

December 6, 2022

Mary Critharis
Chief Policy Officer and Director
Office of Policy and International Affairs
U.S. Patent and Trademark Office
Madison East Building, Concourse Level
600 Dulany Street
Alexandria, VA 22314

Dear Ms. Critharis:

USTelecom – The Broadband Association (“USTelecom”), ACA Connects – America’s Communications Association (“ACA Connects”), Consumer Technology Association (“CTA”), CTIA, and NTCA – The Rural Broadband Association (“NTCA”) (together, “the Associations”) respectfully submit this letter to express concerns about renewed efforts at the World Intellectual Property Organization (WIPO) to introduce an international Broadcasting Treaty.

The concept for an international Broadcasting Treaty was introduced at WIPO in 1998, and various proposals have been discussed and debated repeatedly since then. The treaty has been, and continues to be, highly controversial. As a non-governmental observer at the WIPO, USTelecom has raised numerous concerns about the scope and potential harms of a broadcasting treaty that the Associations share. The Associations are therefore disappointed that the treaty continues to progress. We have reviewed the current draft and unfortunately the concerns flagged regarding prior iterations remain, including that it would cause significant harm to the U.S. communications industry, deter U.S. broadband deployment, and harm Internet growth and innovation and, ultimately, consumers

We understand that it is the position of the U.S. Government that the treaty, if adopted, would not require changes to U.S. law. Because the rationale is unclear to us, we would appreciate the opportunity to more fully understand the reasoning that supports this position. Even if it is the position of this Administration that the treaty would not require changes to U.S. law, broadcast organizations could nonetheless use it as a basis for arguing to Congress and future Administrations that U.S. law in fact needs to be amended to conform to the treaty. Such arguments, however weak, would nevertheless be a huge distraction at a minimum. Additionally, expanding the definition of broadcasting – purportedly only with respect to the additional rights that would be granted by this treaty – would almost certainly lead to confusion and require courts and federal agencies to devote scarce time and resources attempting to differentiate between definitions of broadcasting, including the circumstances under which each one applies.

In particular, broadcast organizations could argue that the treaty creates a broad new set of exclusive IP-like rights for broadcast signals, and that corresponding new IP-like rights for broadcasters under U.S. law will later be necessary to reflect the same. These new broadcasting rights would provide an excessive 20-year term of exclusive protection, under which broadcasters could demand undue payments from third parties, including internet service providers (“ISPs”), related to accessing their broadcast signal.¹ These new broadcasting rights could pose an existential threat to the entire ecosystem of internet intermediaries,

¹ In addition, Article 7 would establish a controversial right of “making available” in the context of deferred transmission of stored programs. The right of “making available” is not an enumerated exclusive right under U.S. copyright law. It, however, also could nevertheless be used to demand unreasonable payments from or enforcement by third parties.

harming innovation and deterring the growth of broadband deployment and, ultimately, consumers. For instance, a 2021 survey of one trade association’s members found that for nearly 20% of member ISPs, more than 75% of households in their service area cannot receive an over-the-air broadcast signal.² As a result, these households are dependent upon their ISP or cable service provider to deliver the local broadcast programming pursuant to a retransmission consent agreement between the ISP/cable provider and the broadcaster. Yet, even in cases like these, video distributors have faced escalating fees for retransmission consent. It is not difficult to foresee that granting additional rights to program signals would result in even higher retransmission consent fees, to the detriment of consumers.

Additionally, the language in Article 12 on technological measures could be used to impose burdensome, and potentially duplicative, technological measures. The U.S. Copyright Office already has an ongoing rulemaking proceeding to implement the technological provisions created by the Digital Millennium Copyright Act (DMCA) in 1998.³ Creating new laws aimed at technological measures while the DMCA’s technological provisions continue to be worked through is premature. Likewise, language in Article 17 regarding “expeditious remedies” for broadcasters to combat infringement echoes ongoing discussions in the copyright policy arena and could make way for technical mandates and overbroad remedies that would shift costs and impose unreasonable burdens and new forms of liability on intermediaries.

