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World Intellectual Property Organization Copyright Treaty: An Overview

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ABSTRACT

The President has requested the advice and consent of the Senate to a new World Intellectual Property Organization ("WIPO") Copyright Treaty. S. 1121 and H.R. 2281 embody the Administration's recommended changes in U.S. law to implement the Treaty. S. 1146 also implements the Copyright Treaty, but, in addition, would amend the copyright law with respect to online service provider liability, ephemeral copying, fair use, and distance learning. The Treaty updates copyright protection internationally for computer programs, databases as intellectual creations, and digital communications, including use of copyrighted works over the worldwide Internet and other computer networks. This report highlights the main features of the Treaty and summarizes the alternative implementation bills.

World Intellectual Property Organization Copyright Treaty: An Overview

Summary

The President has requested the advice and consent of the Senate to ratification by the United States of a new multilateral treaty, the World Intellectual Property Organization ("WIPO") Copyright Treaty. This new treaty was adopted by a Diplomatic Conference, convened in Geneva, Switzerland from December 2-20, 1996. The WIPO Copyright Treaty updates (but does not formally revise) the Berne Copyright Convention, the primary multilateral copyright treaty which was last revised at Paris in 1971. S. 1121 and H.R. 2281, which have been introduced at the request of the Clinton Administration, propose changes in United States copyright law to implement the treaty.

The WIPO Copyright Treaty confirms copyright subject matter protection for computer programs and those databases which are intellectual creations; clarifies or extends rights of public distribution, commercial rental, and public communication (i.e., transmission) when using copyrighted works in digital, electronic environments, subject to limitations that may be enacted by national law if the limitations do not conflict with normal marketing of the work and do not unreasonably prejudice the author's interest; and requires adequate and effective remedies to protect against circumvention of anti-copying technologies and knowing alteration or removal of electronic rights management information.

The new treaty, which is in the nature of a special agreement for current members of the Berne Convention, culminates an international treaty development program that began in 1989 with proposals for a "protocol" to update the Berne Convention.

Both the House of Representatives and the Senate will consider the proposed implementing legislation. S. 1121 and H.R. 2281, the Clinton Administration bills would amend the Copyright Act to create new protection in two fields only: protection against circumvention of anti-copying technology, and protection to assure the integrity of copyright management information systems. Another bill, S. 1146, addresses additional issues, including online service provider liability, fair use, ephemeral copying, and distance learning.

This report reviews the background of the WIPO Copyright Treaty, summarizes its main provisions and the proposed implementation bills, and briefly discusses possible legislative issues concerning implementation of the treaty. (A separate report has been prepared concerning a second new treaty —the WIPO Performances and Phonograms Treaty.)

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World Intellectual Property Organization Copyright Treaty: An Overview

Introduction

The World Intellectual Property Organization (WIPO)[1] convened a diplomatic conference from December 2-20, 1996 in Geneva, Switzerland to consider three draft treaties in the field of intellectual property. Delegates representing more than 125 countries participated in the conference, which ultimately adopted two new intellectual property treaties and postponed consideration of a third draft treaty.

One treaty — the WIPO Copyright Treaty — covers copyright protection for computer programs, databases as intellectual works, and digital communications, including transmission of copyrighted works over the world-wide Internet and other computer networks.

The second treaty — the WIPO Performances and Phonograms Treaty[2] — covers protection for performers of audio works and producers of phonograms (i.e., sound recordings), usually under "related" or "neighboring rights" theories of legal protection. A country like the United States, however, that protects sound recordings under copyright law, may continue to use copyright law to satisfy the obligations of the Performances-Phonograms Treaty.

Consideration of the third draft treaty — the Database Treaty — was postponed to another diplomatic conference both because of insufficient time at the December 1996 Conference and because of objections from many countries that sufficient time had not been expended in the preparatory work to enable the countries to make an informed decision. The draft Database Treaty would have established *sui generis*

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[1] The World Intellectual Property Organization is a specialized agency of the United Nations which administers most of the international treaties in the field of intellectual property (patents, trademarks, and copyrights). WIPO administers the Berne Convention for the Protection of Literary and Artistic Works, the major copyright convention. New treaties in this field are usually negotiated and developed under work programs established by WIPO members. Usually, following a series of governmental experts meetings, WIPO convenes a diplomatic conference of states to consider, debate, negotiate, and perhaps approve a new treaty. This process was followed in developing the new copyright treaty reviewed in this report.

[2] This report makes only brief references to the WIPO Performamces and Phonograms Treaty. A separate CRS Report been prepared. See, D. Schrader, World Intellectual Property Organization Performances and Phonograms Treaty: An Overview, CRS Rep. No. 97-553A.

protection against misappropriation of databases created with substantial effort and investment, even if the database did not represent an intellectual work within the meaning of copyright law.

This report highlights the key provisions of the new WIPO Copyright Treaty, summarizes the Clinton Administration's proposed implementing legislation (S. 1121 and H.R. 2281), and discusses additional possible implementation issues that may arise during Congressional consideration of the implementing bills and the Treaty.

Most Recent Developments

The President of the United States in July 1997 submitted the WIPO Copyright Treaty to the Senate for its advice and consent to ratification of the treaty by the United States, accompanied by recommendations for implementing legislation. Based on this request, S. 1121 and H.R. 2281 were introduced at the end of July 1997 to make the changes in United States copyright law, which the Clinton Administration has concluded are the minimal changes that must be made in U.S. law to comply with the new obligations of the Treaty.

S. 1121 and H.R. 2281 are virtually identical bills that are based on the interpretative position that existing U.S. copyright law is consistent with the obligations of the Treaty except for two substantive matters and technical amendments concerning primarily the definition of foreign-origin works and their eligibility for U.S. copyright protection. The bills propose new legal protection i) against circumvention of anti-copying technology and ii) against knowing performance of prohibited acts relating to removal or alteration of copyright management information ("CMI").

On September 3, 1997, Senator Ashcroft introduced an alternative WIPO treaties implementation bill (S. 1146), which, in addition to proposing different statutory texts concerning anti-circumvention and CMI protection, addresses Internet copyright issues such as online service provider liability, fair use, distance learning, and ephemeral reproduction of copies. The Senate Judiciary Committee held hearings on S. 1146 on September 4, 1997. Additional hearings may be held on the WIPO treaties and/or the implementation bills[3] before the end of the first session of the 105th Congress.

Background

The WIPO Copyright Treaty originated in a WIPO work program to update the major international copyright treaty, the Berne Convention for the Protection of Literary and Artistic Works ("Berne Convention"). This work program started in

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[3] The Senate Foreign Relations Committee has primary jurisdiction over the consideration of the treaty itself. The Senate and House Judiciary Committees have primary jurisdiction over amendments to the copyright law to implement the treaty.

1989 and included discussion of the relevant copyright issues by seven Committees of Experts. This process was known as the "Berne Protocol," since it was conceived as a mechanism to modernize the Berne Convention (last revised in 1971) without engaging in a full "revision" of the Convention. The original purpose was to make explicit in the Berne Convention that computer programs and databases are protected as copyright subject matter, and generally to update the Convention concerning use of copyrighted works in digital, electronic environments.

