

# TACD

TRANS ATLANTIC DIALOGUE TRANSATLANTIQUE  
CONSUMER DIALOGUE DES CONSOMMATEURS

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## Resolution on the Broadcasting Rights Treaty

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### *The Issue*

The World Intellectual Property Organization (WIPO) is developing proposals to create a Treaty on The Protection of Broadcasting Organizations (The Broadcast Treaty). The original rationale for the Treaty was based on a concern that there is an increase in signal piracy, including digital broadcast signals and that broadcasters need further protections to prevent such piracy.

The proposed treaty aims to extend new rights to broadcast organizations adding to those already granted by existing treaties<sup>i</sup>. The treaty would give broadcasters and cable casters and, under a controversial proposal from the US, webcasters, a range of new rights and expand the scope and duration of existing rights in many jurisdictions. It extends the power broadcasters have to control how consumers use and record images and sounds including material that is in the public domain.

The question of whether further intellectual property rights should be granted to broadcast organizations has been under discussion in the WIPO Standing Committee on Copyright and Related rights (SCCR) since November 1998. Governments and The European Community have submitted proposals which have been discussed at various committee meetings.

The General Assembly of WIPO requested that work on this treaty now be accelerated. In November 2004 the SCCR met to discuss a consolidated text for a treaty prepared by the Chairman of the SCCR and the WIPO Secretariat which was based on these proposals and discussions<sup>ii</sup>. The WIPO Secretariat, strongly supported by the US and the EU, is pushing for a Diplomatic conference (traditionally the last step in treaty making) in the face of widespread opposition, particularly from developing country delegates.

The General Assembly also adopted proposals for a 'Development Agenda'<sup>iii</sup> designed to refocus WIPO's work from continually focusing on expanding property rights to focusing on access to knowledge. The Transatlantic Consumer Dialogue (TACD)<sup>iv</sup> shares the concerns of a number of developing nations and international NGO's that WIPO's continued focus on 'special-interest' laws, such as the proposed Broadcast Treaty, conflicts with the development agenda.

In particular, TACD has strong concerns that many of the proposals contained in the consolidated text create new limits on the rights of consumers to use knowledge goods, undermining important limitations and exceptions in traditional copyright laws;

build barriers for innovations in knowledge goods; and increase the opportunity for anti-competitive practices, such as segmenting markets, which raise costs and limit consumer access to information.

It is an issue of particular interest to TACD because the manner in which it is being handled by EU and US authorities indicates a lack of concern for needs of the public and the broader user community. Access to information and knowledge is a key consumer right. Many consumers receive much of their information from broadcasts and thus any restriction on access will limit the exercise of this right. While the copyright system can provide benefits to society, consumers of knowledge goods want copyright policies that support creativity, access and fairness. The present text fails to do so.

### ***Risks for Consumers***

**The proposed treaty gives broadcasters the power to restrict the use of material which could otherwise be freely used and shared.** Broadcasters would receive these powers simply by transmitting materials. This is a much lower bar than is usual for copyright, which does not grant authors and artists control unless there is originality and creativity involved. Since many of these works are available only when transmitted by broadcasters, the treaty would effectively give broadcasters exclusive control over these works. The affected material includes:

Material that is in the 'public domain' and not covered by copyright e.g government works, old films and newsreels, material donated to the public domain.

Material which cannot be copyrighted e.g facts and data.

Material whose creators want it to be distributed as widely as possible e.g speeches by Government officials and scientists.<sup>v</sup>

Broadcasters will therefore be able to lock up and control the public domain. This is of increasing concern when we are about to enter a new broadcasting landscape where thousands of digital channels will be available. Faced with increased competition and pressure on margins broadcasters have both the incentive ( to use cheap rights free content) and the capability ( though technological protection measures (TPMs) to restrict access.

**The proposed Treaty extends monopoly control over context which is harmful to the public and is not necessary for investment.** The consolidated text proposes broadcasters' rights are extended to fifty years. This is more than double the current international standard - for example the Rome Convention permits 20 years. There is no economic rationale for such an extension, as it is a far longer time than broadcasters need to recoup any investment costs. It also creates a further barrier to access to information. Giving broadcasters 50 years of control every time something is broadcast is in effect equivalent to granting an endlessly renewable copyright, with no standards for originality, creativity or substantial investment. Since many public domain works are available only when transmitted by broadcasters, requiring countries to grant fifty years of power and control to broadcasters would dramatically shrink the public domain.

**The proposed Treaty potentially limits access to the Internet and to new forms of entertainment.** The text grants broadcasters new rights for broadcast programming by any means including the Internet. This can have anti-competitive effects as it gives existing broadcasters the right to lock out new companies and

control yet undiscovered new media. They would have the right to prevent redistribution of content (whether originally in the public domain or not) by any new media companies who discover new and innovative ways of providing entertainment to consumers.

