Electronic Frontier Foundation

ELECTRONIC FRONTIER FOUNDATION BRIEFING PAPER ON WEBCASTING ISSUES RAISED BY THE PROPOSED WIPO BROADCASTING TREATY, PRESENTED AT THE 13TH SESSION OF THE WIPO SCCR, November 21-23, 2005

The proposed WIPO Broadcasting Treaty would grant broadcasters, cablecasters (and possibly webcasters), the right to control Internet transmissions, irrespective of the copyright status of the transmitted material. This is likely to stifle technological innovation on the Internet, restrict the public's access to knowledge, and change the nature of the Internet as a medium of communication. This paper analyzes how the proposed treaty would impact Internet transmissions, and addresses the arguments presented by proponents of exclusive rights for webcasters.

Webcasting and Internet Transmissions:

The proposed treaty would create rights of control over Internet transmissions for two reasons:

(1) The SCCR Chair's Working Paper (SCCR/12/6 Prov.) includes three proposals to extend the treaty to "webcasting", which is defined as follows:

"the making accessible to the public of transmissions of sounds or of images or of images and sounds or of the representations thereof, by wire or wireless means over a computer network at substantially the same time. Such transmissions, when encrypted, shall be considered as 'webcasting' where the means for decrypting are provided to the public by the webcasting organization or with its consent."

This definition is taken from the U.S. government's June 2003 proposal to WIPO (WIPO document SCCR/9/4 Rev). Each of the three proposals in the Working Paper is offered in relation to two tiers of rights – simulcasting (Option 1 and 2, Article 3(3)), and webcasting (including simulcasting) (Option 1 and 2, Article 3(4)).

(2) Independent of the various proposals in the Working Paper to extend the draft treaty to "webcasters", Article 6 of the proposed treaty gives broadcasters and cablecasters control over the simultaneous retransmission of recordings of their broadcasts and cablecasts "over computer networks", including the Internet.

In addition, Article 16 of the proposed treaty requires signatories to provide laws against circumventing technological protection measures used by broadcasters and cablecasters. This would apply to webcasters' Internet transmissions if either option one or two in the Working Paper is adopted. Even if the proposals in the Working Paper are not adopted, the technological protection measure provision would apply to simultaneous retransmissions of broadcasts and cablecasts over computer networks under Article 6, retransmissions of fixations of broadcasts and cablecasts by wire or wireless means under Article 11, and the making available of these fixations under Article 12 of the proposed treaty.

What's Wrong with including Webcasting in the treaty?

(1) ***Burden on Internet Innovation*:** 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. This will slow down innovation. Today, a technological innovator only needs to clear the copyrights to the works his invention uses -- or determine whether copyright protects them at all. With this proposal, an entirely new body of middle-men will get a say in the business of innovation, and an entirely new body of difficult and untested law will govern those uses. As a group of 20 technology companies noted in an open letter to WIPO in November 2004(copy in Annexure), this provision is not sought by, nor welcomed by, many in the technology sector, and is likely to benefit only a small group of incumbents, at the expense of new innovators and consumers. (See <http://www.eff.org/IP/WIPO/?f=20041117_open_letter.html>)

(2) **Potential liability:** 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.

If the treaty is extended to "webcasting" in accordance with either option one or two of the Working Paper, it would create a new layer of liability for Internet intermediaries that transmit "webcasts" – that is, Internet search engines, Internet Service Providers, and anyone who reproduces or distributes transmissions of images and/or sounds received from an upstream computer server.

It is not clear whether the definition of "webcasting" in the Working Paper would cover static webpages containing images and/or sound recordings. Since transmission of electronic data comprising a webpage involves serial reproduction and distribution, any downstream computer involved in routing transmissions that receives images and sound recordings from an upstream computer server may face potential liability.

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 Internet intermediaries against online copyright infringements for transient reproductions in national copyright regimes will not automatically apply to transient transmissions of broadcasts and cablecasts over the Internet.

Article 6 of the proposed treaty raise potential liability concerns even if the webcasting proposal is not adopted. It gives broadcasters and cablecasters the exclusive right to control simulcasting – simultaneous retransmissions of broadcasts and cablecasts over computer networks. As a technical matter, such simulcasts generally require transitory or ephemeral copies to be transmitted by third party

Internet intermediaries. This right could be asserted against innocent Internet intermediaries if retransmission requires a transitory or ephemeral recording to be made and transmitted by third party intermediaries.

Articles 8, 11 and 12 create potential liability concerns, but for a different reason. This is because the treaty would give broadcasters and cablecasters the right to control recording (or fixation) of broadcasts and cablecasts (Article 8), the right to control retransmission of those recordings after fixation (Article 11) and the right to control the "making available" to the public of fixations of those recordings (Article 12). Here again, third party intermediaries could face potential liability for their unknowing participation in unauthorized reproductions or retransmissions.