Initially, the United States sought to have updated protection for sound recordings included in the "Berne Protocol" process. The European Union and many other countries strenuously resisted inclusion of sound recording protection since sound recordings are not copyright subject matter under their laws nor, they insisted, under the Berne Convention. The majority of countries protect sound recordings under so-called "neighboring" or "related" rights. The principal neighboring rights convention is the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations[4] (known as the "1961 Rome Convention" or the "Neighboring Rights Convention").

The European Union's viewpoint prevailed: the Berne Convention could not be the vehicle for improved international protection for sound recordings since a majority of Berne States do not protect sound recordings under copyright law. These countries were unwilling to change their thereotical basis for protecting sound recordings or agree to an optional interpretation that sound recordings are copyright subject matter under the Berne Convention.

Consequently in 1992, a decision was taken to split the Berne Protocol process into two phases: an update of copyright provisions, and preparation of a possible "new instrument" (i.e., treaty) on the protection of the rights of performers and producers of phonograms.[5] The issues relating to the "new instrument" were considered by six Committees of Experts.

This dual copyright and "new instrument" work program culminated in adoption of two new treaties at a WIPO Diplomatic Conference in Geneva, Switzerland which met from December 2-20, 1996.

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[4] The United States is not a member of the 1961 Rome Convention on neighboring rights. The United States adheres to a more narrow sound recording treaty — the Convention for the Protection of Producers of Phonograms against Unauthorized Duplication of their Phonograms ("Geneva Phonograms Treaty")(Geneva, 1971). As the title indicates, the Geneva Phonograms Treaty protects producers against unauthorized commercial piracy of sound recordings. Members can opt for copyright, related rights, unfair competition, criminal law, or a sui generis form of protection.

[5] "Phonograms" is the international term commonly used to refer to protection of sound recordings.

The WIPO Copyright Treaty is a special copyright agreement[6] updating the Berne Convention. The second treaty — the WIPO Performances and Phonograms Treaty — is a new treaty dealing with the protection of performers and producers of phonograms (i.e., sound recordings). The latter treaty does not specify under which intellectual property law protection must be extended. Countries are free to legislate protection under copyright, neighboring rights, or possibly misappropriation theories of law.

The major policy issues that arose at the 1996 Diplomatic Conference in the case of the Copyright Treaty were: 1) the liability of online service providers and other communications entities that provide access to the Internet and 2) the scope of the reproduction right as applied to copying of data transmitted over the Internet. In the case of the Performances and Phonograms Treaty, the major policy issue was whether or not performances in audiovisual works (e.g., motion pictures) would be covered by the treaty.

The Copyright Treaty issues were resolved by two, separate "agreed statements" of the participating States: 1) that mere provision of communications-Internet physical facilities (i.e., wires, telephone lines, modems, and other communications devices) does not constitute infringement; and 2) that existing Article 9 of the Berne Convention — the reproduction right — applies to the use of works in digital form and that storage of a protected work in digital form in an electronic medium constitutes a reproduction. However, as part of a compromise, the actual article on the reproduction right was dropped from the Copyright Treaty.

In the case of the Performances and Phonograms Treaty, the audiovisual issue was resolved by excluding audiovisual performances from the treaty. The possibility of extending new rights to audiovisual performances will be pursued in future meetings within the WIPO.

In the copyright field, multilateral treaties or conventions generally establish a few basic principles concerning the scope of protection, eligibility of foreigners to enjoy protection, permissible range of limitations and exceptions to the rights granted, and duration of protection. Copyright treaties, like the Berne Convention and the new WIPO Copyright Treaty, do not govern protection for **nationals** of a member country, do not govern **who** is liable for any infringement of rights, and, do not regulate in any detail the enforcement of rights.

An international copyright treaty generally establishes its basic principles in language that is less explicit than statutory language. This level of generality and flexibility of language is ordinarily essential in order to achieve an international consensus among so many countries with widely differing national legal systems. The details of copyright policy are left to national legislatures.

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[6] Although the WIPO Copyright Treaty was prepared as a special agreement within the meaning of Article 20 of the Berne Convention rather than a complete revision of the treaty, the ratification and implementation process in the United States is the same as for any other treaty. That is, this is not an executive agreement; it is a treaty, which requires approval by a two-thirds vote of the Senate.

There is usually some flexibility in carrying out even relatively explicit treaty obligations. Very commonly, the treaty will specifically provide that certain issues are left entirely to national legislation. If, however, implementing legislation is not adopted, the treaty obligation may be interpreted by the courts of a country, depending upon its system of jurisprudence.

International copyright treaties establish general principles or a framework within which national copyright laws are enacted and enforced. The treaties operate primarily to harmonize national laws concerning minimum rights and duration of rights. National copyright laws usually do not have extraterritorial effect.

Suits for copyright violations are ordinarily brought in the place where the infringement occurs. The court of the country where suit is filed applies its own law, which includes both the national copyright law and any treaty to which the country adheres.[7] Choice-of-law issues are resolved under the national law, subject, in the case of the Berne and WIPO Copyright treaties, to the principle of "national treatment," i.e., the foreigner enjoys the same rights as a national of the country.

Treaty Ratification and Implementation

United States adherence to one or both of the new WIPO treaties requires Senate consent to ratification of the treaty by a two-thirds vote.[8] In general, ratification of intellectual property treaties requires implementing legislation to conform United States domestic law to the treaty obligations. For this reason, the Senate's consent to treaty ratification usually occurs after, or concurrently with, enactment of any necessary implementing legislation.

Unless the existing United States law is consistent with the obligations of an intellectual property treaty, implementing legislation is necessary to avoid a situation in which the United States would fail to meet its commitments to international law. Intellectual property ("IP") law treaties have not been considered self-executing under U.S. law, even though the Supremacy Clause of the U.S. Constitution makes a ratified treaty the "law of the land" if it is later in time than a statute.

IP treaties have not been considered self-executing primarily because they represent private international law rather than public international law. A copyright treaty, for example, creates personal property rights in authors (and perhaps other

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[7] Suits alleging infringement of copyright treaty rights by individuals are not brought before any international forum such as WIPO or the International Court of Justice. Under Article 33 of the Berne Convention, disputes about treaty interpretation between two or more member countries — not between private litigants — may be brought before the International Court of Justice, unless one of the countries in the dispute has declared itself not bound by Article 33(1).

[8] The WIPO Copyright Treaty will not come into force for any country until 3 months after the 30th country to accede or ratify has deposited its instruments of accession or ratification with the Director General of WIPO. Each country follows its own treaty approval process in accordance with national law.

persons) and fixes civil liability (at least) for persons who infringe those property rights.[9] Those property rights and the specific acts that give rise to liability are ordinarily detailed in national laws. Any inconsistencies between the provisions of the copyright treaty and the existing national copyright law are ordinarily resolved by the time the treaty is ratified in order to satisfy United States international treaty obligations and to make clear the rights of IP property owners and the potential liability of IP users.

