



ELECTRONIC FRONTIER FOUNDATION WRITTEN STATEMENT TO THE 18th SESSION OF WIPO SCCR, May 25-29, 2009

Mr. Chair and Member States, thank you for the opportunity to present our organization's written comments for your consideration. The Electronic Frontier Foundation (EFF) is an international civil society non-governmental organization with more than 13,000 members in 57 countries, which is dedicated to the protection of citizens' civil rights, and the creation of balanced intellectual property laws that enable access to knowledge and foster technology innovation. We wish to comment on two matters.

I. Item 7 – Protection of Broadcasting Organizations

EFF is a signatory to the Joint Statement of Certain Civil Society, Private Sector and Rightsholders' Representatives opposing the draft Broadcasting treaty. EFF has analyzed the treaty text in previous briefing papers for SCCR delegates¹. In light of the discussion in May, we wish to highlight several concerns.

1. The Treaty is not limited to Signal Protection

The draft treaty text in SCCR/15/2 would give broadcasters and cablecasters intellectual property rights over the use of transmissions *after* fixation of signals, rather than providing measures against intentional theft of broadcasters' signals. SCCR/15/2 therefore does not meet the 2006 WIPO General Assembly's mandate that the treaty should take a "signal-based approach". Protection of signals does not require the creation of intellectual property rights. So long as it is not limited to signal protection, the treaty threatens the public's access to knowledge and consumers' existing rights under national copyright law, and communication and future innovation on the Internet.

2. Restricting Currently Lawful Consumer Activity and Access to Knowledge

Consumers can currently timeshift and retransmit lawfully acquired television programming within their home environment under national copyright law. The treaty threatens these rights. Creating a layer of rights that are independent of copyright law allows broadcasters and cablecasters to restrict personal uses within the home that would be lawful under copyright law. In addition, legally-enforced broadcaster technological protection measures (TPMs) are likely to override national copyright exceptions and limitations and restrict access to permissively licensed material and public domain works. This will harm consumers, educators, researchers, libraries, podcasters and ICT companies, all of whom need to access information for legitimate purposes.

¹ See http://www.eff.org/files/filenode/broadcasting_treaty/EFF_position_paper_jan_2007.pdf (on SCCR/15/2); http://www.eff.org/files/filenode/broadcasting_treaty/EFF_wipo_briefing_paper_062007.pdf (Non-paper of April 2007); Briefing Paper on TPMs and Technology Mandate Laws: http://www.eff.org/files/filenode/broadcasting_treaty/TPMs-and-Technology-Mandates.pdf.

Commensurate exceptions and limitations are needed to protect currently lawful activity and the public interest. Article 17 permits, but does not require, signatory countries to create exceptions to the new rights that mirror those in national copyright law for certain classes of copyrighted works. Any treaty should include mandatory exceptions that are equivalent in scope to those in the Rome Convention and TRIPs Agreement, including a non-exhaustive enumerated list of exceptions necessary to facilitate freedom of expression, and the ability to create appropriate new exceptions. While the TRIPs Agreement permits signatories to recognize non-exclusive broadcasting rights, unlike the treaty, it does not condition creation of exceptions to those rights on satisfaction of the three-step text. There is no justification for limiting Member States' powers in relation to the treaty's new rights.

3. Detrimental Impact on Internet Communication and Innovation

Although the treaty does not give rights to webcasters, it extends to Internet retransmissions. Extending the treaty to the Internet is likely to harm user-generated content and endanger future Internet innovation for several reasons. First, it would add complexity to already difficult copyright clearance regimes. Second, the new transmission rights may lead to claims of secondary liability against Internet intermediaries who play a vital role in transmitting information, and manufacturers of technologies that might be used by others to infringe those rights.

The proliferation of user generated content on websites such as YouTube 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. Granting traditional broadcasters and cablecasters broad rights over Internet retransmissions is likely to harm new forms of citizen broadcasting on the Internet, such as podcasting, while advantaging incumbent broadcasters and cablecasters, at a time when it is not clear what the future of broadcasting will be. This is of great concern to the Internet community. At the Second Special SCCR Session in June 2007 EFF delivered an open letter from over 1500 podcasters from across the world, expressing concern about the impact of the treaty on the future of podcasting.

4. Harm to Competition and Innovation

The treaty is likely to harm competition and innovation in home entertainment technology by allowing broadcasters and cablecasters to control the market for transmission receiving devices.

Article 19 would require legal protection for TPMs on broadcasters' and cablecasters' transmissions over traditional distribution channels and on the Internet. Broadcaster TPMs are enforced through broadcast-receiving devices. 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 where TPMs are used. These laws require manufacturers to design devices to look for and

respond to particular TPMs and ban devices that do not from the marketplace. Granting exclusive rights over transmissions of fixed broadcasts with legally-enforced TPMs allows broadcasters and cablecasters to use a particular TPM to control the market for transmission receiving devices such as digital video recorders. The ability to use a TPM to lock content reception to particular devices is well understood in countries where cable television is viewable only on proprietary set top boxes. The treaty would expand this practice to other devices that receive broadcasts, cablecasts and Internet transmissions. This threatens existing technologies and the development of future home networking devices.

5. Absence of Empirical Evidence to Justify a Rights-based Treaty

To the extent that broadcasters are seeking a treaty in order to remove unauthorized television content on the Internet, we note that this can already be done using existing national copyright laws. As demonstrated by the daily requests of television networks to remove unauthorized television content from video hosting websites like YouTube, there is no need for a new treaty to deal with that.

We respectfully urge Member States to consider the impact of a rights-based treaty on consumers, citizen broadcasting on the Internet, and competition and innovation, and not just protection of broadcasters' and cablecasters' investments, in your deliberations.

II. Item 8 - Future Work of the Committee

We would like to suggest two additional work items for the Committee's agenda:

First, orphan and out of print works. The SCCR could commission a study comparing the various governmental and non-governmental approaches being considered in the U.S.A., the European Community, and Canada for access to and use of orphan works and out of print in-copyright works.

Second, Open Access licensing. As a complement to its future work on copyright exceptions and limitations for education, the SCCR could consider the benefits of open access licensing for cross-border digital education and potential obstacles arising from territorial copyright regimes and the absence of harmonized national copyright exceptions and limitations.

Thank you for your consideration.

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