

September 7, 2006

Jon W. Dudas
Under Secretary of Commerce for
Intellectual Property and Director of
the United States Patent and Trademark Office
Randolph Building, 401 Dulany Street
Alexandria, VA 22314

Dear Mr. Dudas:

I am responding to a "Statement" you received dated September 5, 2006, from a number of telecommunications, information technology, consumer electronics industry, "public interest", and performers' representatives opposing the proposed World Intellectual Property Organization ("WIPO") treaty designed to fight piracy of broadcast signals and to update the rights of broadcasters in their signal. That Statement paints an erroneous picture of the issues at WIPO apparently intended to create confusion and fear. The purpose of this letter is to set the record straight.

First, the Statement is wrong to suggest that there is no justification for the treaty. The need to modernize the rights of broadcasters in their signal is clear and pressing. Broadcasters' rights at the international level have not been updated for over 45 years and broadcasters are being harmed. For example, several years ago, a Canadian internet service provider began retransmitting U.S. broadcast signals over the internet. While various program providers brought a copyright infringement suit, no remedy was available for U.S. stations based upon the retransmission of their signals. Copyright holders have also sued Caribbean cable systems for the retransmission of Florida stations carrying their programming. Again, the Florida stations are being harmed, but they have no remedy under international law to require foreign cable systems to obtain authorization to retransmit their signals.

The Statement is also wrong to suggest that these problems can be addressed by an approach focused only on signal theft. That focus misses the mark because without an international recognition of substantive rights in broadcast signals, foreign satellite cable and internet providers can expropriate U.S. broadcast signals. Broadcasters need to have the right to prohibit and to authorize use of their signals. U.S. broadcasters have had such protection in the form of retransmission consent rights with respect to carriage of their signals by U.S. cable systems and satellite carriers since 1992, but no such right currently exists with respect to carriage of their signals to non-U.S. cable and satellite providers.

U.S. retransmission consent laws show the fallacy of the claims in the Statement that recognition of expanded broadcaster rights is unprecedented and unwarranted. Moreover, substantive rights in a broadcaster's signal have been recognized in Europe and other regions for some time without any of the dire consequences that the signatories have predicted. The WIPO Treaty would simply establish a mechanism to recognize similar rights in broadcast signals at the international level.

The alleged threats to software developers, device and equipment manufacturers, and the public are similarly unfounded. Any final version of this treaty will include a section on the limitations and exceptions that permits countries to adopt limits and exceptions to rights created under the treaty. The same language is included in almost every other international intellectual property treaty. The limitations and exceptions provision would allow the U.S. to adopt fair use, private home copying, use by libraries and schools, safe harbor provisions, home and personal networking provisions and all other limitations on and exceptions to the rights of copyright and related rights holders. In contrast, the assertion of the Statement that this proposed international treaty should contain "specific" provisions and limitations contained in U.S. law would be likely to offend other countries. Indeed, it could lead other countries, with justification, to assert that their national system of limitations and exceptions should also be adopted wholesale into this treaty. Such an approach would be unworkable and could result in, for example, limitations and exceptions imposed by totalitarian regimes that are antithetical to freedom of speech and access to knowledge.

While the Statement alleges that adoption of a broadcaster treaty would "harm important economic and public policy interests," quite the opposite is true. The potential detriment that would flow from failure to adopt a treaty is substantial. With respect to signal piracy, alone, many articles have documented the problem.¹ A study released by Envisional in 2005 reported that television show piracy increased 150% in the past year. And, in a front page Washington Post article on June 15, 2006, entitled "U.S. Joins Industry in Piracy War," it is estimated that U.S. companies lose as much as \$250 billion per year to internet pirates.

As you know, WIPO began its exhaustive work on the broadcast treaty in 1998. WIPO has held fourteen separate sets of negotiations in Geneva, in which scores of non-governmental organizations participated, as well as three fact gathering symposiums and seven regional consultations around the world attended by representatives of over 85 countries. There has been a full and fair airing of all viewpoints including those expressed in the Statement. The time to move to a diplomatic conference to adopt a treaty updating the rights of broadcasters is long overdue. I urge you strongly to support efforts at the upcoming WIPO sessions to schedule such a conference in 2007.

¹ See "Spiraling Piracy Threatens T.V.", Television Week, 2/21/05; "Newest Export from China: Pirated Pay T.V.", Wall Street Journal, 9/2/05; "24 Reasons Why T.V. Piracy is Soaring," <http://networks.silicon.com>, 2/17/05; "Steal This Show", New York Times, 1/30/05, Arts & Leisure Desk Television, p. 1; "Tech Driven T.V. Piracy Rampant: Report", <http://www.indianatelevision.com>, 5/23/05; "Online Trading of T.V. Episodes Grows", USA Today, 05/20/04, Money Section, 3B.

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Should you have any questions about the broadcaster treaty or wish to discuss it further, please contact: Benjamin Ivins (202-429-5460 bivins@nab.org) or Jane Mago (202-429-5459 jmago@nab.org) here at the NAB.

Best wishes.

Sincerely,

David K. Rehr

cc: Mr. Stephen M. Pinkos
Deputy Under Secretary of Commerce
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