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## CREATING NEW EXCLUSIVE RIGHTS FOR BROADCASTERS WOULD UNDERMINE ONLINE FREE EXPRESSION

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Giving broadcasters a new exclusive right, as proposed in the WIPO broadcast treaty negotiations, would impair online free expression. It would raise new legal barriers to expressive activity that is legal today; greatly complicate the task of getting clearances; discourage fair use; exacerbate the orphan works problem; and chill otherwise lawful viral distribution of information. The United States should press WIPO to focus any treaty on prohibiting and punishing true signal piracy, rather than creating new economic rights.

At the June 2011 session of WIPO's Standing Committee on Copyright and Related Rights (SCCR), the SCCR Chairman and the South African delegation both issued documents continuing to insist that a WIPO treaty on broadcasting should create *new exclusive rights*, akin to copyright rights, for broadcasters. The effort to create new exclusive rights is rightfully controversial and is a major reason that negotiations on a WIPO Broadcast Treaty have been unsuccessful to date despite many years of negotiation. This memo focuses on the ways that a new regime of exclusive rights for broadcasters would undermine online free expression.

In the United States, intellectual property laws are designed to incentivize creativity and the production of original works, not the dissemination of works created by others. Extending similar economic rights to *distributors* would greatly complicate the already-complicated legal and rights-clearance landscape facing online speakers, as described in greater detail below. In many scenarios, the new rights would create serious new hurdles for legitimate actors who are not engaged in anything that could reasonably be considered "signal piracy." By contrast, providing protections against true *signal theft* – which would entail strong prohibitions against retransmitting broadcast signals with the intent of enabling widespread evasion of the associated fees or advertising – would have little if any effect on legitimate actors and legitimate online expression.

Digital technologies and the Internet facilitate widespread participation in informative and artistic expression in many forms, including through audio and video. It has become common for Internet users to circulate clips of video and audio in viral fashion and to edit or piece together clips for purposes of satire or commentary. These activities are by no means the province of fringe or technologically sophisticated enthusiasts. As technology tools become more powerful and ubiquitous, participation in such multi-media speech grows more commonplace and important. Online video is an increasingly participatory medium.

Of course, copyright law imposes some valid limitations on speech that makes use of materials originally created by others. But establishing an entirely new class of rights holders would erect new barriers to the public's ability to access, use, and disseminate audio and video works in a variety of circumstances where *copyright law would permit it*. Simply put, navigating the copyright issues would no longer be enough; the broadcaster's exclusive right would enable it to act as an additional gatekeeper, able to demand an additional toll. This may well serve the economic interests of broadcasters, but only at the direct expense of online speech.

The following examples illustrate a variety of scenarios in which new exclusive rights would create new barriers to online free expression.

- The copyright holder in a work that has been broadcast or cablecast affirmatively wishes to permit the widespread redistribution of the work, or perhaps previously consented to redistribution through a Creative Commons or comparable license. But the copyright holder is not in a position to serve as the distribution source for the work – because the holder has lost or damaged the original copy of the work, or simply lacks the technical or logistical capacity. Current copyright law would permit persons to record the broadcast and circulate the work on the Internet – but if the broadcaster were granted an exclusive right, it could bar or limit such circulation. The broadcaster becomes the gatekeeper for a work that otherwise could be freely distributed in accordance with the wishes of the copyright holder.
- An artist or filmmaker with limited resources wants to obtain authorization to use clips from a broadcast or cablecast in a documentary or similar creative work. Under current copyright law, the process of identifying and negotiating with the appropriate rights holder can already be complicated. But a new right for broadcasters would double the potential complication, and likely the cost as well, by adding another rights holder. The clearance process would become even more complicated and expensive – causing some would-be clearance seekers to give up on using the works in question.
- A person wants to use audio or video recorded from a broadcast or cablecast in a manner that would constitute lawful fair use under current copyright law. This should mean that no authorization is necessary. But unless the broadcaster's right were subject to exceptions that precisely track the fair use provisions of U.S. law (something that most WIPO proposals would permit but certainly not require), the existence of the new right would mean that the person would still need to seek authorization from the broadcaster or cablecaster. And even if the broadcaster right were subject to the same fair use exception as copyright, the existence of the second rights holder would effectively double the number of parties who could challenge the assertion of fair use and tie matters up in costly litigation. This would chill the exercise of fair use.
- The copyright holder cannot be found, but use of the work would be allowed under a future legislative solution to the “orphan works” problem. With a new exclusive right, the broadcaster could still deny access to any version of the work recorded from a broadcast.
- A work was cablecast on a minor cable channel, which has since folded. Under a WIPO treaty granting new broadcaster rights, any recording of that cablecast could be orphaned, because nobody can be found to authorize its use or distribution on behalf of the cablecaster. Granting a new right exacerbates the orphan works problem.

- A person receives audio or video over the Internet and wishes to engage in further redistribution. (This kind of viral distribution is common on the Internet and is one of the medium's great strengths.) The content features a Creative Commons copyright license, making it clear that redistribution does not pose a copyright problem. But the person does not know how the content was originally distributed. For all the person can tell, it could have been recorded from a broadcast. For fear of violating potential broadcaster rights, the person might refrain from redistribution – even though the content may not have come from a recorded broadcast at all.
- A work has just entered the public domain, meaning that it is no longer subject to copyright protection. Under current law, personal recordings made from past broadcasts of the work could be transmitted lawfully over the Internet, and any future broadcasts of the work could be recorded and shared. But a new exclusive right effectively could give broadcasters the ability to control all such recording and transmission for years to come.

In addition to creating complications for Internet speakers directly, a new exclusive right could affect the operations of the user-generated content platforms that provide key forums for online speech. Companies providing such speech-enabling technology tools must take care to avoid being held secondarily liable for the behavior of their users, but are assisted in that effort by established legal precedents and legislative safe harbors. It is simply unclear if or to what extent the existing precedents and safe harbors would apply to a new broadcaster right. In any event, even with appropriate limits on secondary liability, it should be clear that a new broadcaster right would create a new front of legal risks for online speech platforms. Platforms could respond by exercising tighter control or aggressively taking down material upon any complaint by broadcasters. In short, any chilling effect due to existing liability threats or notice-and-takedown policies could be increased substantially.

Significantly, none of these potential impacts on online speech are necessary to protect broadcasters against signal piracy. Legitimate online speakers do not engage in the wholesale and contemporaneous retransmission of broadcasts for the purpose of enabling viewers to avoid payment or avoid seeing advertisements. Prohibiting such signal theft, therefore, would have little if any impact on lawful speech.

The United States has a uniquely strong tradition of legal protections for free speech and is the leading global advocate for global Internet freedom and online free expression. To the extent the United States participates in negotiations towards a WIPO treaty for the protection of broadcasters, it should insist on a “signal theft” approach. It should oppose the creation of new exclusive rights as unnecessary and harmful to online free expression.