The exact content of the implementing legislation is subject to public debate and legislative consideration. This legislative process ordinarily involves an assessment of the minimum obligations of the treaty; analysis of, and some consensus, on the settled interpretations of existing U.S. law; and the impact of the treaty and any changes in U.S. law on various groups in this country. The Congress also may decide to specify certain policies in the statute, and leave certain details to administrative regulation or to the case-by-case decisions of the courts.

The WIPO Copyright Treaty has now been forwarded to the Senate for its advice and consent, and bills have been introduced to implement the changes in United States law deemed necessary by the Administration.[10]

Some groups, such as the Digital Future Coalition (representing the electronics industry, library and educational groups, and certain technology companies), the online service providers, telephone companies, and other communications entities have urged Congress to enact legislation clarifying their liability for Internet uses of copyrighted works, in conjunction with any ratification of the WIPO treaties.[11]

Content owners and computer software interests urge early Congressional action on the Copyright Treaty and the implementing legislation. These groups generally prefer the "minimalist" approach of S. 1121 and H.R. 2281,[12] and argue that online

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[9] As noted earlier, international copyright treaties to date have not specified who is liable, but they fix the major parameters for assessing liability by specifying rights and permissible limitations on rights.

[10] In introducing S. 1121, Senator Hatch, Chairman of the Senate Judiciary Committee, expressed the view that the United States "must act promptly to ratify and implement the WIPO treaties in order to demonstrate leadership on international copyright protection, so that the WIPO treaties can be implemented globally and so that further theft of our nation's most valuable creative products may be prevented." 143 CONG. REC. (Daily sheets) at S8582 (July 31, 1997).

[11] Leading Internet Industry Coalition Says Clarifying Legislation Must Accompany Pending Copyright Treaties "Balanced" Solution Needed or Internet at Risk, PR Newswire, February 26, 1997; Recording, Telco Interests Spar Over Copyright Law, National Journal's Congress Daily, April 30, 1997; D. Braun, Copyright Laws Choke Tech Development, Group Warns, TechWire, August 18, 1997.

[12] Senator Hatch, in introducing S. 1121, confirmed that the bill takes a "minimalist" approach and is based on the assumption that "the substantive protections in U.S. copyright law already meet the standards of the new WIPO treaties, and therefore very few changes to U.S. law are necessary in order to implement the treaties." 143 CONG. REC. (Daily sheets)

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service and access provider liability, fair use, and other copyright policy isues can be addressed, if necessary, in separate legislation, apart from the WIPO Treaty implementation bills.

WIPO Copyright Treaty: Summary

Nature of Legal Instrument

The WIPO Copyright Treaty is a new treaty, but it also effectively "updates" the 1971 Paris version of the Berne Convention by providing strong links to the Berne Convention and by incorporating Berne articles by reference.

For countries already bound by the Berne Convention, the new Copyright Treaty is in the nature of a special agreement within the meaning of Article 20 of Berne. Under Article 20, such special agreements are permitted provided they improve protection for authors of copyrighted works or contain provisions not inconsistent with Berne obligations. The WIPO Copyright Treaty clearly improves protection for authors.

Non-Berne countries may adhere to the new treaty only by agreeing to comply with the substantive articles of the 1971 Paris version of Berne, i.e., Articles 1-21 and the Appendix for Developing Countries. In effect, the WIPO Copyright Treaty legally binds non-Berne adhering countries to apply the Berne Convention, but such countries do not become dues-paying, voting members of the Berne Union.

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[12](...continued)
at S8582 (July 31, 1997).

In addition to requiring the adherents to comply with Berne's substantive articles, the new treaty explicitly incorporates Berne Articles 2-6[13] and requires application of Article 18.[14]

Subject Matter Provisions

Computer Programs. — The treaty makes clear that computer programs are protected as literary works under Article 2 of the Berne Convention, whatever may be the mode or form of their expression.[15]

Databases. — The treaty makes clear that the parties must accord copyright protection to databases that constitute "intellectual creations," i.e., works in which the selection or arrangement of the content is the result of intellectual effort. The

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[13] Art. 3 of the WIPO Copyright Treaty. Berne Article 2 specifies the subject matter protected ("literary and artistic works" in general; specific categories of works are listed). Berne Article 2bis allows national legislation to exclude protection for political and legal speeches, and to allow fair use of lectures, addresses and similar works by the press and media, subject to the right of the author to copyright a collection of these works. Berne Article 3 establishes the highly important rules concerning eligibility to claim protection under the Convention, usually based on nationality of the author or place of first publication (so-called "points of attachment"). Berne Article 4 establishes special eligibility rules for cinematographic works (usually the place where the author's production facilities are headquartered or the author's habitual residence in a member country) and works of architecture (the Berne country where the building is located).
Berne Article 5 prohibits formalities on the enjoyment or exercise of rights, establishes that protection must be extended to eligible foreigners based on the principle of national treatment, and establishes rules defining the "country of origin" and provides that protection in the "country of origin" is ordinarily governed by national law (i.e., the rights granted authors by the Berne Convention do not have to be applied in the country of origin). Berne Article 6 permits members to retaliate against (i.e., deny protection for works of) nationals of non-members who fail to provide adequate protection for works of Berne member nationals, even though the work is first published in a Berne member country and would otherwise be eligible for protection under the Convention.

[14] Art. 13 of the WIPO Copyright Treaty. Berne Article 18 essentially requires some form of retroactive protection (perhaps pursuant to a bilateral agreement) for works that entered the public domain of a new member before adherence to the Berne Convention, but remain under copyright in the country of origin.

[15] Art. 4 of the WIPO Copyright Treaty. The Diplomatic Conference also adopted an "agreed statement" concerning the relationship between the Treaty, Article 2 of the Berne Convention, and the provision on computer program protection in the Agreement on Trade-Related Aspects of Intellectual Property Standards ("TRIPS Agreement") of the Uruguay Round of the General Agreement on Tariffs and Trade (1994), signed April 15, 1994. The statement reads as follows:

"The scope of protection for computer programs under Article 4 of this Treaty, read with Article 2, is consistent with Article 2 of the Berne Convention and on a par with the relevant provisions of the TRIPS Agreement."

compilation of the content (or data) is protected as copyright subject matter, but protection does not extend to the content itself (unless the content is independently a work of the intellect, in which case it enjoys a separate copyright).[16]

New or Clarified Exclusive Rights

Reproduction Right: No New Treaty Article. The most contentious copyright issue at the WIPO Diplomatic Conference related to a draft article dealing with the reproduction right and its application to digital or electronic formats.[17] Internet service providers, telephone companies, and other telecommunications entities generally objected to application of the reproduction right to indirect or temporary copying by computers transferring files on the Internet and other computer networks. In the end, draft Article 7 on the reproduction right was dropped entirely from the text of the Copyright Treaty. The Diplomatic Conference, however, adopted

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[16] Art. 5 of the WIPO Copyright Treaty. The Diplomatic Conference adopted an "agreed statement" concerning the relationship between the Treaty, Article 2 of the Berne Convention, and the provision concerning protection of databases in the TRIPS Agreement. The statement reads as follows:

"The scope of protection for compilations of data (databases) under Article 5 of this Treaty, read with Article 2, is consistent with Article 2 of the Berne Convention and on a par with the relevant provisions of the TRIPS Agreement."

