

# Summary of International Copyright and IP Activities

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At the urging of the United States, a new "digital agenda" recently has been added to the range of issues under consideration in a long-running series of negotiations convened by the [World Intellectual Property Organization \(WIPO\)](#). Currently, the U.S. is pressing for the early conclusion of international agreements on a number of issues as to which the Congress has yet to legislate and the U.S. copyright community remains deeply divided. In the longer term, this effort to shape global intellectual property policy before achieving domestic consensus could have the unintended consequence of jeopardizing both the U.S. leadership role in the field and the interests of U.S. copyright-related industries and institutions.

## The International and Domestic Background

Since 1991, the World Intellectual Property Organization (WIPO) has been sponsoring a series of negotiations at its Geneva headquarters, aimed at achieving broad international consensus about the contents of two potential new treaties: a "Protocol to the [Berne Convention](#) for the Protection of Literary and Artistic Works" and an "Instrument for the Protection of the Rights of Performers and Producers of Phonograms." The agenda for the talks has included a number of issues which are of crucial importance to the United States copyright community, such as the legal status of computer programs, rights in sound recordings, the protection of "original databases," the duration of protection for photographs, the principle of national treatment, and copyright enforcement measures. Some of these issues are difficult and controversial, but despite this the negotiations have made generally good progress over the last five years. For most of that period, the even more difficult topic of copyright and the Internet has not been part of the discussion.

Here at home, the [National Information Infrastructure](#) Task Force Working Group on Intellectual Property Rights initiated a series of hearings on copyright and the Internet (among other issues) in late 1993; these were followed by the issuance of a preliminary draft report (the "Green Paper") in July 1994, which was itself the subject of hearings later that year. Over the months, it emerged that the U.S. copyright community was deeply divided. Although all parties favored providing copyright owners with adequate security against the electronic appropriation of their works, they had many differences over how this could best be achieved. Owners of traditional copyrighted "content" tended to favor imposing potentially far-reaching liability for copyright infringement in connection with a wide range of net-based information transactions, and outlawing a variety of electronic technologies which might be used to facilitate "piracy." By contrast, information consumers (including librarians and educators) and companies engaged in building the infrastructure of the NII favored a more cautious approach to adapting copyright to the networked information environment. The former group argued that without strong copyright, content providers might not make use of the networked environment as a medium of distribution, a view strongly endorsed in the Green Paper itself; by contrast, the latter group criticized the Green Paper's approach as lacking in "balance," arguing that premature or excessive regulation might discourage the development of network architecture and the emergence of new business and cultural models. The ["White Paper"](#) and the International "Digital Agenda"

In September 1995, the Working Group released its final report, Intellectual Property and the National Information Infrastructure (the "White Paper"), a document which (for the most part) tracks the earlier Green Paper, and contains specific proposals for new legislation. Significantly, the White Paper was made public not only in Washington, D.C., but also -- simultaneously -- in Geneva. This gesture was intended to indicate that the proposals for copyright law reform contained in the "White Paper" were not

meant for domestic consumption only; rather they were intended a template for new international norms in the nature of "rules" for the global information superhighway. With the release of the White Paper, the United States delegation made it clear that it wished to expand the negotiations over the "Berne Protocol" and the "New Instrument" to include various topics constituting a so-called "digital agenda," and that it hoped to bring the talks to a conclusion at a formal Diplomatic Conference before the end of calendar year 1996.

Later in September, the NII Copyright Protection Act of 1995 was introduced (as [S. 1284](#) and [H.R. 2441](#)) in both houses of the United States Congress. The bills tracked exactly the legislative proposals of the White Paper, and although those proposals had been characterized as only "minor changes" in existing copyright law, they proved highly controversial. Among other things, they called for the creation of:

- a new "transmission right" for works in digital format, coming under the existing "distribution right" in 17 U.S.C. Sec. 106;
- stringent new prohibitions against the manufacture or sale of devices and services which were capable of being used to circumvent technological protections applied to copyrighted works; and
- new penalties against the falsification of "copyright management information."

