

ETNO Reflection Document on the draft WIPO Treaty on the Protection of Broadcasting Organisations

April 2006

Executive Summary

ETNO Members share serious concerns regarding the draft Treaty which are linked to the document's failure adequately to distinguish different technologies.

In order to guarantee a technology-neutral approach, the text needs to be revised so that closed telecoms networks are clearly covered.

At the same time, an optional annex on "webcasting" should be deleted so that the public Internet is not covered. Failing this, the Treaty will undermine the network's role as an open platform for any-to-any communication with global reach. In other words, it will threaten the very features which have established the network as a key enabler of economic and cultural development.

ETNO Members believe that this threat is accentuated by an over-wide definition of "webcasting", and the proposal to allow member states to address webcasting on an optional basis. This procedure will not allow for due process and is incompatible with the integrated global nature of the public Internet.

Background

1. The World Intellectual Property Organisation is working on a draft Treaty on the Protection of Broadcasting Organisations (see the 8 February 2006 draft to which the present paper refers at <http://www.wipo.int/copyright/en/>). The central aim of the WIPO document is to provide a form of copyright protection for broadcasting signals. Such protection is already provided in most EU Member States on the basis of the 1961 Rome Convention. The rationale for this Convention was based on a combination of factors:
 - the inapplicability of standard copyright to the content of some types of broadcast (eg, news, sports events)
 - a perceived need to incentivise broadcasters' investment in transmission networks.Advocates of the new Treaty argue that it is important to establish similar protection at global level because modern technology creates increased opportunities for signal piracy.

Draft Treaty fails to distinguish different technologies

2. ETNO Members have a number of serious concerns regarding the draft Treaty. The main basis for these concerns is the document's failure adequately to differentiate between the following technologies for the remote electronic distribution of audiovisual content:
 - "traditional" broadcasting using radio spectrum
 - "traditional" cable TV (CATV)
 - closed networks which use *some* elements of existing fixed and mobile telecoms infrastructure (NB. modern telecoms networks are essentially computer networks)
 - the public Internet
3. Traditional broadcasting and CATV are clearly covered in the main body of the draft Treaty. Closed telecoms networks and the public Internet both seem to fall into the scope of an optional annex on "webcasting" for which the claimed rationale is a need for technological neutrality. This approach ignores fundamental differences between the technologies in question:
 - 3.1 Traditional broadcasting, CATV and closed telecoms networks share common characteristics:
 - Significant network investment is a precondition for content distribution.
 - The networks in question have defined reach (linked to range of terrestrial transmitters, satellite footprints, geographic coverage of cable network, size of subscriber base etc)
 - The content distributed across the network is subject to the centralised control of the network owner.

3.2 Very different characteristics are associated the public Internet:

- Content distribution is possible without any network investment (this has already been undertaken by other entities)
- The reach of the network is theoretically unlimited (the public Internet is, in reality, a network of networks unified only by use of a single technical standard and address system; this permits the any-to-any communication of all users of all networks which choose to implement the same standard and address system). Consequently, almost all public Internet content is made available on the understanding that its potential audience is subject to no a priori definition or limitation.
- Any user can distribute content.

Closed telecoms networks need to be included

4. In the light of the common characteristics identified in para 3.1, a technology-neutral approach clearly requires that closed telecoms networks should be afforded the same protection as broadcasters and CATV operators. The definitions in Article 2 therefore need to be revised and expanded so that, when such networks are used to provide services which are essentially similar to those provided by traditional broadcasters, they are covered in the main body of the Treaty rather than an optional annex. (A second-best approach would involve rewriting the final sentence in the Article 2 definitions of both “broadcasting” and “cablecasting” so that only transmissions over open computer networks are excluded. In this way, restricted access services on mobile networks could be assumed to fall under the definition of broadcasting, and similar services on fixed networks could be treated as part of cablecasting.)

Public Internet services should not be included ¹

5. The case for protection of content distributors using the public Internet is less clear:
- There is no need to incentivise network investment (as noted above, this has already been undertaken by other entities)
 - The principle of technological neutrality needs to be applied in a discriminating way which takes account of the underlying characteristics of different technologies, and the different business models that they facilitate. The principle should never be an end

¹ All the comments made in the present paper apply both to “webcasting” in the commonly-understood sense, and to “simulcasting” (ie, simultaneous transmission using traditional broadcasting networks and the public Internet at the same time).

in itself (nobody suggests allowing cars to drive on railway tracks simply because both are concerned with people transport).

- Any attempt to fit the public Internet into a regulatory model designed for technologies with the characteristics identified in para 3.1 will undermine the network's role as an open platform for any-to-any communication with global reach. In other words, extension of the draft Treaty to cover the public Internet will threaten the very features which have established the network as a key enabler of economic and cultural development. This point is explained in more detail in para 6 below.