[17] In the draft treaty, Article 7 (Scope of the Right of Reproduction) read as follows:
(1) The exclusive right accorded to authors of literary and artistic works in Article 9(1) of the Berne Convention of authorizing the reproduction of their works shall include direct and indirect reproduction of their works, whether permanent or temporary, in any manner or form.

(2) Subject to the provisions of Article 9(2) of the Berne Convention, it shall be a matter for legislation in Contracting Parties to limit the right of reproduction in cases where a temporary reproduction has the sole purpose of making the work perceptible or where the reproduction is of a transient or incidental nature, provided that such reproduction takes place in the course of use of the work that is authorized by the author or permitted by law.

an "agreed statement" concerning the existing Article 9 of Berne.[18] The meaning of this "agreed statement" is now sharply contested among interests in the United States.

Public Distribution Right. Authors enjoy the exclusive right of authorizing the making available to the public of copies of their works.[19] The Treaty permits, but does not obligate, the parties to limit the public distribution right by the "first sale" or "exhaustion of rights" doctrines.[20]

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[18] The "agreed statement" on the reproduction right is tied to Article 1(4) of the Copyright Treaty, which requires Contracting Parties to "comply with Articles 1 to 21 and the Appendix of the Berne Convention." The statement reads as follows:

"The reproduction right, as set out in Article 9 of the Berne Convention, and the exceptions permitted thereunder, fully apply in the digital environment, in particular to the use of works in digital form. It is understood that the storage of a protected work in digital form in an electronic medium constitutes a reproduction within the meaning of Article 9 of the Berne Convention."

This "agreed statement" interpretive device is highly unusual in international copyright treaties. The weight, as well as the meaning, of the statement will be debated in legislative fora and argued in court cases. Its weight hinges upon the significance of the obligation in the WIPO Copyright Treaty to "comply with" Articles 1-21 of the Berne Convention, given that these articles were originally adopted by preceding diplomatic conferences. Article 9 of Berne was adopted by a Diplomatic Conference at Stockholm, Sweden in 1967. The Stockholm substantive revision never came into force because developed countries rejected the version of the "Protocol for Developing Countries" attached to it. Article 9 of Berne, therefore, became effective only when the 1971 Paris revision came into force in 1974. Ordinarily an interpretation of an existing article by a subsequent diplomatic conference would be analogous to a comment in a committee report on a statutory provision enacted by a preceding Congress. The incorporation in the WIPO Copyright Treaty of a general obligation to "comply with" Articles 1-21 of Berne arguably authenticates the weight of the "agreed statement," but does not resolve the issue of the "meaning" of the statement.

[19] Art. 6(1) of the WIPO Copyright Treaty. The Diplomatic Conference adopted an "agreed statement" concerning Articles 6 ("right of distribution") and 7 ("right of rental") of the Treaty to confirm that these rights apply to fixed copies embodied in tangible objects. The statement reads as follows:

"As used in these Articles, the expressions 'copies' and 'original and copies,' being subject to the right of distribution and the right of rental under the said Articles, refer exclusively to fixed copies that can be put into circulation as tangible objects."

[20] Art. 6(2) of the WIPO Copyright Treaty. These doctrines are applied usually to limit the public distribution right to the first sale authorized by the copyright owner (i.e., the purchaser of a copy of a book may resell or otherwise redistribute the book without obtaining permission from the copyright owner). See, for example, Section 109 of the U.S. Copyright Act, title 17 U.S.C. In recent years, commercial rental rights have been granted to copyright owners of computer programs and sound recordings by qualifying the application of the first sale doctrine to these works. At the international level, a major issue exists concerning

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Rental Right. Authors of computer programs, cinematographic works, and works embodied in phonograms (which works are determined by national law in the case of phonograms) enjoy a generally exclusive right of authorizing the commercial rental of these works.[21]

There are three exceptions to the exclusive right. (i) In the case of computer programs, the right does not apply where the program itself is not the essential object of the commercial rental. (ii) In the case of cinematographic works, the right does not apply unless commercial rental in a given country has led to widespread unauthorized reproduction of copies, which materially impairs the right of reproduction. iii) As a concession to Japan, if a country's law in effect on April 15, 1994 (the date the GATT Agreement was adopted) provides only a right of equitable remuneration for rental of works in phonograms, that remuneration right satisfies the Treaty obligation as long as there is no "material impairment" of the exclusive right of reproduction.

Public Communication Right. Authors enjoy the exclusive right generally of authorizing any communication to the public by wire or wireless means, if the public can access the communication at different times and places.[22] In effect, this amounts

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[20](...continued)
national, regional, or international "exhaustion" of the public distribution right (i.e., assuming the exhaustion doctrine is legislated, does the first sale in a given country exhaust the distribution right only in the country of origin, or does exhaustion also occur throughout a given region of affiliated states and/or worldwide).

[21] Art. 7(1) of the WIPO Copyright Treaty. The Diplomatic Conference adopted an "agreed statement" concerning rental of works in phonograms. If the Contracting Party does not grant authors rights in phonograms, then there is no obligation under the Copyright Treaty to grant authors a rental right in phonograms. This statement interprets the provision in Article 7(1) allowing national law to determine whether or not copyright protection is accorded to phonograms. It reflects the fact that most countries, unlike the United States, do not accord copyright protection to sound recordings. Note that these "non-copyright" States would presumably extend rights to performers and producers of phonograms analogous to the rights conferred on authors of other works under the copyright law. (These related rights are covered by the separate Performances and Phonograms Treaty.) The statement reads as follows:

"It is understood that the obligation under Article 7(1) does not require a Contracting Party to provide an exclusive right of commercial rental to authors who, under that Contracting Party's law, are not granted rights in respect of phonograms. It is understood that this obligation is consistent with Article 14(4) of the TRIPS Agreement."

[22] Art. 8 of the WIPO Copyright Treaty. The Diplomatic Conference adopted an "agreed statement" to the effect that mere provision of physical facilities to enable communications is not itself an act of communication, i.e., does not infringe the public communication right. The statement reads as follows:

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to a transmission right, which extends to digital online and interactive communications, as well as analog communications. The reference to individual choice of reception is intended to exclude broadcasting, a right which remains governed by the existing Berne Convention. Also, the public communication right of the new Treaty explicitly cannot prejudice the existing public performance, broadcasting, and communication rights of authors as set out in Berne Articles 11(1)(ii), 11*bis*(1)(i) and (ii), 11*ter*(1)(ii), 14(1)(ii) and 14*bis*(1).

Limitations on Rights

In addition to the limitations to the exclusive rights expressed in the grant of the right,[23] the Copyright Treaty permits two general limitations on the rights.