On the other hand, the bills failed to deal with a number of related topics of concern, including

- rules to govern the liability of service providers for on-line copyright infringements committed by their customers or subscribers;
- the place of the traditional "fair use" and "first sale" doctrines in the new world of digital copyright; and
- the impact of new regimes of liability on existing cultural exemptions, such as those found in Sec. 110(2), relating to distance education.

Although the bills, as introduced, received strong support from various owners of traditional copyrighted content, others -- including educators, library organizations, consumer groups, privacy advocates, manufacturers and distributors of computers and other electronic hardware, as well as telecommunications companies -- called for major revisions prior to its enactment. After several lively congressional hearings and a series of useful (though as yet inconclusive) congressionally-sponsored negotiations among the interested parties, there is a general consensus that no further legislative action on the bills is expected in this session of congress. Ultimately, the issues proved too difficult -- and too important -- to resolve without further process.

In November 1995, before the domestic legislative outcome was clear the U.S. delegation (along with other nations) to the WIPO talks in Geneva submitted concrete proposals for language to be included in the "Berne Protocol" and "New Instrument." They include language addressing the new "digital agenda," including proposals for both a new right of "communication to the public" and a new "transmission right" equivalent to that called for in H.R. 2441 and S. 1284; likewise, the U.S. proposals included an "anti-circumvention" provision arguably even more stringent than that contemplated in the those bills. As the commentary on the U.S. submission put, these "proposals... are based on the Administration's recent White Paper in Intellectual Property and the National Information Infrastructure and legislation currently pending before both the House of Representatives and the Senate."

### **The Evolution of the "Digital Agenda"**

The United States has worked closely with the European Union in formulating the "digital agenda," and on a number of issues the EU's proposals effectively recapitulate those of the U.S. However, one

particular suggestion offered by the EU (in May 1996) goes further than the U.S. submissions in dealing with what has emerged as one of the most controversial issues in our domestic debates over copyright in cyberspace: the legal status of "temporary" or "ephemeral" copies created in connection with the operation of computer hardware systems (including systems constituting the infrastructure of the National or Global Information Infrastructure, such as Internet servers and routers). While "content providers" urge that all unauthorized reproductions of a copyrighted work should be considered potential infringements, Internet service providers (among others) and computer makers contend that to do so could cripple the further development of the NII and GII. Domestically, this issue is likely to hotly debated in future sessions of Congress. Meanwhile, however, the EU's proposed language would make it clear that even "temporary storage" of a work in an electronic medium constitutes the making of a "copy" within the meaning of the Berne Convention. There is no indication that the U.S. delegation to the WIPO negotiations would dissent from this proposal -- especially since it appears to be consistent with the legal analysis of the White Paper itself.

### **Beyond the White Paper: Databases and the "Digital Agenda"**

Going beyond anything in the White Paper, both the United States and the European Union recently have proposed expanding the scope of the WIPO negotiations still further, to include proposals for "Sui Generis Protection of Databases," without regard to whether they possess the "originality" required for protection under copyright law. Although the concept would apply to all databases, it is likely to have its greatest impact where those in electronic format are concerned; thus, there is an important sense in which these proposals, too, form part of the "digital agenda." Although the European Union has a Directive providing for such protection in place, the proposal is a highly controversial one in the United States, especially in light of the 1991 Feist decision of the Supreme Court, which held that databases which reflect effort and expense rather than "creativity," fall outside the scope of copyright as a constitutional matter. Moreover, the U.S. proposal to WIPO is for a scheme of database protection which goes beyond the existing EU Directive in a number respects. Domestically, any effort to legislate sweeping sui generis protection of databases is likely to be opposed by many, if not all, of the groups which have expressed concerns about the legislative proposals of the White Paper.. Although a bill which tracks the language of the U.S. proposal to the WIPO has been introduced in the House of Representatives (H.R. 3531), it appears there will be no hearings or other action on it in this session of Congress.

