

TPMs AND TECHNOLOGY MANDATE LAWS
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What does Article 14 say?

“Contracting Parties shall provide *adequate legal protection and effective legal remedies* against the circumvention of effective technological measures that are used by broadcasting organizations in connection with the exercise of their rights under this Treaty and that restrict acts, in respect of their broadcasts, that are not authorized by the broadcasting organizations concerned *or* are not permitted by law.”

Does Article 14 contain an obligation to mandate for the broadcasters to use technological measures?

No. It imposes an obligation on signatory countries where technological measures are used by broadcasters and by cablecasters (*mutatis mutandis* under Art.3). Signatory countries then have an obligation to “provide adequate legal protection and effective legal remedies” against circumvention of those measures. If the treaty is extended to webcasters, signatories would be required to provide legal measures for technological measures used by webcasters (under Appendix Article 3’s *mutatis mutandis* clause). As far as we know, no one has ever made the claim that Article 14 mandates the use of technological measures by broadcasters.

What is required to comply with Article 14?

Paragraph 14.03 of the Explanatory notes in SCCR/14/2 states: “In order to comply with the obligations of this Article the Contracting Parties may choose appropriate remedies according to their own legal traditions.”

The language in Article 14 is the same as that used in respect of copyright owner TPMs in Article 11 of the WCT and Article 18 of the WPPT. In the United States, these obligations were implemented through the Digital Millennium Copyright Act of 1998, which inserted sections 1201-1204 in to the U.S. Copyright statute, and in the Europe Community, by Article 6 of the Information Society Directive (Directive 2001/29/EC of the European Parliament and of the Council on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society). As noted by several delegations in the discussion on May 4, despite the scope of discretion left to Member States by this language, in practice, a number of global political pressures, including the use of bilateral free trade agreements, has effectively required countries to converge around these two main models of implementing these obligations in relation to copyright owner TPMs. The same factors are likely to lead to convergence in implementing the broadcaster TPM and Rights Management obligations in Articles 14 and 15 of the Treaty through laws banning the circumvention of broadcaster, cablecaster and potentially webcaster TPMs on transmissions, and regulation of tools, technologies and devices that can be used to circumvent.

Technology Mandate Laws

Broadcaster TPMs are different in certain key respects from copyright owner TPMs. To be effective, broadcaster TPMs require regulation of the devices which broadcast signals can be received. Broadcaster TPM regimes require devices to detect and respond to the broadcaster

TPM. In the U.S., broadcasters sought a further law, in addition to the DMCA, to provide adequate legal protection for the U.S Broadcast Flag TPM, the Federal Communications Commission's Broadcast Flag regulation.¹ The U.S. Broadcast Flag regulation is a Technology Mandate law. In basic terms, Technology Mandate laws and regimes do two things (1) they require manufacturers to design devices to detect and respond to TPMs and (2) they seek to ban all devices that don't do so from the marketplace, by various means. In the United States, the FCC regulation and implementing rules would have had the effect of precluding free and open source software technologies.²

Broadcaster TPM technology mandate laws are also under discussion outside of the United States. In March 2005, a representative of the North American Broadcasters Association announced that the European Digital Video Broadcasting standards-specifying body intended to use the technological protection measure provisions in the Broadcasting Treaty to obtain national technology mandate laws for the DVB CPCM digital rights management standard in digital television technology in all countries using DVB broadcast standards (which include Europe, parts of Asia, Latin America and Australia).³

What's wrong with Technology Mandates?

Imposing government mandate on emerging broadcast technologies (such as digital television and radio) is detrimental for innovation and competition policy, as U.S. corporations like Intel Corporation have noted.

These mandates will also restrict private, non-commercial uses of broadcasting content that are reserved to the public, researchers, archivists and educators under existing national laws. For instance, a legally-backed technological measure could restrict in-home recording of broadcast television for personal, non-commercial use, or "time-shifting," which in United States' law is recognized as lawful fair use and not copyright infringement.

Absent any evidence that non-commercial uses pose any substantial harm to broadcasters, the imposition of a technology mandate regime is premature.

Why is the Broadcaster TPM regime different from the copyright TPM regime established in the WCT and WPPT?

A broadcaster technological protection measure regime is likely to have more far-reaching consequences on technological innovation and information distribution than the parallel copyright rightsholder technological protection measure regime under Article 11 of the WIPO Copyright Treaty and Article 18 of the WIPO Performances and Phonograms Treaty for three reasons.

¹ *In the Matter of Digital Broadcast Content Protection*, MB Docket No. 02-230, Report and Order and Further Notice of Proposed Rule, FCC No. 03-273 (rel. Nov. 4, 2003). The recording industry is also seeking a technology mandate for digital radio broadcasting: See FCC MM Docket No. 99-325.

² See EFF Briefing Paper for WIPO Delegates on Technological Protection Measures, April 2005, pages 10-11, http://www.eff.org/IP/WIPO/dev_agenda/EFF_WIPO_briefing_041205.pdf

³ See *Protecting Digital Broadcast Content From Unauthorized Redistribution – An Issue For All Broadcasters*, Presentation to the DVB World, Dublin, Ireland, March 2005, by Spencer Stephens, North American Broadcasters Association, <http://www.iab.ch/dvbworld2005.htm> and <http://www.iab.ch/dvbworld2005/NABA%20DVB%20World%20Presentation.ppt> Slide 19 explaining need for Broadcasting Treaty TPM provisions.

(1) **“No mandate” precluded:** The 1996 treaties leave room for “no mandate” type provisions in national implementation law. That means that consumer electronics, telecommunications devices and computing products do not have to be designed to detect and respond to particular technological measures.⁴ These types of provisions are necessary to minimize a) anti-competitive uses of technological measures backed by legal sanctions and b) attempts by rightsholders to use technological measures to ban or lever control over technologies that interoperate with their copyrighted works that would otherwise stifle technological innovation.

Unlike the rightsholder regime, a broadcaster technological measure regime leaves no space for a “no mandate” safeguard. A broadcast in a particular country must meet that nation’s broadcasting standard (for instance, PAL or NTSC format). Any technology designed to receive broadcasts in that country must necessarily interoperate with that nation’s broadcast signal. If the broadcast signal incorporates a technological measure, all devices must respond to it. While a device could be designed to ignore a technological measure, it will not be able to receive the signal broadcast in that country. As a result, device manufacturers must comply with design mandate laws to sell their devices in the market.

(2) **Global Standardization:** A broadcaster technological measure regime is likely to erode Member States’ national sovereignty in technology regulation. Electronics are strongly standardized across international borders. In practice, this means that governmental mandates imposed in a few large electronics markets will become the de facto requirements for all Member States, regardless of variations in national implementation laws.

(3) **Broadcaster TPM regimes apply beyond Copyright:** Since the Broadcast Treaty creates rights that are intended to apply in addition to, and independently of, copyright, broadcaster, cablecaster, and potentially webcaster, TPMs could be used to restrict access to information that is in the public domain, not copyrightable or has been permissively licensed (for instance by a Creative Commons license) by a rightsholder.

Contact for further information:

Gwen Hinze

International Affairs Director

Email: gwen@eff.org

⁴ See, for instance, section 1201(c)(3) of the U.S. Copyright Act: “Nothing in this section shall require that the design of, or design and selection of parts and components for, a consumer electronics, telecommunications, or computing product provide for a response to any particular technological measure, so long as such part or component, or the products in which such part or component is integrated, does not otherwise fall within the prohibitions of sections (a)(2) or (b)(1).”