Broadcast organizations could seek to exploit the treaty by interpreting it as creating a new, wholly unnecessary and counterproductive broadcasting right, layered on top of existing copyright rights in the underlying content. Broadcast organizations could argue that a signal that is broadcast – even for a few seconds – would be entitled under the treaty to 20 years of exclusive IP-like protection. Such a new right would be unnecessary to protect the underlying content and could force traditional and online content distributors to clear a thicket of broadcast treaty rights. This would add to the already complex and costly processes of licensing copyright-protected content and obtaining retransmission consents for each piece of content they wish to distribute. The United States should not sign onto a treaty that could invite these complexities and confusion.

The treaty’s overbroad definitions and rights could compound its other defects if implemented in the United States. For example, the draft includes an expansive definition of “broadcasting” that would cover all transmission types, including cable, satellite, computer networks and by any other means. This definition goes far beyond live broadcasts and would inappropriately capture stored programs such as catch-up services, video-on-demand (VOD) services and previously broadcast programs. Article 6 likewise proposes a sweepingly broad right of retransmission under which “[b]roadcasting organizations shall enjoy the exclusive right of authorizing the retransmission of their program-carrying signals by any means.” The explanatory notes go even further, indicating that the proposed right protects broadcasters “against all retransmissions, by any means, including rebroadcasting and retransmission by wire, by cable or over computer networks, when done by any another [sic] entity.” The breadth of this right exacerbates liability and cost risks.

² NTCA Broadband/Internet Availability Survey Report, Dec. 2021 at p. 29, available at <https://www.ntca.org/sites/default/files/documents/2021-12/2021-broadband-survey-report-final-12-15-21.pdf> (2021 Survey Report).

³ See, e.g., Section 1201 Rulemaking: Eighth Triennial Proceeding to Determine Exemptions to the Prohibition on Circumvention. Recommendation of the Register of Copyrights, Oct. 2021, p. 4, available at https://cdn.loc.gov/copyright/1201/2021/2021_Section_1201_Registers_Recommendation.pdf (“Title I of the DMCA added a new chapter 12 to title 17 of the United States Code, which prohibits circumvention of technological measures employed by or on behalf of copyright owners to control access to their works.”).

Even if the treaty would not lead to changes in U.S. law, it could have a negative impact on the U.S. communications industry by precipitating the adoption of problematic laws in other countries. Given the international nature of ISPs' operations and those of ISPs' international business partners, this treaty would result in ISPs having to navigate complex new regimes.

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In sum, the draft treaty in its current form remains overbroad and harmful. It has the potential of creating a thicket of unnecessary rights, which would have the effect of chilling broadband development and imposing new costs and liabilities on large and small U.S. communications providers and online intermediaries, including ISPs, ultimately harming consumers and other end-users and their access to critical information.

We understand an interagency team is currently reviewing the treaty for possible effects on U.S. interests. Given the concerns above, the United States should oppose the adoption of this treaty, and instead should offer alternatives more narrowly focused on signal theft that cannot be used to press for counterproductive changes in U.S. law. Should WIPO nevertheless pursue the treaty, it is essential that Article 10 of "Limitations and Exceptions" be drafted as mandatory, not optional, and that online intermediaries, including ISPs, have a complete carve-out from the scope of this treaty and the liability it would impose. Otherwise, U.S. ISPs and other online intermediaries will be left to battle for limitations and exceptions in national laws of every country that becomes a signatory.

We would appreciate the opportunity to meet with you and your team to discuss our concerns and hope the U.S. will actively engage at WIPO to ensure the scope of the Broadcasting Treaty is appropriately constrained. Please contact Morgan Reeds, Director of Policy & Advocacy at USTelecom, at mreeds@ustelecom.org with questions.

Sincerely,

ACA Connects – America's Communications Association
Consumer Technology Association
CTIA
NTCA – The Rural Broadband Association
USTelecom – The Broadband Association

CC: Michael Shapiro, U.S. Patent and Trademark Office
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