KEEPING THE INTERNET
OPEN • INNOVATIVE • FREE

www.cdt.org

CENTER FOR DEMOCRACY
& TECHNOLOGY

1634 I Street, NW
Suite 1100
Washington, DC 20006

P +1-202-637-9800
F +1-202-637-0968
E info@cdt.org

WIPO CONSIDERING BROADCASTING PROTECTION TREATY THAT COULD UNDERMINE ONLINE FREE EXPRESSION

December 2011

The World Intellectual Property Organization is considering proposals for a treaty that would guarantee broadcasters exclusive rights, extending beyond copyright, to control the re-use of the material they transmit. Such rights, proposed as a response to the piracy of broadcast signals, threaten serious negative side effects for online free expression. Creating or expanding such rights would raise new legal barriers to expressive activity that is legal today; greatly complicate the task of getting clearances to use copyrighted material; discourage expression that qualifies as fair use or fair dealing; exacerbate the orphan works problem; and chill otherwise lawful distribution of information. Advocates, policymakers, and nations that strongly support online free expression should press WIPO to focus any treaty on prohibiting and punishing true signal piracy, rather than creating new gatekeepers for the legitimate re-use and re-dissemination of content.

Introduction

Off and on for 12 years, the World Intellectual Property Organization (WIPO) has been debating the development of a new treaty focused on securing legal protections for broadcasters. Throughout the process, there has been substantial disagreement over the appropriate objective and scope for such a treaty. Controversy has centered on whether a treaty should give broadcasters new or expanded *exclusive rights*, akin to copyright rights; and whether such rights should be extended not just to traditional over-the-air broadcasters but also to those who distribute programming over cable or Internet infrastructure. Having such rights would enable a broadcaster (or other content distributor) to withhold permission for use of any content it has distributed to the public, even if the broadcaster does not own the copyright to the material.

Discussions about the treaty had been stalled for several years, but recent proposals seem to have revived both interest in the treaty and concerns about its scope and impact. In particular, at the June 2011 session of WIPO's Standing Committee on Copyright and Related Rights (SCCR), the SCCR Chairman and the South African delegation each issued documents suggesting a treaty framework with an exclusive-rights focus.[1] The November 2011 SCCR session continued in the same vein, concluding with a statement that a new, exclusive-

[1] See Proposal on the Draft Treaty on the Protection of Broadcasting Organizations, *Proposal by the Delegation of South Africa,* SCCR/22/5, (Mar. 1, 2011) *available at* http://www.wipo.int/edocs/mdocs/copyright/en/sccr_22/sccr_22_5.pdf; Elements of a Draft Treaty on the Protection of Broadcasting Organizations, SCCR/22/11 (May 30, 2011), *available at* http://www.wipo.int/edocs/mdocs/copyright/en/sccr_22/sccr_22_11.pdf.

rights-based proposal from South Africa and Mexico should be the basis for active treaty negotiations in 2012.[2]

The effort to create or expand exclusive rights is deservedly controversial. The concept is a major reason that negotiations on the WIPO Broadcast Treaty have been unsuccessful to date. In particular, as we explain in this memo, a new regime of exclusive rights for broadcasters would undermine online free expression.

Some countries, including the United States, do not currently grant any exclusive, copyright-like rights to broadcasters or other distributors. U.S. intellectual property laws are expressly designed to incentivize creativity and the production of original works. They are not intended to regulate the dissemination of works created by others. Extending to *distributors* rights and powers that are similar to those under copyright law would be a significant change in approach, with significant consequences. In other countries, particularly those countries that signed on to the 1961 Rome Convention, there is a concept of "neighboring rights" that give broadcasters some copyright-like rights; a new Broadcast Treaty would aim to update and expand those rights.

Creating or expanding exclusive rights for broadcasters 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 being proposed on behalf of broadcasters would create serious new hurdles for legitimate actors who are not engaged in anything that could reasonably be considered "signal piracy."

A better approach would be to craft protections against true *signal theft.* This more direct approach would entail strong prohibitions against retransmitting broadcast signals with the intent of enabling widespread evasion of the associated fees or advertising. It would prevent true signal piracy while having little if any effect on legitimate actors and legitimate online expression.