6. The draft Treaty's proposed extension to the public Internet presents threats in two main areas:

6.1 Network operator liability

On its path from source to viewer, webcast content will typically travel through infrastructure owned by many different entities. Each new entity in the chain may be considered to be "retransmitting" the webcast within the meaning of the draft Treaty (Article 6). Temporary "fixation" of the webcast may also be necessary at some points in the network (Article 7). In both cases the entity concerned will have no knowledge of the nature of the content which its facilities are helping to transport. The draft Treaty therefore presents serious liability problems for Internet infrastructure providers.

Within the EU, these problems may be mitigated by the provisions of the E-Commerce Directive relating to mere conduit and caching. However:

- There can be no guarantee that these provisions will remain unaltered.
- The public Internet is an integrated global network for which distance is a largely irrelevant consideration (the communication necessary to allow a user in London to view a website hosted in Paris might easily transit via New York). Operators outside the EU do not all enjoy similar protections. Consequently, EU citizens will also suffer if non-EU network operators are negatively affected by the Treaty.
- Some of the network links and fixations affected will be within users' homes and offices, rather than a commercial network (eg, wireless connection from broadband modem to PC). The protections afforded by the E-Commerce Directive will not apply in such cases.
- Even with a limitation of liability, the rights afforded to webcasters are so broad that they could attempt to impose charges or other restrictions on the ability of network providers to provide access to the "webcasting signal." The draft Treaty contains no requirement that such signals be encrypted or that

signal theft is a prerequisite for a violation of these very broad rights.

6.2 Technological protection measures

Suppose that a webcaster introduces technological protection measures for its service which involve the user's purchase of a modem/home network hub based on proprietary technology. For reasons of cost and convenience, most users will be unlikely to have more than one such item of equipment in their home. Furthermore, under Article 14 of the draft Treaty, it would be unlawful for users to attempt to receive the service using any other item of equipment.

This combination of factors would allow a webcaster with popular content to build a particularly powerful market position. More specifically, it would gain "bottleneck control" over access to large numbers of users, allowing it to favour its own content and to influence the way in which other material from the public Internet is presented to the end-user. In this way, control of a network which has hitherto operated on an open, democratic basis would be annexed so that it functions as another form of CATV.

It is true that Article 14 of the draft Treaty simply mirrors provisions in other WIPO Treaties and the EU Copyright Directive. Market dominance risks are also associated with these provisions. However, in the present case, the risk is much higher since future markets are likely to be populated by relatively few webcasters with a compelling content offer. Furthermore, the balancing arguments to justify taking this risk are particularly weak.

7. Taking into consideration all the points made in paras 5 and 6 ETNO believes that, from a public welfare perspective, the extension of the Treaty to public Internet content distributors as currently proposed will involve potential costs that far outweigh the possible benefits. The role of the network as an open platform which allows distribution of *all* types of content by *all* users will be threatened simply in order to enhance the legal framework for distribution of a *narrow subset* of content types by a *narrow subset* of users. In any case, it is arguable whether such enhancement is required since a flourishing webcasting sector has emerged without the benefit of the protection which the WIPO Treaty seeks to provide.

Definition of "webcasting" is too broad

8. The scale of the threats outlined in para 6 is accentuated by the draft Treaty's current definition of "webcasting". Whereas the text deals adequately with sound-only webcasts, the same is not true for visual content. Insofar as the latter is concerned, the assumed aim is to benefit all services which consist of delivery of moving images of physical events in real time. However, since the current definition fails to

specify these points, it potentially applies to *all* web content – even a page of static text.

Optional annex on webcasting does not provide for due process

9. The threats outlined in Article 6 are also heightened by the way in which the draft Treaty seeks to address “webcasting”. More specifically, the current proposal to permit countries to opt-in to the webcasting provisions simply by depositing a notice with WIPO’s Director General does not provide the proper process for member states to consider this controversial issue and adds business uncertainty for others in the online distribution chain. Such a fragmented approach is incompatible with the integrated global nature of the public Internet as highlighted in para 6.1 above.

Possible solution to Treaty costs

10. As indicated above, ETNO is opposed to the draft Treaty’s inclusion of public Internet distribution since it considers that the costs outweigh the benefits. It follows that the Association could support the inclusion of such services if the Treaty text can be redrafted in a way which avoids these costs. ETNO is currently unsure how this might be reliably achieved. We would nevertheless suggest limitation of the Treaty to signal piracy scenarios as one option for further consideration. For example, Article 3(1) could be amended as follows: "*Protection granted under this treaty protects against the intentional theft or misappropriation of programme-carrying signals used for the transmission by the beneficiaries of this treaty....*"