Article 2 provides that "[c]opyright protection extends to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such." This limitation on the scope of copyright reflects the well-settled principle known as the "idea-expression dichotomy" — copyright protects against copying of original expressions but does not inhibit copying of the ideas, concepts, methods, etc. embodied in the expression of the idea, concept, or method.

Article 10 allows each Contracting Party to legislate limitations or exceptions to the Treaty rights "in certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author."[24] This general limitation would presumably justify the limitations and exceptions of existing United States law and would permit additional limitations or exceptions that do not conflict with the normal market for a work and do not "unreasonably" harm the interests of the author.

The Diplomatic Conference also adopted an "agreed statement" concerning Article 10 that has three main points. Contracting Parties may extend into the digital environment any existing limitations and exceptions that have been considered

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[22](...continued)
"It is understood that the mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of this Treaty of the Berne Convention. It is further understood that nothing in Article 8 precludes a Contracting Party from applying Article 11bis(2)."

Article 11bis(2) of the Berne Convention permits compulsory licensing of broadcasts and communications to the public. At one stage of the Berne Protocol process, the WIPO staff had proposed elimination of this compulsory license option in updating the Berne Convention. That proposal was abandoned earlier and was not presented to the Diplomatic Conference.

[23] For example, Article 7 applies the rental right only to specified categories of works (computer programs, cinematographic works, and, if specified in national law, works in phonograms). Also, the rental right for works in phonograms can be limited to a right of remuneration.

[24] This general limitation is drawn almost verbatim from Article 9(2) of the Berne Convention, which has been part of the Berne Convention only since 1974.

acceptable under the Berne Convention. They may also devise new exceptions and limitations "that are appropriate in the digital network environment." Finally, the Conference expressed an "understanding" that Article 10(2) of the Copyright Treaty "neither reduces nor extends the scope of applicability of the limitations and exceptions permitted by the Berne Convention."

Term of Protection for Photographs

Only one article of the Copyright Treaty deals with duration of protection. Article 9 obligates a Contracting Party generally to apply the standard term of life of the author plus 50 years to protection for photographic works.[25] This provision improves the protection accorded photographs under the Berne Convention, which permits a term as short as 25 years.

Enforcement of Rights

The Berne Copyright Convention traditionally has not included detailed provisions regarding enforcement of rights.[26] The 1996 Diplomatic Conference considered proposals to include detailed enforcement provisions in the Copyright Treaty, either as an Annex to the treaty or by reference to the enforcement articles of the TRIPS Agreement.[27] In the end, the Diplomatic Conference rejected both proposals in favor of a brief enforcement article that makes no reference to the provisions of the TRIPS Agreement.

Article 14 requires Treaty adherents to ensure that enforcement procedures exist under domestic law to permit "effective action against any act of infringement of rights covered by this Treaty, including expeditious remedies" to deter future infringements. Paragraph (1) of Article 14 expresses the general obligation of Contracting Parties "to undertake to adopt ... the measures necessary to ensure the application of this Treaty."

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[25] The term of copyright for works other than photographs would remain controlled by Article 7 of the Berne Convention. The standard term is life of the author plus 50 years after his or her death.

[26] Article 36 of the Berne Convention obligates its adherents to "undertake to adopt...the measures necessary to ensure the application" of the Convention and also requires that, at the time of joining the Convention, a country should have domestic law in place "to give effect to the provisions" of the Convention. Berne Article 15 establishes a legal presumption that an author is entitled to bring an infringement action if his or her name appears on the work. Berne Article 16 provides that infringing copies shall be subject to seizure in any member country. Except for these articles, the Berne Convention does not deal with enforcement of rights. Traditionally, the Convention has been concerned with the grant of rights to authors outside the country in which the work originated. Until the recent Diplomatic Conference, there had been no serious attempt to include detailed enforcement provisions in the Berne Convention.

[27] Articles 41 to 61 of the TRIPS Agreement.

Retroactive Application

Article 13 of the Copyright Treaty binds adherents to apply the provisions of Article 18 of the Berne Convention, which, in essence, requires some form of retroactive protection for works that might have fallen into the public domain of the new member of the Treaty but remain under copyright in the country of origin.

Technological Measures

The Copyright Treaty in Article 11 establishes a new kind of legal protection for authors. Treaty adherents shall provide "adequate and effective legal protection and effective legal remedies against the circumvention of effective technological measures" (that is, protection against devices or services that defeat anti-copying technologies).

The obligation is expressed in general language and leaves the details of protection to national law. Strong opposition had been expressed domestically to the related proposal in S. 1284 and H.R. 4221 of the 104th Congress (the bills that would have amended the copyright law concerning use of copyrighted works on the Internet and other computer networks). The electronics industry objected to civil liability for devices whose "primary purpose or effect" was to circumvent anti-copying systems. The final version of the Copyright Treaty dropped this controversial language from Article 11.[28]

Rights Management Information

Pursuant to Article 12, Treaty adherents must provide "adequate and effective legal remedies against any person knowingly performing" prohibited acts relating to the removal or alteration of **electronic** rights management information.

This obligation extends only to rights management information in electronic form. By implication, the remedies could be criminal or civil.[29] In the case of civil remedies, protection should apply against someone who has reasonable grounds to know that he or she has engaged in a prohibited act.

"Rights management information" (RMI) means information that identifies the work, the author, the rightsholder, or discloses terms and conditions concerning use of the work. The intent is to facilitate widespread use of this information by

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[28] The Digital Future Coalition, which includes electonics industry groups, supports the general obligation expressed in Article 11 of the Copyright Treaty, but strongly opposes provisions of S. 1121 and H.R. 2281 that would implement the technological measures obligation of the Treaty. These groups apparently support S. 1146, which essentially absolves primary manufacturers, importers, and distributors from liability for making and distributing devices that may be used to circumvent anti-copying systems.

[29] S. 1121 and H.R. 2281 create legal protection for copyright management information ("CMI") systems in analog or electronic form, and provide criminal as well as civil remedies. S. 1146 creates only civil remedies and apparently applies only to CMI in electronic form.

rightsholders in order to make licensing of works, or permission to use works, more readily available to the public.

The Diplomatic Conference adopted an "agreed statement" concerning the interpretation of Article 12. First, the Conference expressed an "understanding" that the reference to "infringement of any right covered by this Treaty or the Berne Convention" encompasses both exclusive rights and rights of remuneration. As a second "understanding," the Conference stated the Contracting Parties will not use Article 12 to devise or implement RMI systems that would have the effect of imposing formalities, prohibiting the free movement of goods, or impeding the enjoyment of rights under the Treaty.

Administrative Provisions

Any member State of the World Intellectual Property Organization may become a party to the Copyright Treaty.[30]The Treaty enters into force three months after 30 States ratify or accede to it.[31]No reservations are permitted, that is, a country must accept the obligations of the entire treaty and cannot decline to be bound by certain provisions.[32]

Article 15 establishes an "Assembly" of the member States that provides some organizational structure for dealing with future questions about maintenance, development, or revision[33] of the Treaty. The Assembly meets in regular session once every two years upon convocation by the Director General of WIPO.