New and Expanded Rights to Control Broadcast Material Would Stifle Free 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, commentary, or human rights advocacy. These activities are permitted under copyright law, and they are by no means practiced only by fringe artists or technologically sophisticated computer users. 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 the use of materials originally created by others. However, establishing an entirely separate class of rights and a separate 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 to develop an

[2] See WIPO SCCR, Twenty-Third Session, *Conclusions*, *available at* http://www.wipo.int/edocs/mdocs/copyright/en/sccr_23/sccr_23_ref_conclusions.pdf; Draft Treaty on the Protection of Broadcasting Organizations, *Proposal presented by the Delegations of South Africa and Mexico*, SCCR/23/6 (Nov. 28, 2011) *available at* http://www.wipo.int/edocs/mdocs/copyright/en/sccr_23/sccr_23_6.pdf.

innovative new piece of content incorporating copyrighted material; instead, the broadcaster's exclusive right would enable it to act as an additional gatekeeper, able to demand an additional toll. This would directly limit innovative forms of online speech.

The following examples illustrate a variety of scenarios in which new or expanded exclusive rights for broadcasters 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 the copyright holder previously consented to redistribution through a Creative Commons or comparable license. But the copyright holder is not able to distribute the work, perhaps because it has lost or damaged the original copy of the work or it simply lacks the technical or logistical capacity. Copyright law would permit persons to record the broadcast and circulate the work on the Internet. However, if the broadcaster were granted an exclusive right as proposed under the WIPO treaty, 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 additional rights for broadcasters would double the potential complication, and likely the cost as well. The clearance process would become even more complicated and expensive – causing some speakers 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 or fair dealing under current copyright law, as with news commentary or criticism. Many nations provide for such limitations and exceptions to copyright, which should mean that no authorization is necessary. However, unless the broadcaster's right were subject to exceptions that precisely tracked the fair use or fair dealing provisions of copyright law, the existence of the additional right would mean that the person seeking to use the material would still need to seek authorization from the broadcaster or cablecaster. And even if the broadcaster right were subject to the same exceptions and limitations as copyright, the existence of the second rights holder would effectively double the number of parties who could challenge the assertion of an exception or limitation and tie matters up in costly litigation. This would chill the exercise of fair use or fair dealing.

- A person wants to use audio or video recorded from a broadcast or cablecast, but the copyright holder cannot be found or has gone out of business. In the U.S. and elsewhere, policymakers are seeking to solve the problem of such "orphan works" – works that are effectively tied up from future uses because there is nobody to ask for permission. Creating or expanding broadcaster rights would undercut the benefits of any legislative solution adopted to address the "orphan works" problem. With an exclusive right of its own, a broadcaster could still deny access to any version of the work recorded from a broadcast, even if use would be pemitted under the "orphan works" legislation.

- A work was cablecast on a minor cable channel, which has since gone out of business. Under a WIPO treaty guaranteeing exclusive rights to broadcasters and cablecasters, 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 new or expanded broadcast rights would thus create a new 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. However, the person receiving the content does not know how it 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. From a copyright perspective, therefore, personal recordings made from past broadcasts of the work may be transmitted lawfully over the Internet, and any future broadcasts of the work may be recorded and shared. But an exclusive right for broadcasters 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 platforms must take care to avoid being held secondarily liable for the behavior of their users, but they are assisted in that effort by established legal precedents and legislative safe harbors (such as those provided by a "notice and takedown" system). However, it is unclear if or to what extent the existing precedents and safe harbors would apply to a new or expanded broadcaster right. In any event, even with appropriate limits on secondary liability, it should be clear that a new or expanded broadcaster right would create new legal risks for online speech platforms. These platforms might respond by exercising tighter control over their users, limiting access and creativity, or by 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.

Conclusion

The creative use of information online is critical to economic and human development. Copyright law needs to strike a balance between the protection of copyrighted material and the ability to access such material and to re-use and re-disseminate it for creative purposes. As nations participate in negotiations towards a WIPO treaty for the protection of broadcasters, civil society advocates should work with their national delegations to WIPO to focus on solving the "signal theft" problem without creating or broadening exclusive rights for broadcasters on top of existing copyright protections. Additional and expanded exclusive rights are unnecessary and would be harmful to online free expression.

For more information, contact David Sohn, dsohn@cdt.org.