being sold to consumers at lower prices than new cartridges and Lexmark's own "authorized" remanufactured printer cartridges. TPM regimes can also be used to preclude the development and use of "unauthorized" open source products.

Second, they can be used to obtain rights beyond those granted by national and international legal regimes. Legally protected TPMs afford privileges to rights-holders that no law-maker has granted. Rightsholders have used legally sanctioned TPMs to effect geographical market segmentation through region-coding technologies on DVDs and video-games. This is not a right protected under copyright law, and it is inconsistent with many nations' laws on parallel importation. While not a legal right, this does reflect the wish of rights-holders to preserve a business model premised on inefficiencies in the old technologies that led to separated regional markets. In effect, however, region-coding TPMs have restricted the public's ability to enjoy their lawfully acquired property anywhere in the world. Rightsholders' use of TPM regimes to create market segmentation by which they may discriminate as to price and availability of products and technologies is rightfully of concern to developing countries.

5. TPM regimes do not provide the best mechanism for protecting intellectual property, nor for fostering creation and technology transfer.

"[A] new subsidiary body within WIPO could be established to look at what measures within the IP system could be undertaken to ensure an effective transfer of technology to developing countries." [DAP, page 3]

In practice, TPMs have proven to be a failure in protecting rightsholders' copyrights, as demonstrated by their ineffectiveness in keeping unauthorized copies of digital music and motion pictures from being shared over the Internet. At the same time, TPM regimes have imposed significant collateral costs on the public interest that have outweighed any benefit to rightsholders in countries which have implemented the WIPO Copyright Treaty and Performances and Phonograms Treaty TPM obligations. For instance, in the United States, the TPM regime in the Digital Millennium Copyright Act has been challenged in court on the grounds that it overrides consumers' rights under existing statutory exceptions and limitations to copyright, restricts freedom of expression, chills scientific research, and stifles technological innovation.

The TPM provisions in the proposed Broadcasting Treaty would create an even broader spectrum of TPM protection than currently exists under the WCT and WPPT, with attendant costs to the public interest. In the absence of clear evidence that TPM regimes are effective tools to protect rightsholders' intellectual property rights, it is premature and unwise to adopt a further layer of TPM protection for broadcasts, cable transmissions and webcasts.

For these reasons, EFF respectfully requests that the SCCR:

1. Remove the TPM provisions in the proposed Broadcasting Treaty from consideration; and
2. Undertake a comprehensive study of the likely impact of TPM regimes on the development dimensions of WIPO's agenda, and prepare a report for discussion at the meeting of the General Assembly in July 2005. To facilitate Member States' consideration of the issues, EFF recommends that the study should:
 - (a) Build on the work in WIPO documents SCCR/9/6 and SCCR/10/2 by providing an assessment of whether existing TPM regimes have been successful in providing protection for rightsholders' intellectual property and their impact on innovation, technology transfer, and the public interest in those countries which have implemented the WCT and WPPT; and
 - (b) Evaluate the likely impact of adopting TPM regimes on developing countries.

EFF would be pleased to provide any further information that would assist the SCCR and the Delegates to evaluate the likely implications of the TPM regime in the proposed Broadcasting Treaty.

Gwen Hinze
Staff Attorney
Electronic Frontier Foundation
Tel. +(1)(415) 436-9333x110
Email: gwen@eff.org

Cory Doctorow
European Affairs Coordinator
Electronic Frontier Foundation
Tel. + (44) 798 607 2869
Email: cory@eff.org