

CONGRESS DELIBERATES ON COPYRIGHT

Last month, implementing legislation for two international copyright treaties adopted by the World Intellectual Property Organization (W.I.P.O.) was introduced in Congress. In addition, the W.I.P.O. treaties were forwarded for Senate consideration.

Sen. Ashcroft Introduces Balanced Copyright Legislation

The W.I.P.O. treaties' implementing legislation, S.1121 and H.R. 2281, an Administration proposal, is very limited in scope and extremely problematic. In contrast is the balanced copyright legislation introduced by Senator Ashcroft of Missouri. The Ashcroft bill, the Digital Copyright Clarification and Technology Act of 1997, S. 1146, sets the appropriate tone and context for discussions of how best to update the Copyright Act to meet the digital environment.

Key elements of the Ashcroft bill include:

- clarification that fair use does apply to the digital environment;
- provisions ensuring that digital technologies may be used for preservation purposes under certain circumstances;
- provisions supporting distance education activities;
- more balanced W.I.P.O. implementing provisions relating to anti-circumvention measures and copyright management information;
- provisions that make explicit the fact that electronic copies of material incidentally or temporarily made in the process of using a computer or network may not serve as the sole basis for copyright infringement liability; and
- provisions regarding online service provider liability issues.

ARL and members of the Digital Future Coalition support S. 1146 because the bill includes many important issues that merit attention and action. The language of the Ashcroft bill broadens the scope, and thereby changes the nature, of the upcoming debate. A summary of the legislation, prepared by the Digital Future Coalition (DFC), is available at <http://www.dfc.org//docs/onpg.htm>.

House Hears Conflicting Views on Copyright

In a series of hearings with 24 witnesses, the House Subcommittee on Intellectual Property and the Courts heard widely divergent views on W.I.P.O. implementing legislation (H.R. 2281), and on legislation to address online service provider (OSP) liability issues (H.R. 2180). Two themes which emerged during the course of the two days were the need to address the perceived rampant piracy of information products, music and software in particular, and how fair use could be negated by provisions in the proposed legislation.

W.I.P.O. Implementing Legislation - H.R. 2281 Witnesses ranged from Johnny Cash, who noted that one of his greatest hits could be found on an illegal web site abroad, to Douglas Bennett, President of Earlham College and representing the Digital Future Coalition, who

stressed the importance of achieving balance between the interests of owners, users, and creators of proprietary works. The panels were fairly evenly divided. Content industries, such as those in the music, movie, and publishing industries, expressed strong support for the W.I.P.O. implementing legislation. In contrast, those in the library, education, high technology, consumer electronics, and telecommunications industries spoke in opposition to the legislation, characterizing it as overreaching and failing to address critical issues, such as fair use.

Responding to H.R. 2281, both Bruce Lehman, Commissioner of Patents and Trademarks, and Marybeth Peters, Register of Copyrights, concurred that the bill, “fully and adequately implement the obligations of the new W.I.P.O. treaties.” Under questioning by Rep. Boucher (D-VA), Commissioner Lehman conceded that, indeed, the legislation exceeded what was called for by the treaties. In addition, with regard to one section of H.R. 2281, Marybeth Peters acknowledged that fair use would be virtually excluded under this legislation, as a user could not exercise that privilege.

Several members of the Subcommittee focused on the risks that the proposal posed to fair use. Rep. Frank (D-MA) pressed witnesses from the content industries about the need to include new provisions to ensure that fair use survives intact under this new regime. Universally, witnesses representing content industries opposed new language supporting fair use. In fact, under questioning by Rep. Frank, Michael Kirk of the American Intellectual Property Law Association noted that there should not be access to works without the permission of authors, “disavowing the fair use” doctrine, according to Rep. Frank. Many of these concerns were shared by Rep. Lofgren (D-CA), particularly the broader impact of these proposals on all library and education exemptions and of encryption technologies in denying access to resources.

Rep. Boucher took the opportunity offered by the hearing to announce that he would introduce a bill to address the shortcomings of the H.R. 2281. Key elements of the Boucher bill include:

- a provision that the fair use doctrine apply with full force in the digital environment;
- the concerns of libraries and educators by assuring the applicability of the first sale doctrine in the digital environment; and
- the needs of educators, by authorizing the use of data networks for distance education.

Online Service Provider Liability Issues – H.R. 2180

H.R. 2180 was introduced last July by Rep. Coble (R-NC) as a starting point for discussion among groups seeking to clarify online service provider (OSP) liability issues. Similar to the division among communities regarding W.I.P.O. implementing legislation, there was again a clear difference of opinion regarding the need for greater clarification of such issues. Libraries, educators, and telecommunications and high-technology sector witnesses all spoke in favor of the bill and of the need for certainty regarding liability in the networked environment. Robert Oakley, Professor of Law, Georgetown University Law Center, and Director of the Law Library, speaking on behalf of 23 non-profit education and library associations, including ARL,

noted that:

- copyright law should foster an environment in which the broadest possible spectrum of the public enjoys the educational and cultural benefits of the Internet;
- any liability system ultimately adopted should permit the use of state-of-the-art “navigational” systems and practices to facilitate access to information; and
- any service-provider liability regime adopted should respect and incorporate the general practices and principles adopted by libraries and educational institutions to protect individual privacy.

Jack Valenti, head of the Motion Picture Association of America, spoke in support of the status quo and echoed the concerns of the content industries opposing the legislation. He noted that, “some service providers paint a terrorizing script of their own. They assert that the burden of taking steps to prevent and detect online piracy will be crushing, that it will stunt the growth of the Internet and take down with it many of the high-flying cyberspace ventures. As for the assertion that the threat of infringement liability is a dagger pressed against the jugular of the Internet,...is not so...and a legal status quo...functions well.”

Although Rep. Conyers (D-MI) called for an immediate mark-up of H.R. 2281, enough members of the Subcommittee expressed reservations with the legislation that further debate and discussion on both bills is expected.

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[Table of Contents for Issue 194](#) | [Other Copyright Articles](#) | [Other Federal Relations Articles](#) | [ARL Newsletter Home](#)



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