The International Bureau of WIPO performs any administrative tasks concerning the Treaty.[34]

Treaty Implementation Issues

General Observations

In general, the decision whether or not to submit implementing legislation, and the form of that legislation, depends upon interpretation of existing United States law.[35] The Clinton Administration and most copyright/content owners apparently

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[30] Art. 17 of the Copyright Treaty.

[31] Art. 20 of the Copyright Treaty.

[32] Art. 22 of the Copyright Treaty.

[33] Revision of the Treaty would entail convocation of another diplomatic conference. Art. 15(2)(c).

[34] Art. 16 of the Copyright Treaty.

[35] For example, does electronic transmission in computer networks without further public distribution or downloading of any copy infringe the existing rights of reproduction (a "copy" is made automatically by operation of the computer network in order to transmit the

(continued...)

take the position that United States law — including state law and other federal laws in addition to the copyright law — is now consistent with the obligations of the Treaty, except for protection against circumvention of anti-copying systems and protection against removal or alteration of copyright management information.

Those who hold this viewpoint argue that the WIPO Copyright Treaty mainly clarifies certain rights and subject matter issues, and that, to the extent the Treaty grants new rights, it tracks changes that have already been legislated in the United States copyright law. Also, some would argue that the courts can deal with the few, if any, remaining issues concerning the consistency of U.S. law with the Treaty, which are not covered by S. 1121 and H.R. 2281.

The opposing viewpoint is that United States law relating to use of copyrighted works on the Internet and other electronic or computer networks is not settled. Some might argue that existing U.S. law is inconsistent with certain Treaty obligations. Others argue that, at a minimum, legislation is needed to achieve a higher degree of certainty on a number of controversial legal issues. Judicial resolution of these issues, some would argue, takes too long, is too fraught with uncertainty for conducting Internet business, and seldom provides clear, nationwide interpretations of the law. S. 1146 essentially responds to the concerns of those who seek legislative clarification of the U.S. law about copyright liability in digital, electronic environments.

Finally, it might be argued that, if the Treaty is ratified without amending United States law on issues such as the scope of rights and limitations on the rights, the Treaty language will be cited in court to determine the outcome of cases and in future legislative fora as a barrier to enactment of certain legislation. The Treaty will shape the interpretation of U.S. law and future legislative debate; certain positions and interpretations will arguably be foreclosed by the Treaty, unless the Treaty content is shaped by U.S. implementing legislation before, or simultaneous with, ratification.

In debating the Treaty and the implementing legislation, it is possible that, in addition to the provisions included in S. 1121 and H.R. 2281, the following copyright policy issues may receive legislative consideration: online service provider (OSP) liability for contributory or vicarious infringements; the scope of the exclusive rights (especially those relating to reproduction, distribution, "transmission,"[36] and "public

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[35](...continued)
data/work) or public distribution? To what extent are Internet service providers now contributorily liable for any infringements of their customers? To what extent does the doctrine of "fair use" apply to excuse certain otherwise infringing activities on the Internet?

[36] Neither the WIPO Copyright Treaty nor United States copyright law expressly mention any "transmission" right. The "public communication" right of Article 8 of the Treaty, however, essentially creates a transmission right. Domestically, the NII bills of the 104th Congress would have created a transmission right as a subset of the public distribution right. Some argue that existing United States law can be interpreted to protect against unauthorized transmissions as a violation of the public distribution right.
The opposing view is that transmissions fall under the public performance right of existing
(continued...)

communication");[37] and the limitations on rights (such as fair use and the first sale doctrine). S. 1146 addresses several of these issues.

Summary of S. 1121 and H.R. 2281

General Scope of the Bills.. The implementation bills recommended by the Clinton Administration and apparently supported by most copyright/content owners assume that existing United States law is already in compliance with the minimum obligations of the WIPO Copyright Treaty, except for two articles which require:

> i) legal protection against circumvention of anti-copying technology [Article 11]; and
>
> ii) legal remedies against knowing performance of prohibited acts relating to removal or alteration of electronic rights management information [Article 12].[38]

The only other amendments proposed in the implementation bills are technical in nature and relate primarily to consequential adjustments to those definitions of the Copyright Act that affect treaty relationships and the eligibility of foreigners to claim copyright in the United States. Technical amendments are proposed for the same reasons in three substantive sections of the Copyright Act: section 104, which governs eligibility of foreign authors to claim copyright under United States law; section 104A, which concerns restoration of copyright in certain foreign-origin works; and section 411, which makes copyright registration in the United States Copyright Office a jurisdictional prerequisite to a suit for copyright infringement, except for certain works of foreign-origin.

S. 1121 and H.R. 2281 propose no amendments to United States law concerning the existing exclusive rights of copyright owners or concerning permissible limitations on those rights.

Circumvention of Copyright Protection Systems. The implementation bills would add a new chapter 12 to the Copyright Act, title 17 U.S.C., creating civil and criminal liability for circumvention of copyright protection systems.

The proposed section 1201 would prohibit the manufacture, importation, offering to the public or other trafficking in any technology, product, service, device, **component or part** thereof that is **primarily designed or produced** to circumvent an anti-copying system.

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[36](...continued)
law and that certain transmissions are exempt because they are not made to the "public."

[37] While United States copyright law does not expressly grant a "public communication" right, the public performance right of U.S. law seems to encompass the rights granted by Article 8 of the WIPO Copyright Treaty.

[38] Statement of Senator Hatch, accompanying the introduction of S. 1121. 143 CONG. REC. (Daily sheets) at S8582 (July 31, 1997).

Proposed civil penalties include: injunctions, impoundment of infringing material or equipment, actual damages or statutory damages ranging from $200-$2500 per act of circumvention, product, or performance of service or, at the plaintiff's option, a total award bertween $2500-$25,000. For repeated violations within three years, the court may triple the damages. The court also has the discretion to reduce or remit damages if the violator proves, and the court finds, he, she, or it was not aware and had no reason to believe that the law was violated.

Criminal penalties would apply to willful violation of section 1201 for purposes of commercial advantage or private financial gain.[39] First offenders could be fined up to $500,000 or imprisoned up to 5 years or both. The maximum fine and time in prison can be doubled for subsequent offenses.

Since the WIPO Copyright Treaty expresses its anti-circumvention obligation in general language, the implementation bills (S. 1121 and H.R. 2281) appear consistent with the Treaty.

The bills have been criticized by the electronics industry and other opponents of the proposals as overly broad. Criticism is expressed about the "primarily designed or produced" language, and extension of protection to "parts" of a technology. Also, the WIPO Copyright Treaty does not require (although it permits) criminal penalties. In proposing criminal penalties for acts of circumvention, S. 1121 and H.R. 2281 exceed the remedies proposed in the NII bills of the 104th Congress.