When combined with the broadcaster technological protection measure (TPM) provisions in Articles 16 and 17, this would appear to allow broadcasters and cablecasters to use technological measures backed by national laws such as the failed U.S. Broadcast Flag regulation, to preclude the development of new technologies that allow consumers to time-shift and space-shift lawfully acquired television programming. This also raises liability concerns for existing innovative technologies that currently compete with broadcasting and cablecasting companies' own integrated television technology, such as the open source software MythTV digital personal video recorder. (For further details, see EFF's comments submitted to the SCCR in June 2004, at: <http://www.eff.org/IP/WIPO/20040607_wipo_tpms.pdf>).

Broadcaster TPMs have questionable relevance to signal protection. Many countries' national laws already contain signal protection regimes that protect against unlawful reception of broadcast and cable signals. By comparison, attempting to use TPMs to control use *after* reception (for instance, when the signal is fixed in some format, or transmitted within a home for personal use), is about control of the program content carried by the signal. It's also about control of the platform – namely the devices on which broadcasts, cablecasts and webcasts are received. Importing the TPM language from Article 18 of the WIPO Performances and Phonograms Treaty, when combined with the broad new rights in Articles 6, 8, and 11, is not related to signal protection.

(3) Simulcasting is indistinguishable from webcasting: The Working Paper purports to create an option for limited protection for simulcasting – the simultaneous and unchanged webcast of broadcasts and cablecasts - that is scheduled and non-interactive, and hence like traditional broadcasts. However, this limitation will be meaningless in practice because the treaty grants simulcasters the right to create a fixation of any scheduled transmission (Article 8), and the exclusive right to control retransmission of that fixation at any time and by any wire or wireless means (Article 11). This would appear to include retransmissions as part of a video on demand system delivered over cable or satellite broadcast.

(4) Restriction on access to information: The proposal is likely to restrict the public's access to information because webcasters would be given exclusive rights over the combinations of images and sounds that they transmit, even if the original authors

have granted permission to use the underlying content, or if it would otherwise be in the public domain or not copyrightable, or if the use would be protected under national copyright law, such as as a fair use in United States' law.[1] The combination of legally-enforced technological protection measures together with a new layer of rights above copyright is particularly problematic for the Internet. Allowing webcasters to use legally-enforced technological protection measures to control all downstream uses of material they transmits likely to restrict the flow of information on the Internet. This is likely under either the proposed webcasting extension, or, even if that were not adopted, as a result of the broad fixation and retransmission rights granted to broadcasters and cablecasters by Articles 8, and 6 and 11 of the treaty.

(5) Technology is not neutral in its operation*:* While proponents of the webcasting right have framed this as an argument about parity and neutrality between broadcasters and webcasters, this fails to take account of the impact on the Internet as a medium of communication. Unlike traditional television and radio broadcasting which involves high technology investment and one-way delivery of content, the Internet is a multi-directional content forum with a high level of public participation, and webcasting has low barriers to entry. Granting exclusive rights to webcasters will restrict the flow of information and freedom of expression on the Internet.

Parity is an easily understood concept, but there are sound policy reasons for giving different treatment to different technology platforms U.S. copyright law is replete with examples of this. It has separate and distinct regimes for music on digital audio tape versus jukeboxes and audio CDs, and for each of terrestrial broadcasts, cable, and satellite broadcasts. The proposed treaty goes beyond merely providing equivalent rights to webcasters. It would create a brand new type of right that does not exist in the national law of any WIPO member country, except, possibly, Finland.

(6) ***No economic justification for monopoly rights:*** Finally, there has been no demonstrated economic justification for the creation of such a broad 50 year term rights for webcasters. The proliferation of webcasting entities indicates that there is sufficient market capitalization in this sector. Before we create broad new rights that would have a significant impact on consumers, educators, copyright owners and new Internet technologies, EFF believes that there should be a demonstrated need for such rights and a clear understanding of their impact.

EFF would be pleased to provide any further information that would be of assistance to national delegates. For more information, please contact Cory Doctorow (cory@eff.org) - European Affairs Co-ordinator, Gwen Hinze (gwen@eff.org) – International Affairs Director, or Ren Bucholz (ren@eff.org) - Americas Policy Co-ordinator.

