

Preliminary Comments on the Draft Non-paper on the WIPO Treaty on the Protection of Broadcasting Organizations

We appreciate the opportunity to share our preliminary assessment of the draft non-paper. As you are aware, the Chair of the Standing Committee on Copyright and Related Rights (SCCR) has circulated a draft non-paper of the WIPO Treaty on the Protection of Broadcasting Organizations. The draft non-paper represents some improvement over previous drafts of the proposed treaty, in that it attempts to limit the scope of rights that would be granted to broadcasting organizations. However, rather than implementing a signal theft approach, the draft non-paper still creates a new set of intellectual property rights for broadcasters. Accordingly, it fails to follow the General Assembly's mandate that the chair should prepare a signal theft proposal. The text remains very strongly based around the use of rights to protect signals, and we do not believe this is either necessary or appropriate, nor congruent with the WIPO General Assembly's decision. This manifests itself in the multiple problems we have identified with the draft, including the scope of rights outlined in the non-paper, limited exceptions, and inconsistencies with U.S. law discussed below.

The Draft Non-Paper Is Not a True Signal Theft Treaty. The draft non-paper would broadly apply to the "unauthorized use" of broadcasts. Rather than explicitly limiting the treaty to signal theft, the draft gives broadcasting organizations the right to authorize how their broadcasts are used or allows contracting parties to establish adequate and effective legal protections for broadcasts. This grants far more protection than necessary to enable broadcasters to prevent the theft of their signals. In fact, the protection of signals does not require new rights at all. Broadcasters should not be given broad rights over retransmissions, fixations, and reproductions. For instance, with the protection of broadcasts granted in the draft non-paper, a broadcaster could prohibit the fixation of its broadcast after an authorized reception, effectively eliminating use of digital video recorders, VCRs and home networking services.

Purportedly the non-paper would permit Member States to adopt alternative implementations of the treaty. The narrower alternative, Article 8(2), requires the contracting parties to implement the treaty through unfair competition laws by providing "adequate and effective legal protections" to protect against broadly worded "unauthorized retransmission by any means, against unauthorized fixation, and against unauthorized reproduction of their broadcasts." This approach, however, would require significant substantive changes to existing US state and federal signal theft laws, which is contrary to the narrow signal theft approach the U.S. has been advocating. Also, inconsistent with our narrow signal theft regime, other nations would be permitted to implement a new and broader rights-based protections treaty that would permit broadcasting organizations to authorize any retransmissions, fixations or reproductions of their signals, raising serious questions about national treatment.

The Draft Non-Paper Provides No Protection for Fixations and Transmissions/Retransmission on Home and Personal Networks. The non-paper limits protections for transmissions over computer networks, but individuals are provided no right to fix a broadcast or to transmit and retransmit broadcasts across home or personal networks. Under the draft non-paper, broadcasting organizations have the exclusive right of authorizing (or prohibiting) the fixation of their broadcasts. The expansive scope of this right when applied to lawfully-received broadcast could prohibit a number of technologies commonly used in the U.S., such as digital video recorders, media center PC's, etc.

The Draft Non-Paper Provides for Technical Protection Measures. Although the draft non-paper attempts to balance the rights of the general public and broadcasters, the treaty would give broadcasting organizations "adequate and effective legal protection" against piracy and

decryption, including before a broadcast has been transmitted to the public. Coupled with the broad protection of broadcasts found in Article 8, implementation of the draft non-paper would require a definitive change to U.S. law. In addition, the non-paper prohibits “manufacture, importation, sale or any other act that makes available a device or system capable of decrypting an encrypted broadcast.” This prohibition is so far reaching that it would encompass a number of technologies, including, most troubling, the personal computer. Mandating technical protection regimes (as this draft would require) is likely to interfere with innovation in a whole range of consumer devices in ways entirely unnecessary to protecting signals from theft or misappropriation.

The Draft Non-Paper Does Not Provide Adequate Protection for Intermediaries. The non-paper fails to respond to previously-voiced concerns that broadcaster protections will expose network intermediaries to liability for fixing, transmitting, retransmitting, or reproducing protected signals in the ordinary course of providing network services. Such protection for intermediaries, including telecommunications providers and online service providers, is a staple provision in U.S. free trade agreements. The protection proposed by the current non-paper would undermine that policy, however, and could subject intermediaries to liability for unknowingly transmitting protected signals in their ordinary business. Accordingly, any broadcasting treaty should provide intermediaries specific protection from liability.

The Draft Non-Paper Grants Rights Inconsistent with U.S. Signal Theft Laws. The draft non-paper is more sweeping than U.S. signal theft laws and would require revisions of state and federal law. The draft non-paper has much broader language that prohibits simultaneous and deferred retransmissions sent by any means, and does not require that a defendant act knowingly or with an intent to defraud without authorization. The focus on retransmissions, rather than on the actual theft of the service, would require U.S. laws to be rewritten to comply with this broad mandate. In addition, the lack of formalities in the draft non-paper and the 20 year term of protection grant a broad set of rights to broadcasters that is antithetical to U.S. law and policy.

The Draft Non-Paper Expands US Retransmission Consent Laws. Under U.S. law, broadcast licensees already have the legal authority to protect against certain unauthorized retransmission of their broadcasts. Specifically, under retransmission consent laws, broadcasters in the U.S. may authorize the carriage of their broadcast signal by multichannel video programming distributors (MVPDs). Congress carefully crafted these retransmission consent laws to ensure a level playing field between the local broadcaster and the MVPD. The proposed draft would radically shift this balance of power in that it would give broadcasters rights not only over retransmissions, but fixations and reproductions as well. Moreover, under the proposed draft, cablecasters – which currently have private contractual rights that govern retransmissions of their content – would suddenly be extended a statutory right over fixations and reproductions.

If you wish us to meet with you and/or your staff or you have any questions about our analysis, please contact: Sarah Deutsch at (703) 351-3044; Manon Ress at (202) 332-2670, Kevin Rupy (202) 326-7276, Matt Schruers (202) 783-0070 x109, or Jim Burger at (202) 776-2300.

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