### **Towards a December 1996 Diplomatic Conference**

It now appears extremely unlikely that there will be any further domestic legislative action on any of these digital copyright issues prior to early 1997. Where the negotiations on the "Berne Protocol" and "New Instrument" -- including the "digital agenda" -- are concerned, however, the following calendar was adopted by WIPO's governing bodies on May 24, with the support of the United States delegation:

- September 1, 1996. Release of draft treaty language, compiled from the submissions of participating delegations by the chair of the WIPO "Committee of Experts" (Mr. Jukka Liedes of Finland);
- September 20 - November 22. A series of WIPO-convened regional consultations on the draft language; and
- December 2-20, 1996. Diplomatic Conference in Geneva to take final action on the two new agreements.

### **The Relationship Between International Agreements and Domestic Law Reform**

As appears from the foregoing, there is a real possibility that international agreement on new intellectual property norms applicable to the digital networked environment could be agreed upon in advance of the formation of any domestic consensus on these issues in the United States. Indeed, this has been

identified as a legislative strategy by Commissioner of Patents and Trademarks, Assistant Secretary of Commerce Bruce Lehman, the principal author of the White Paper and leader of the U.S. delegation to WIPO, who put it as follows (in an interview published in late June 1996):

LEHMAN: ....I know the [NII Copyright Protection Act, S. 1284 and H.R. 2441] is troubled, but I still think there is a possibility it may be resurrected this term....

[Q.] What will the Clinton Administration do next if the bill fails?

LEHMAN: The thing we are going to do is go to Geneva in December.... We are going to see if we can't negotiate some new international treaties and get [the international situation] straightened out. Now it may be that those treaties will require some legislative implementation. They will certainly have to be ratified by the Senate in any event, but they also might have to be implemented and that gives us a sort of second bite of the apple.

### **The "Digital Agenda and the U.S. Leadership Role in Intellectual Property**

Putting to one side the question of whether this approach is calculated to produce sound global or domestic intellectual property policy in a area where United States companies and consumers have considerable economic and cultural stakes, the strategy articulated by Commissioner Lehman would seem to pose some risk for the general conduct of U.S. diplomacy on intellectual property issues. Over the past decade, the U.S. has led a successful campaign to upgrade international norms in the field. One indication of the general success is the TRIPS agreement which formed part of the Final Act of the Uruguay Round of the General Agreement on Tariffs and Trade. Another is the progress which had been made in Geneva, over five years prior to the introduction of the "digital agenda," toward a Berne Protocol and a New Instrument covering many of the most important general outstanding issues in global information commerce. Insistence on early conclusion of agreements incorporating the "digital agenda" may put these accomplishments, and -- perhaps more importantly -- the perception of the United States as an international leader in the field, at risk.

If the U.S. continues to press for a "fast track" international resolution of issues which remain unresolved at home, it must be anticipated that the groups which have opposed the enactment of the original White Paper-based NII copyright bills in congress may focus their attention on efforts (1) to prevent the conclusion of any agreements at December's Geneva meeting, (2) to frustrate the ratification of treaties emerging from that meeting which contain provisions relating "digital agenda", and (3) to block domestic implementation of provisions they find objectionable in any treaties which actually are ratified -- U.S. obligations under international law. The damage that would result to the U.S. leadership position in international intellectual property policy, were these efforts to be successful, is obvious. Even if treaties reflecting current proposals on the "digital agenda" ultimately are ratified and implemented in the U.S., over the strenuous protest of a large part of the domestic copyright community, the potential for international embarrassment is considerable. Given the likelihood that, over coming months, it will be possible to hammer out a domestic consensus on copyright in cyberspace, on which proposals for new international norms could be modelled, there is a serious question as to whether the risks for proceeding now to conclude international agreements on a "digital agenda" from which many U.S. companies institutions and individuals vigorously dissent.

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**Last Modified:** August 15, 2001