Negotiations on Broadcast Treaty Raise Concerns

September 8, 2006

Policy Posts are in-depth analyses on current tech policy issues from CDT experts. Sign up to receive the latest Policy Posts here:

The World Intellectual Property Organization (WIPO), an agency of the United Nations, has been working for a number of years on developing a treaty that would give intellectual-property-like rights to broadcasters, cablecasters, and possibly webcasters. The prospect of such a treaty raises significant concerns that have received little attention to date.

1) Negotiations on Broadcast Treaty Raise Concerns

The World Intellectual Property Organization (WIPO), an agency of the United Nations, has been working for a number of years on developing a treaty that would give intellectual-property-like rights to broadcasters, cablecasters, and possibly webcasters. The prospect of such a treaty raises significant concerns that have received little attention to date. As discussed in greater detail below, extending broad rights to distributors of content, rather than just creators:

- would represent a substantial shift in U.S. intellectual property law;
- could pose new and unnecessary hurdles to the robust flow of information online;
- could restrict innovation in home and personal networking technology; and
- could create new litigation risks.

The proposed "WIPO Treaty on the Protection of Broadcasting Organizations" would build upon the 1961 Rome Convention, which was signed by many European countries but not the United States. Under that treaty, signatories agreed to give broadcasters certain copyright-like rights - specifically, rights to control the rebroadcast, fixation, or reproduction of their broadcasts. Those rights are separate from and in addition to the rights of the copyright holder in the broadcast content. The currently debated treaty would increase the duration of these broadcaster rights from 20 to 50 years and extend them to cablecasters. It also would expand broadcaster rights in a number of ways, including requiring signatory countries to prohibit circumvention of technological protection measures that broadcasters might employ.

Since the United States never joined the Rome Convention, the potential impact of the new treaty in this country would be much greater than a simple modernization or extension of existing legal rights. The U.S. system of intellectual property rewards the production of original works, not the dissemination of works created by others. Offering broadcasters IP-like rights would represent a major shift in direction for US intellectual property law. Despite this, a US delegation from the Patent and Trademark Office and the Copyright Office has been participating actively in the discussions, apparently on the assumption that the United States would likely join the eventual treaty.

In addition, the US delegation has pressed for extending the treaty to cover "webcasters" or "netcasters" -- terms used to describe parties that distribute broadcast-like content via the Internet. Adding webcasting would raise a number of new questions and could have a substantial practical impact on Internet communications, depending in part on the way webcasting provisions were

drafted and implemented. Recent discussions at WIPO have resulted in webcasting being separated out of the proposed treaty, but U.S. negotiators have made clear that they wish to see webcasting addressed.

Until recently, the treaty negotiations have remained off the radar screen in the United States, escaping the notice of the general public, most business interests, and lawmakers. Thus, there has been little discussion of the changes to U.S. law that would be needed if the United States were to adopt the proposed treaty.

In June 2006, CDT joined with other public interest groups in a letter to Members of Congress encouraging them to solicit public input on the treaty. A similar letter was sent by industry groups expressing their own concerns with the treaty and asking Congress to hold hearings before progress on the treaty goes any farther.

In September 2006, the U.S. Patent and Trademark Office held a roundtable discussion at which various parties expressed their views about the proposed treaty and the ongoing negotiations. In connection with this event, CDT and a broad group of companies, trade associations, and public interest groups delivered a document to the relevant U.S. officials expressing a number of shared concerns with the proposed treaty.

- Public interest letter to Congress [1]
- Industry letter to Congress [2]
- Joint statement on WIPO proposal [3]

2) Need for Expanded Broadcaster Rights Unclear

Proponents of the treaty have largely failed to publicly articulate why such a treaty is necessary. Most statements of the rationale for the proposed treaty have focused on the threat of signal theft. The theft of live sports broadcasts is reportedly a particular area of concern, especially with respect to transmissions that cross national boundaries. But there has been little effort to document the specific ways in which existing laws fail to address the problem of the intentional misappropriation of broadcasters' signals.

Moreover, to the extent that signal theft or specific types of signal theft are real problems under current legal regimes, it is far from clear that the solution is to grant broad new IP-like rights that would last 50 years. One straightforward approach would be to define the kind of theft that is at issue and then guarantee adequate legal protections against it. Yet the proposed treaty makes no effort to define, prohibit, or otherwise directly target signal theft or any analogous undesirable behavior.

As discussed above, many European countries have taken a rights-based approach to protecting broadcasters pursuant to the 1961 Rome Convention, but the United States has not. In the United States, legal protections against signal theft are provided under several provisions of federal communications law and state competition laws. CDT is not aware of any analysis suggesting that the growth or success of the broadcast industry in the United States has been curtailed as a result. Likewise, CDT is not aware of any analysis suggesting that the incidence of signal theft is higher in the United States than in Europe. There is no evidence that granting IP-like rights to broadcasters is necessary to achieve effective protection against signal theft.

3) Costs and Risks of Expanded Rights

Granting a new set of IP-like rights to broadcasters, cablecasters, and possibly webcasters could have a number of undesirable consequences.

