

## **EFF STATEMENT ON THE PROPOSED WIPO BROADCASTING TREATY**

### **WIPO AND GOVERNMENT OF NORWAY INFORMAL CONSULTATION WITH NGOS, BRUSSELS, SEPTEMBER 13, 2005**

Mr. Chair, the Honorable Representative from the Government of Norway, and WIPO Member States, thank you for the invitation and opportunity to present my organization's views to this important meeting.

The Electronic Frontier Foundation is an international civil society organization, with over 9500 members worldwide, dedicated to protecting civil liberties, technological innovation, and the public interest in the digital environment.

EFF has previously submitted detailed comments on its concerns with the technological protection measures provisions in Articles 16 and 17 of the proposed Treaty to the Eleventh Session of the SCCR in June 2004, and a letter from 20 technology companies opposing the proposed webcasting provision at the Twelfth Session of the SCCR. Copies of those comments and the webcasting letter are available on the papers table and I would be pleased to provide them electronically to any interested Member States' governments.

Today I wish to make three points on two aspects of the draft Treaty.

#### **(1) The Technological Protection Measure (TPM) Provisions in Articles 16 and 17 are likely to cause significant harm to innovation, competition, freedom of expression and the existing personal use rights of Member States' citizens.**

- (a) Broadcaster TPMs are not likely to be effective for the intended purpose, but are certain to cause collateral harm to consumers. In those countries which have implemented these obligations under Article 11 of the WIPO Copyright Treaty (WCT) and Article 18 of the WIPO Performances and Phonograms Treaty (WPPT), these measures have not been successful at stopping or even slowing the unauthorized reproduction and distribution of works online – for instance, every major motion picture released on DVD is currently circulating on peer to peer networks despite the fact that DVDs have only ever been released with technological measures that are backed by law in Europe, the United States, Australia and Japan. There is no basis for thinking that broadcaster TPMs will be any more effective. At the same time, there is now much evidence that copyright owner TPM laws in the United States and Europe have curtailed consumers' traditional personal and fair use rights under national law, chilled freedom of expression and scientific research, impaired competition, and stifled technological innovation.
- (b) These provisions will also be bad for innovation and competition because they require Member States to create technology mandates over the design of televisions, radios, and if webcasting is included, personal computers. Contrary to one of this morning's presentations, there will be little flexibility left to Member

States in how they implement these provisions. Broadcaster technological measures, such as the failed U.S. Broadcast Flag, rely on the signal-receiving device acting in a particular way. In order to protect broadcasters' technological measures, countries must pass laws that ban all devices that do not look for and respond to the particular type of measure. In March 2005, a representative of the North American Broadcasters Association announced that the European Digital Video Broadcasting standards-specifying body hoped to use the technological protection measure provisions in this treaty to obtain national technology mandates over digital television technology in all DVB member states. So this is a very real concern for consumers. As the experience in the United States demonstrates, these mandates over the design of devices that can receive broadcasts, cablecasts and webcasts are likely to stifle technological innovation, preclude the use of free and open source software players, and impair competition.

- (c) Rather than adopting a further layer of technological protection measure laws in broadcasts, over and above those already available to copyright owners under the WCT and the WPPT merely out of a sense of parity between different classes of rightsholders, we respectfully request that WIPO Member States examine whether there is a sound policy basis for creating such rights in the first place. Before Member States are asked to take on these *new* obligations, EFF reiterates its recommendation made in the November 2004 SCCR meeting, that WIPO should conduct a study on the likely impacts of the new treaty on all stakeholders in the process, and in particular, the impact of technological protection measures for broadcasters, cablecasters and webcasters. Accordingly, EFF supports Alternative NN in Article 16 of the Chairman's draft text.

## **(2) Extension to Webcasters**

The proposal to create exclusive rights for webcasters raises significant concerns for citizens' access to knowledge and for innovation on the Internet. At the same time, no economic justification has been given for the creation of new monopoly rights, I wish to make three points here.

- (a) These provisions are likely to stifle technological innovation because they require technology companies to negotiate with two sets of rightsholders before they can create technologies that interoperate with web content.
- (b) Creating exclusive rights for webcasters, combined with legal sanctions for webcaster technological protection measures, is likely to restrict the public's access to information. While the Internet is already subject to copyright owner technological protection measures under the WCT and WPPT, While the Internet is already subject to copyright owner TPMs under the WCT and WPPT, the likely impact of a webcaster TPM regime is far broader because as currently drafted, the proposed treaty would provide webcasters, with the right to restrict access to transmissions of works which may not be copyrighted or

are in the public domain.

- (c) Finally, no economic justification has been demonstrated for the creation of new monopoly rights for webcasters. The proliferation of webcasting companies over the last five years indicates that there is more than adequate capitalization in the market and no further need for economic stimulation. The economic rationale for protecting traditional broadcasting – namely to recoup the high costs of investment in equipment - simply does not apply to webcasting. To the contrary, creating a new exclusive rights regime for webcasters actually advantages incumbents and precludes the establishment of new players. Moreover, given the immaturity of the Internet media market and the constantly evolving nature of media transmission, it is premature to shape the nascent market by the creation of new monopoly rights in technologies such as “real-time streaming” where those technologies may be obsolete in several years’ time.

There is no consensus amongst American web technology companies that exclusive rights for webcasters is beneficial. The webcasting proposal has been expressly rejected by 20 web technology companies who presented an open letter to the Twelfth Session of the SCCR. Amongst others, the letter was signed by Mark Cuban, the operator of the largest digital HDTV network in the world (HDNet), owner of a major league sports team whose matches are webcast (Dallas Mavericks), and owner of half a billion dollars' worth of digital content.

While there is clearly much momentum to move the proposed treaty into an early 2006 Diplomatic Conference, these fundamental issues require further careful consideration by WIPO Member States.

Thank you for your consideration.

Gwen Hinze  
International Affairs Director