---

[1] For instance, the use of satellite feed television news footage for the purpose of critiquing U.S. television news media, in the 1995 documentary "Spin", concerning news media coverage of the 1992 U.S. Presidential election. See <http://www.imdb.com>

ANNEXURE

STATEMENT OF TWENTY TECHNOLOGY COMPANIES AND ORGANIZATIONS ON THE INCLUSION OF WEBCASTING IN THE PROPOSED BROADCASTING TREATY, PRESENTED BY THE ELECTRONIC FRONTIER FOUNDATION TO THE STANDING COMMITTEE ON COPYRIGHT AND RELATED RIGHTS, TWELFTH SESSION, NOV. 17-19, 2004

The World Intellectual Property Organization's Standing Committee on Copyright and Related Rights is undertaking a Treaty on the Protection of Broadcasting Organizations. This treaty will confer upon the transmitters of information a host of "related" or "pseudo" copyrights that have the potential to trump true copyright and restrict the flow of information on the Internet.

One proposal within the Treaty would extend these pseudo-copyrights to the Internet, by means of a controversial "Webcasting Provision." While there has been very little support from the national delegations for this proposal, the insistent voice of self-styled representatives of the technology industry has been loud enough to see to it that this proposal has persisted through draft after draft of the Treaty.

We, the undersigned representatives of technology businesses large and small, reject the idea that the Internet needs or will benefit from the extension of these pseudo-copyrights to so-called "Webcasters."

Briefly, we reject the Webcasting Provision for the following reasons:

1. The Internet depends on permission-free access. This is reflected in the exemptions in many countries' copyright laws for online and Internet service providers. When authors or rights-holders' permission has been required for fixation, copying, retransmission or decoding in other situations, the negotiation of licenses from creators and copyright rights-holders have provided ample protection for all parties. Adding a new layer of intermediaries, over and above copyright holders, for the re-use of information on the Internet benefits no one -- save those intermediaries. If an Internet company has the rights to a work, or need not secure the rights to a work due to a limitation in copyright, or because the work is in the public domain, there is no rational reason to require that the company also seek the permission of a further intermediary whose sole creative contribution to the work is in making it available.

2. There is no demonstrable problem. Internet businesses are famously, legendarily well-capitalized from angels, venture capitalists, public markets, private investors, governments and every other source of capital imaginable. Proponents of webcasting rights have offered no credible evidence that the lack of legal protection for webcasting rights has precluded the establishment of any new Internet businesses. Indeed, the businesses most volubly calling for Webcasting protection are among the best-capitalized in the history of the world. There is no

> certainty of benefit here, but it *is* certain that the creation of a new pseudo-copyright will slow down adoption and innovation in Internet markets by requiring all content-related businesses to negotiate yet another layer of license agreements before they can offer new products or services to the public. The most likely result of introducing these new rights will be to skew the market; in practice it will provide financial assistance to incumbents who will be able to assure investors of their right to exclude their competitors and new entrants from the market. At the same time, it is likely to constrain, not increase, the creation of more information products for the public.

We do not desire the "protection" you offer us, nor do we believe it will benefit us.

Thank you,

Mark Cuban, HDNet, Dallas Mavericks NBA Team Owner
mark.cuban@dallasmavs.com
(Mr. Cuban is also the owner of over US$500,000,000 in copyrighted video works)

Elliot Noss, TuCows, Inc.
enoss@tucows.com

Tim O'Reilly: O'Reilly and Associates
tim@oreilly.com

Scott Rosenberg, Salon Media Group/Salon.com
scottr@salon.com

Jeremy Hogan, Lulu, Inc
jhogan@lulu.com

Austin Wallender, pictothink
austin@pictothink.com

Jonathan M. Hollin, Digital-World, Ltd (UK)
urbanmainframe@gmail.com

Adam Rifkin, KnowNow, Inc.
ifindkarma@gmail.com

Rohit Khare, CommerceNet Coalition
Rohit@KnowNow.com

Michael J. Masin, M2 Group Corp.
mmasin@m2gc.com

David Daniels, Starfish Internet Services
daniels@starfishnet.com

John Burden, FuturesGuide, Inc
info@bwp.net

Leisa Fearing, Elf Systems Corporation
leisa@elf.net

Arthur van Dorp, Siteware Systems GmbH Switzerland
vandorp@siteware.ch

Matt Rudderham, DynamicHosting.Biz
matt_AT_norex.ca

Robert L Mathews, Tiger Technologies LLC
business@tigertech.net

Anil Gupte, ke.e.n., Inc.
anilgupte@keeninc.net

Kai Schaetzl, Conactive GmbH & Co KG
vertrieb@conactive.com

Marc Gadsdon, In-Tuition Networks Ltd
marc.gadsdon@in-tuition.co.uk

Joyce Thomas, Bizgrok, Inc.
jt@bizgrok.com