Integrity of Copyright Management Systems. The WIPO Copyright Treaty implementation bills would add a new section 1202 to the Copyright Act prohibiting the knowing provision of false copyright management information ("CMI").[40] Specifically, the bills would prohibit the knowing distribution or importation of false CMI with the intent to induce, enable, facilitate or conceal a copyright infringement. The intentional removal or alteration of CMI would also be prohibited.

The purpose of these provisions would be to facilitate widespread use of CMI by rightsholders in order to make licensing of works (or permission to use works) more readily available to the public. Consistent with the Treaty, the provisions cannot be legislated as a formality (i.e., a condition of the erercise or enjoyment of the copyright) or prohibit the free movement of goods.

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[39] Since the bills do not contain any definition of "commercial advantage" or "private financial gain," it seems likely that the mens rea standard of existing copyright law, as developed by court decisions, would apply. Under existing law, a for-profit motivation must be proved to justify criminal penalties; nonprofit infringers who act willfully have only civil liability (but the statutory damages can be increased to "punish" willful conduct). A separate bill, S. 1044, and and its companion, H.R. 2265, would increase the penalties for criminal copyright infringement, and would also revise the mens rea to subject certain "nonprofit" activities to criminal penalties for the first time in United States copyright laws.

[40] This new right would implement Article 12 of the WIPO Copyright Treaty, although the treaty uses the terminology "rights management information."

Both civil and criminal remedies are proposed. These remedies are the same as described above for violations of the anti-circumvention provisions.[41]

The new rights to protect the integrity of CMI systems apply both to analog and digital formats. In this respect, the bills apparently exceed the minimum treaty obligation since the WIPO Copyright Treaty requires protection only for **electronic** rights management information.

Summary of S.1146

The Digital Copyright Clarification and Technology Education Act of 1997 (S. 1146) is an alternative implementation bill. S. 1146 proposes different statutory text than S. 1121 and H.R. 2281 with respect to protection against circumvention of anti-copying technologies and removal or alteration of copyright management information. This bill also addresses several copyright issues of concern to OSPs, telephone and electronics industry groups, and the library and educational communities.

S. 1146 consists of three titles: Title I deals with OSP[42]copyright liability; Title II proposes several amendments relating to use of copyrighted works by teachers and librarians in digital, electronic environments; and Title III proposes the addition of a new Chapter 12 to the Copyright Act relating to protection against cirvumvention of copy-protection technologies and against removal or alteration of CMI.

Online Service Provider Liability —Title I of S. 1146. The Administration's implementation bills (S. 1121 and H.R. 2281) do not address the issue of who is liable for copyright infringement of copyrighted works, as a result of actions by customers and users of online service and access providers (OSPs), or the liability of the OSPs.[43]

The Ad Hoc Copyright Coalition, consisting of telecommunications companies and online service providers ("OSPs"), has publicly urged enactment of legislation clarifying their copyright liability in conjunction with any ratification of the WIPO Copyright Treaty. The Digital Future Coalition (which includes the electronics industry, and library, educational and telecommunications groups) also urges enactment of domestic legislation to clarify OSP liability in any legislation to implement the Treaty.

Although the WIPO Copyright Treaty could be implemented without clarifying OSP liability, that outcome would leave to the courts decisions about OSP liability.

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[41] The civil remedies would be codified as 17 U.S.C.§1203. The criminal remedies would be codified as 17 U.S.C.§1204.

[42] The online service and access providers are the main beneficiaries of the copyright liability proposals in Title I. Entities other than OSPs can claim exemption from direct, vicarious or contributory infringement liability if they meet the statutory conditions. This Report uses "OSP" as short-hand for persons who transmit, route, provide connections, or otherwise facilitate computer network service and access for clients without initiating or altering the content of the transmission.

[43] A separate bill, H.R. 2180, does address the liability of OSPs.

At least one court decision suggests that OSPs may be liable as contributory infringers for the copyright violations of their customers.[44]

S. 1146 basically absolves OSPs who transfer information via the Internet, without having any control of the content, from either direct, vicarious, or contributory copyright infringement. Upon receiving a notice of infringement that complies with statutory requirements,[45] an OSP is expected to remove, disable or block access for 10 days or until it receives a court order, to the extent blocking is technologically feasible and economically reasonable. The exemptions from liability apply both to network service transmissions and to private and real-time communications services.

Title I of the bill also contains provisions that would: i) establish civil liability in the amount of $1000 or more against someone who makes misrepresentations about an infringement; ii) absolve OSPs from liability to the person whose material is blocked or removed from the Internet when the OSP acts in reliance on a statutory notice of infringement; and iii) establish the principle that traditional copyright defenses (such as fair use) are unaffected by an OSPs blockage of, or failure to block, access to alleged infringing material.

Technology for Educators and Children (TECH) Act —Title II of S. 1146. Title II of S. 1146 proposes several amendments that would update the limitations on the rights of the copyright owner in the context of digital, electronic uses of copyrighted works.

Briefly, the bill would specify that fair use [17 U.S.C. §107] applies to analog or digital transmissions and that the courts shall not give independent weight to the means of performing, displaying, or distributing a work in evalutating the fair use criteria.

The library exemption of 17 U.S.C. §108 would be expanded by permitting library reproduction of three copies or phonorecords rather than the one copy of existing law, by deleting the references of existing law to reproduction only in "facsimile form," and by adding, as a new justification for library reproduction, the factor that the work is stored in an obsolete format.

The existing instructional broadcasting exemption of 17 U.S.C. §110(2) would be expanded to exempt "distance learning" — that is, performances, displays, or distributions of works by analog or digital transmission to remote sites for reception of systematic instructional material by students officially enrolled in the course and by government employees as part of their official duties.

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[44] Religious Technology Center v. Netcom, 907 F. Supp. 1361 (N.D. Cal. 1995)

[45] Among other requirements, the notice must describe the infringing material, give information about its location on the network, provide proof of copyright registration or application for registration or a court order that the use is unlawful, contain a sworn statement that the notice of infringement is accurate, be signed physically or electronically by an authorized person, and be accompanied by any payment the Register of Copyrights determines is necessary to deter frivolous notices.

Section 112(b) of the Copyright Act, which deals with ephemeral recordings of works by nonprofit organizations and governmental bodies, would be expanded to cover distribution of a work (in addition to performance and display).

The existing limitations of 17 U.S.C. §117 apply to the rights of a computer program copyright owner. The bill would create new limitations in an amended section 117 on the rights of **any** copyright owner with respect to the use of digital copies. It would not be an infringement to make a copy of any work in a digital format, if the copying i) is incidental to the operation of a device in the course of a lawful use of the work and ii) does not conflict with the normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.[46]

Circumvention of technologies and integrity of CMI — Title III. The third title of S. 1146 (entitled "WIPO Treaty Implementation") proposes different statutory text than S. 1121 and H.R. 2281 to implement the article of the WIPO treaties requiring protection against circumvention of anti-copying technologies and against removal or alteration of copyright management information ("CMI"). S. 1146 does not, however, contain the technical amendments of the Administration's implementation bills relating to treaty relationships and the eligibility of foreign-origin works for copyright protection in the United States.[47]

Like the Administration's bills, S. 1146 would add a new Chapter 12 to title 17 U.S.C.. Section 1201 would establish rights against circumvention of anti-copying technologies. Section 1202 would establish standards for CMI and rights against removal or alteration of CMI. Section 1203 fixes the civil remedies.

