



**EFF Statement to U.S. Delegation to WIPO on Proposed Broadcasting Treaty
Meeting with civil society representatives
February 8, 2006, Washington D.C.**

EFF is a non-profit organization with more than 10,000 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 morning to discuss our concerns. However, we remain troubled by the fact that there appears to have been little analysis undertaken of the significant changes that the proposed Treaty would entail for U.S. law, consumers' rights and the technology sector, and no opportunity for a broad scale informed public consultation process with the domestic constituencies that will be most directly impacted by the treaty.

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. Most importantly, it will radically alter the nature of the Internet as a communication medium.

Many of the people who have spoken this morning have addressed some of these points. I would like to comment on several points that have not been addressed, and provide you with a copy of the comments that EFF has previously submitted to the WIPO Standing Committee on Copyright and Related Rights in June 2004 and November 2005.

I would like to reiterate the value of seeking engagement and consultation with domestic parties at this stage in the treaty process because the policy issues raised by the treaty are significant. They will radically change the contours of U.S. law and the environment for technological innovation.

I would like to make three comments this morning.

(1) The proposed treaty is likely to stifle technological innovation on the Internet and in next generation broadcast technologies.

The proposed webcasting right would create a broad new layer of exclusive rights over the content carried by the signal, independent of, and additional to, the program content's copyright. The proposed treaty would require technology companies to negotiate and obtain clearances from two sets of rightholders before they can create innovative technologies that interoperate with broadcast or web content. This is likely to stifle technology innovation.

At present, technology companies only need to obtain clearance from a copyright owner, or determine whether copyright protection applies at all. This will change under the proposed treaty. Anyone who wants to create technologies that interoperate with broadcast or webcast content, will need to identify and negotiate with a second set of

transmission rights entities in addition to the copyright owner before they can safely bring technologies to market.

Under the proposed treaty it is not clear at all that a parallel set of exceptions and limitations to those under U.S. copyright law will apply to the new transmission right. Therefore, actually working out whether your technology will require clearance is going to be difficult, even if a technology company can identify the transmitter involved. This is only likely to inhibit technological innovation.

(2) The proposed treaty appears to create a new liability regime for Internet intermediaries that transmit data over the Internet.

Both the Working Paper's webcasting proposal and Article 6's right of retransmission of broadcasts and cablecasts over computer networks may create potential liability for intermediaries that transmit data over the Internet. Although Article 14 provides for limited exceptions to the exclusive rights granted to broadcasters and cablecasters, it does not explicitly address the question of Internet intermediaries. In addition, since the treaty grants rights that are independent of, and additional to, copyright, any protection granted to U.S. Internet intermediaries against online copyright infringements for transient reproductions will not automatically apply to transient transmissions of broadcasts and cablecasts over the Internet.

This is likely to apply to a wide range of Internet intermediaries, including ISPs, Internet search engines, video search engines and user-uploadable services such as Google Video, Blogger, podcast producers and podcasting services.

I would like to understand whether the U.S. delegation has analyzed the policy considerations and potential liability issues raised by the proposed webcasting right in the process of negotiating this treaty.

(3) Technological Protection Measures

The combination of Technological Protection Measure provisions with the treaty's broad set of post-reception rights will allow broadcasters and cablecasters to use technological measures backed by national laws (such as the U.S. Broadcast Flag regulation) to preclude the development of new technologies, such as TiVos, that allow consumers to time-shift and space-shift lawfully acquired television programming.

This will be a serious redrawing of the current boundary between consumers' and copyright owners' rights. As Mr. Stallman and Mr. Perens have noted, any implementing legislation for the treaty's broadcaster technological protection measures is likely to preclude free and open source software technologies. On this point, I want to emphasize a key distinction between the existing unauthorized access regimes that protect against unlawful reception of cable and satellite television services in U.S. law, such as 47 USC 605 and 18 USC 2511-20, 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 and webcasters to use technological measures to control use *after* a signal is received in the home, and after it's been recorded. The combination of Technological Protection Measures with post-fixation rights is about control of the program content carried by the signal, and not about signal theft. It is also about control of the devices on which consumers can watch broadcasts, cablecasts and webcasts that they have lawfully acquired. This has significant implications for competition and innovation.

I would like to learn whether the U.S. delegation has given consideration to the potential anticompetitive implications of the broadcaster technological measures in the treaty, and in particular, whether it would support an express exception in the treaty language to preserve the ability of the U.S. government to regulate potential anti-competitive implications of the broad technology mandate that would be required to implement the treaty in U.S. law.

Finally, I want to reiterate a point made by others this morning. The treaty's combination of broadcaster technological protection measures with broad post-reception rights that apply above copyright law is likely to curtail consumers' traditional fair use rights in lawfully-acquired television programming. Creating exclusive rights for webcasters, combined with legally enforced technological measures, is likely to be even more detrimental because it will restrict the public's access to information that is in the public domain or not protected under copyright.

In conclusion, I urge the U.S. delegation to hold a broader public consultation on the significant policy and civil liberty issues raised by this treaty.

Thank you for your consideration.

Gwen Hinze
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