Of particular concern is the proposal by the US, (and opposed by virtually all other delegates, including the EU), to include webcasting in the treaty. The Internet is the best opportunity ever to provide more equal access to knowledge. Every consumer who has access to the Internet now has roughly the same opportunity to learn and has been empowered by the vast sea of free information available. It allows consumers to make informed choices about goods and services and access to providers. Yet there has been no debate about how to preserve, and indeed improve, this key consumer asset. Instead, the proposals to create new and never tested rights for webcasters are made by special interests who seek to claim ownership over works that are now freely available. Such proposals do not even have the support of the broader technology industry.<sup>vi</sup>

**The proposed Treaty restricts consumers' rights by limiting exceptions and limitations to the broadcasters rights.** Traditionally copyright protection has sought to create a balance between the copyright holders' ability to restrict use and the wider public's ability to access and use the copyrighted work. One of the ways of achieving such a balance is by providing exemptions to the right of copyright holders to restrict access - for example a consumer's right to make a private copy. The text, however, does not maintain such a balance. Instead it provides expansive new rights for broadcast companies and gives no real rights to consumers and other users. What rights are given are optional as opposed to the mandatory rights for broadcasters. This is not balance, it is capitulation to commercial interests. Strong rights and weak exemptions undermine the goals of the Development Agenda, limiting access to knowledge and stifling innovation.

**The proposed Treaty extends use of technology locks to prevent fair consumer use.** The proposal to allow broadcasters the right to use technological protection measures (TPMs) is not required to protect broadcasters signals and would pose threats to the rights of consumers and the investigative work of consumer organizations. TPMs act as locks that can be used to prevent access to broadcasts, and to segment markets using region coded TPM's so broadcasters can raise prices and limit the availability of products. Similar prohibitions have been already invoked to prevent the publication of scientific papers, prosecute reputable cryptographers, censor journalists, limit fair use rights, and prevent competition in the US.<sup>vii</sup>

The costs to consumers of the restrictions caused by TPMs far outweigh any benefit to broadcasters. TPMs previously approved by WIPO have been shown to harm competition and technological innovation but have not been effective in stopping copyright infringement. It is therefore inappropriate to grant legal protection to a further and broader layer of technical measures.

**The proposed Treaty outlaws circumvention of technology locks that prevent fair use.** The Proposed Treaty forbids the decryption of broadcast signals, even if the programming is in the public domain or when its creator does not wish to suppress its distribution. It outlaws a broad range of devices (including personal computers), software, and other technical information that could help a consumer to decrypt a broadcast signal. Without the ability to circumvent technological locks consumers are unable to exercise any exemptions, such as private copying. They are thus left with a paper right without a remedy, while broadcasters have legally and technologically.

enforceable rights. The restrictions on anti-circumvention should be removed from the treaty.

**There is a better approach to protect against signal theft** . TACD agrees that broadcasters should be able to protect their legitimate interests and seek to prevent signal theft. However there is no evidence to suggest that it is necessary to give broadcasters new copyrights to achieve this end. Instead a treaty based on protecting signals rather than on copyright would safeguard the interests of consumers from the threats listed above whilst providing a more effective protection to broadcasters. TACD therefore supports the alternative 'NGO' treaty based on a 'signal' approach.<sup>viii</sup>

### **Resolved**

The TACD urges the governments of the United States and the European Union:

- To justify why a broadcast treaty based on copyright, rather than a 'signals' based approach, is necessary.
- To refrain from exerting further pressure to finalise the provisions on exemptions and limitations until the intergovernmental meetings proposed by Brazil and Argentina to discuss whether there should be mandatory minimum exemptions has taken place.
- To support the removal of the technical protection and anti-circumvention provisions in the Proposed treaty
- To encourage WIPO to a) provide an assessment of whether existing TPMs have successfully protected IP rights and what their impact on innovation and the exercise of consumer access has been. b) undertake a comprehensive study on the likely impact of TPMs on the Development Agenda.
- For the US to withdraw its support for the inclusion of webcasting
- To refrain from further pressure to hold a Diplomatic Conference.

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#### Associated Files:

<sup>i</sup> Berne Convention, the TRIPS Agreement, the WIPO Copyright Treaty (WCT) and WIPO Performers and Phonograms Treaties (WPPT)

<sup>ii</sup> Sccr/12/2 – revised consolidated text for a treaty on the protection of broadcasting organizations

<sup>iii</sup> Development Agenda : Document WO/GA/31/11

<sup>iv</sup> Geneva Declaration on the Future of WIPO- <http://www.cptech.org/ip/wipo/futureofwipo.html>

<sup>v</sup> See further Union for the Public Domain- Statement on the WIPO Treaty on the Protection of Broadcasting Organizations, SCRR12

<sup>vi</sup> [http://www.eff.org/IP/WIPO/?f=20041117\\_open\\_letter.html](http://www.eff.org/IP/WIPO/?f=20041117_open_letter.html)

<sup>vii</sup> See 2003 report of the Electronic Frontier Foundation "Unintended Consequences: 5 years Under the DMCA" [http://www.eff.org/ip/DRM/DMCA/unintended\\_consequences.php](http://www.eff.org/ip/DRM/DMCA/unintended_consequences.php)

<sup>viii</sup> A proposal by NGOs for a Treaty on the Protection of Broadcasts and Broadcasting Organisations