S. 1146 proposes statutory text and an approach to implementation of the WIPO treaties on these points, however, that fundamentally differs from the Administration's bills. Among the differences, the following important points may be noted. Concerning circumvention, S. 1146 i) omits any reference to "primarily designed or produced" for the purpose of circumvention; ii) omits any reference to "components or parts" of a technology; iii) excludes from its definition of infringing conduct, the manufacturing, importing, or distributing of a device or computer program;[48] iv) requires proof of knowing infringing conduct; v) defines effective anti-

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[46] The exemption for copying that is "incidental" to operation of a device is intended to exempt the automatic reproduction of works which occurs when messages or communications are transmitted via a computer network. The condition that the copying must not "conflict with the normal exploitation of the work," etc., tracks exactly the general limitation permitted by the WIPO treaties — Article 10 of the Copyright Treaty and Article 16(2) of the Performances and Phonograms Treaty.

[47] Technical amendments relating to treaty relationships and the status of foreign-origin works are necessary to implement the WIPO treaties correctly. The sponsors of S. 1146 may be willing to accept the Administration's proposed technical amendments and did not consider it necessary to repeat them in S. 1146.

[48] In essence, the primary manufacturers, importers, and distributors would be exempt from liability for the acts of circumvention of purchasers of their equipment. Liability would fall apparently on the seller of the deactivation equipment, on the consumer who requests

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copying technologies to mean either encryption or a system that cannot be removed without degrading the copyrightable work or a portion of it; and vi) omits any criminal penalties.

Concerning protection for the integrity of CMI, S. 1146 more closely follows the approach of the Administration bills than in the case of the circumvention provisions. S. 1146, however, applies only to electronic CMI. Also, with respect to removal or alteration of CMI, S. 1146 requires that the person act "knowingly and with intent to mislead or to induce or facilitate infringement," whereas the Administration bills require that the person act "intentionally [to] remove or alter any copyright management information," or distribute or import CMI "knowing" that the CMI has been removed or altered.[49] S. 1146, moreover, exempts from liability the manufacturing, importing, or distributing of a device and omits any criminal penalties.

The civil remedies proposed by S. 1146 are similar to, but not the same as, the civil remedies in the Administration bills. The statutory damage amounts are close but are not exactly the same. For repeated violations, S. 1146 gives the court discretion to double the damages; the Administration bills permit triple damages.

Conclusion

Adoption of the WIPO Copyright Treaty by the 1996 Geneva Diplomatic Conference culminates an international effort to modernize the Berne Copyright Convention that began 8 years ago as the "Berne Protocol" proposal. Although the purpose of this Treaty is to update and strengthen the protection afforded to authors by the Berne Convention, the WIPO Copyright Treaty is a new multilateral treaty. It will come into force 3 months after 30 countries have deposited their instruments of accession or ratification with the Director General of WIPO, whether those countries are members of the Berne Convention or not. The Treaty is subject to ratification by the United States with the advice and consent of the Senate.

The Copyright Treaty clarifies that computer programs and databases that constitute "intellectual creations" are literary works. The Diplomatic Conference adopted an agreed statement confirming that these categories of works are eligible for copyright protection under Article 2 of the Berne Convention as well as under the new Treaty.

Several exclusive rights of authors are clarified or extended by the Copyright Treaty, including the rights of public distribution, commercial rental, and public communication. With respect to the reproduction right, the Copyright Treaty

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[48](...continued)
deactivation of an anti-copying technology, and on the person (if someone other than the consumer) who provides a deactivation service. The person must act knowingly, however, to trigger liability.

[49] These "knowledge" or "intent" standards seem nearly the same.

contains no new text. An agreed statement of the Diplomatic Conference interprets the reproduction right of Article 9 of the Berne Convention.

Limitations on rights are generally left to national law except that: 1) some qualifications are expressed in the grant of rights articles; 2) the Treaty embodies the principle that copyright protects expression and not ideas; and 3) Article 10 specifically permits national law to enact limitations that do not conflict with normal exploitation of the work and do not unreasonably harm the author's legitimate interests. In an agreed statement, the Diplomatic Conference interpreted Article 10 of the Treaty and the Berne Convention as permitting appropriate limitations in digital, computer network environments.

The Copyright Treaty also includes a general article on enforcement of the treaty rights, an obligation to provide adequate and effective remedies to prevent the circumvention of technological measures designed to inhibit copying, and an obligation to assure adequate and effective remedies against knowing removal or alteration of electronic rights management information.

The WIPO Copyright Treaty has now been submitted to the Senate for its consideration. At the request of the Clinton Administration, S. 1121 and H.R. 2281 have been introduced to implement the treaty obligations. These bills propose no changes in the rights or limitations on rights of existing law, on the assumption that existing law is consistent with the Treaty. The Administration's implementation bills do propose the creation of new protection against cirvumvention of anti-copying systems and against removal or alteration of copyright management information. The bills also would make technical amendments to the definitions in the Copyright Act, and to sections of the Act relating to treaty relationships and the eligibility of foreigners to claim copyright in the U.S.

An alternative implementation bill, S. 1146, differs in important respects from the circumvention and CMI protection proposals of the Administration bills. S. 1146 does not create criminal remedies for violation of the circumvention or CMI provisions; exempts manufacturers, importers, and distributors of devices or software from liability under these provisions; and the CMI provision applies only to CMI in electronic form. S. 1146 also proposes amendments relating to OSP copyright liability, ephemeral copying, fair use, and distance learning. S. 1146 does not, however, contain the technical amendments relating to treaty relationships and eligibility of foreigners to claim copyright.

Copyright owners, authors, publishers and other producers/disseminators of copyrighted works generally support ratification of the WIPO Copyright Treaty and enactment of the minimal changes to implement the treaty found in S. 1121 and H.R. 2281. These content providers argue that United States law is already consistent with the Treaty with respect to exclusive rights and limitations on rights. They favor early ratification and enactment of the bills to send an appropriate signal to other countries, which will encourage other countries to adhere to the Treaty and generally upgrade protection for the use of copyrighted works in electronic, digital environments. Since the United States is the world leader in producing the hardware and software for these environments, it is asserted that enhanced international protection of copyrighted works will benefit the United States economy.

Groups representing the telecommunications and electronics industries, libraries, and other educational interests generally support the ratification of the WIPO Copyright Treaty in principle, but only on the basis of implementing legislation that addresses their concerns about OSP liability, fair use, distance learning, ephemeral copying, and other issues concerning use of copyrighted works on the Internet and in electronic environments. They argue that United States law is not settled concerning the scope of rights and limitations on rights in digital, electronic environments. It is asserted that these issues must be addressed in legislation rather than through judicial decision-making. These groups generally support the approach of S. 1146.