For CDT, one major concern is the likely negative impact on the robust flow of information on the Internet. The Internet provides a vibrant forum for the exchange of informative and artistic expression in multiple forms, including audio and video. It has become common for Internet users to

circulate clips of audio and video in viral fashion, and to edit or piece together clips for purposes of satire or commentary. Obviously, copyright law imposes some limits on these types of behaviors. But creating a new class of rights holders could erect new barriers to the public's ability to access, use, and disseminate audio and video works in a variety of circumstances where current copyright law would permit it. The following scenarios illustrate how problems could arise:

- The copyright holder in a work that has been broadcast or cablecast affirmatively wishes to permit the widespread redistribution of the work, or perhaps has previously consented to redistribution through a Creative Commons or comparable license. However, the copyright holder is not in a position to serve as the distribution source for the work -- because the holder is dead or defunct, or 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 to circulate the work on the Internet -- but under the proposed treaty, the broadcaster could bar or limit such circulation. In effect, the broadcaster would become 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 the proposed treaty could double the potential complication, and perhaps the cost as well, by adding another rights holder. The clearance process would become even more time consuming 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 treaty's implementing legislation were to include exceptions that precisely track fair use provisions in U.S. copyright law (something the treaty permits but does not require), adoption of the treaty would mean that the person would still need to seek authorization from the broadcaster or cablecaster. And even if the broadcaster/cablecaster rights were made subject to exactly the same fair use exceptions as copyright law, the existence of a 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 could chill the exercise of fair use.
- The copyright holder cannot be found, but use of the work would be allowed under a legislative solution to the "orphan works" problem (Congress is currently considering possible solutions). Under the proposed treaty, the broadcaster or cablecaster might still be able to deny access.
- A work was cablecast on a minor cable channel, which has since folded. Under the proposed treaty, any recording of that cablecast effectively could be orphaned, because nobody can be found to authorize use or distribution on behalf of the cablecaster.
- A person receives audio or video content 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 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. Under the proposed treaty, the person might well worry that the content may have been recorded from a broadcast or cablecast. For fear of violating potential broadcast or cablecasts 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. Under the proposed treaty, however, the broadcaster would retain control over all such recording and transmission for 50 years from the date of the broadcast. Despite the work's public domain status, the broadcaster could effectively control access for decades to come.

The proposed treaty raises several other very serious concerns as well. First, it could be interpreted to grant broadcasters and cablecasters the rights to control how their transmissions may be handled

within a user's home or personal network -- including whether home electronics devices may record, retransmit, or otherwise manipulate the signals. Such an interpretation would put broadcasters and cablecasters in a position to approve or reject the use of innovative consumer electronics devices such as those made by TiVo or Slingbox - and thus to prevent the rise of innovative but disruptive new consumer technologies. It also would amount to an end run around the landmark 1984 Sony Betamax case, which held that the movie studios could not control the sale and use of VCRs.

Second, the treaty could create a new set of liability risks for technology companies and for Internet intermediaries such as ISPs. In copyright law, the question of when a party may be liable for infringement committed by someone else (secondary liability) has been the subject of considerable legislation and litigation, including the 1998 Digital Millennium Copyright Act (DMCA) and the 2005 Grokster case in the Supreme Court. Creating a new set of rights would raise the specter of a new set of secondary liability questions, with substantial potential for chilling innovation.

Finally, the proposed treaty would require signatory governments to provide effective legal remedies against the circumvention of technical measures used by broadcasters to prevent unauthorized uses of their signals. Such anti-circumvention provisions were enacted in the copyright context as part of the DMCA. Their effect is a matter of substantial debate, with many arguing that the provisions have been used in ways that stymie innovation and competition. Moreover, extending anti-circumvention laws to the broadcasting context raises questions about how technological protection measures (TPMs) for broadcast may be selected and implemented. Because broadcasting is generally highly regulated, there is a risk that governments would choose (and perhaps mandate) specific TPM standards. Government-chosen TPMs can limit innovation and distort markets.

4) Status of Proposed Treaty

The WIPO committee responsible for the proposed treaty will determine in September whether to recommend the convening of a Diplomatic Conference where an official treaty text for possible adoption would be finalized. If the committee makes this recommendation, it could be put to a vote at the Fall 2006 WIPO General Assembly starting at the end of September. A vote to proceed could result in a Diplomatic Conference in 2007.

Webcasting provisions are currently on a separate and slower track, although this is a topic of active discussion. The U.S. delegation continues to argue that webcasters should get whatever rights are granted to traditional broadcasters and cablecasters.

CDT believes that both congressional scrutiny and additional opportunities for public comment are warranted before further action on the treaty proceeds. The treaty would require substantial changes to U.S. law, and the costs and benefits of such changes need to be carefully considered in a manner that does not appear to have occurred to date.

Source URL: https://www.cdt.org/policy/negotiations-broadcast-treaty-raise-concerns

Links:
[1] http://www.publicknowledge.org/pdf/wipo-nonprofit-letter-20060607.pdf
[2] http://www.publicknowledge.org/pdf/wipo-industry-letter-20060607.pdf
[3] http://www.cdt.org/copyright/20060905wipo.pdf