

# WIPO: Summary and Key Accomplishments

by [Prudence Adler](#), ARL Assistant Executive Director, Federal Relations and Information Policy

---

During a Diplomatic Conference convened in December 1996 in Geneva, Switzerland, the World Intellectual Property Organization (WIPO) considered three treaties designed to update the intellectual property rights established by the Berne and Rome conventions. Delegates from 160 countries met to consider proposed changes to copyright law, with a particular focus on the digital environment. The treaties sought to update copyright law for works delivered in digital form; to enact protections for performers in and producers of sound recordings; and to enact a new intellectual property regime to protect databases.

At the close of the Diplomatic Conference, the delegates adopted new versions of two of the three treaties that had been originally proposed. Consideration of the third treaty regarding database protection was deferred, with a recommendation that WIPO convene another session early in 1997 to consider a schedule for future discussions of that topic. Overall, the adoption of the new provisions resulted in a more balanced approach to copyright issues than would have resulted from the original draft proposals. The efforts of representatives of the Digital Future Coalition, the Home Recording Rights Coalition, the International Federation of Library Associations, the Computer Communications Industry Association, and others were instrumental in achieving this balanced approach. The U.S. library and educational communities were well represented by ARL President-Elect James Neal, Director of Libraries, Johns Hopkins University; Doug Bennett, Vice President of the American Council of Learned Societies; and Roger Knutsen, National Education Association.

## **"Reproduction" and "Communication to the Public"**

The original WIPO proposal dealing with reproduction rights would have placed libraries at risk from the activities of their patrons because it would have extended the copyright owner's right of reproduction to all temporary copies, including ephemeral images captured in a computer's random access memory. In addition, the draft included a new, exclusive "right of communication to the public." When coupled, these rights would have significantly increased the exposure of online service providers, including libraries, to copyright infringement liability, thereby creating a chilling effect on the ability of libraries and library users to access needed information resources because of these serious concerns over liability.

The proposal on communication to the public was retained, although it was significantly modified with new language that noted: "the mere provision of physical facilities for enabling or making a communication does not in itself amount to communication." This limit, although it does not eliminate concerns about indirect liability for libraries as a result of activities of patrons and other users.

## **Fair Use and Related Educational Exceptions**

The draft WIPO proposal on communication to the public would have undermined many of the exceptions created by Congress to support educational and library activities in the U.S. In particular, it could have limited the applicability of these exceptions in the digital environment.

With the support of the U.S. delegation however, the Conference adopted an "agreed upon statement" to make clear that the two adopted treaties "will permit application of fair use in the digital environment, and should be understood to permit contracting parties to devise new exceptions and limitations as

appropriate in the digital environment." The addition of "new exceptions and limitations" and language in the treaty preamble recognizing "the need to maintain a balance between the rights of authors and the larger public interest, particularly education, research, and access to information," is significant progress in reaching a balance in the digital environment between the interests of users and owners of copyrighted materials.

## **Technological or Anti-circumvention Measures**

The draft WIPO proposal on anti-circumvention measures would have imposed liability for the manufacture, distribution, and possession of any devices having the "primary purpose or effect" of circumventing any technology used to protect copyrighted works. As an example, a VCR manufacturer could have been held liable for infringement unless assurance could be made that copies of copyrighted works made by the VCR would be "primarily" for authorized uses. The proposal as written could have precluded libraries from engaging in lawfully permitted activities in support of research, education, and public access to information. For example, if a manufacturer developed a device that enabled a library to circumvent copy-protection systems for the purpose of making lawful archival copies, the manufacturer could be held liable if a Court determined that the manufacturer should have expected that at least one user would also use the device to make an infringing copy.

The treaties as adopted include only a general obligation to protect technologies against the act of circumvention for unlawful purposes. As a consequence, there is no longer a "threat" to the manufacturer of such devices, nor ultimately to the current and future market for such devices, nor to the end user who employs them for fair use, archiving, or related educational purposes.

## **Rights Management Information**

Rights management information (terms and conditions, information regarding authors, and more) would have been protected from alteration or deletion by the WIPO draft proposals indeed protected from any changes, including legitimate ones. The treaties as adopted however, while still including language that rights management information will be protected, now only provide protection when the information is knowingly altered for the purpose of enabling infringement.

## **Next Steps**

The U.S. Administration set a very ambitious schedule for domestic consideration of both the treaties and any implementing legislation (required to bring national law in line with the new treaties and to make them enforceable): both were to be sent to the Hill in Spring 1997. Although some do not concur with their assessment, the Patent and Trademark Office (PTO), in consultation with other federal agencies, determined that two pieces of implementing legislation were necessary: provisions relating to technological measures of protection, or anti-circumvention measures, and to copyright management information.

Once the implementing legislation is drafted by the PTO, it will circulate within the Administration and be considered by the National Economic Council prior to being sent to the House and Senate Judiciary Committees. Several congressional committees have indicated an interest in the treaties and implementing legislation: the Foreign Relations Committee (chair, Sen. Helms, R- N.C.); the Senate and House Judiciary Committees (chairs, Sen. Hatch, R-UT and Rep. Hyde, R-IL); and the Senate Commerce Committee (chair, Sen. McCain, R-AZ), which is particularly interested in online service provider (OSP) liability issues.

Staff of the House Judiciary Committee expect to introduce several pieces of copyright-related legislation once the treaties and implementing legislation are sent to the Hill. It is anticipated that Rep. Coble (R-NC and chair, Subcommittee on Courts and Intellectual Property) will introduce the Administration's implementing legislation as a courtesy and possibly three related legislative packages. These three additional pieces include: introduction of the "chairman's mark" May 14, 1996, which addresses a wide range of issues, including fair use and preservation; a bill devoted to "mere conduit" issues; and a technology managers bill that focuses on technological solutions to copyright issues. The Senate Judiciary Committee will play a key role in Congressional consideration of the treaties, in addition to consideration of the implementing legislation. Internationally, 30 countries must ratify the WIPO treaties for them to be in force.

## **Post WIPO-Key Issues**

NII Copyright legislation failed in the last session of Congress due to several extremely contentious provisions dealing with technological measures of protection, or anti-circumvention measures, and OSP liability provisions. Draft 1997 PTO anti-circumvention language is proving to be just as problematic. Key industry players (Motion Picture Association of America, Business Software Alliance, Consumer Electronics Manufacturers Association, and more) could not reach agreement in recent negotiations on appropriate language. In a letter outlining their concerns, the President of the Consumer Electronics Manufacturers Association commented that "its language leaves open to interpretation important questions of potential liability for manufacture, sale, and use of integrated and multipurpose products that are now entirely bona fide and legal." The Administration's complete package of proposals is expected to be circulated for review shortly. Hopefully, it will contain reworked and more balanced anti-circumvention language.

Members of the telecommunications industry signaled early on that any consideration of the treaties and implementing legislation should include provisions which address online service provider liability issues. There is a strong sense that congressional consideration of the WIPO treaties and accompanying legislation presents a unique opportunity to update copyright issues to meet the challenges of the digital environment. Therefore, it is considered unlikely that additional changes to the Copyright Act will occur outside of these discussions, nor once the treaties are considered by the Senate. The failure of the Administration to acknowledge that OSP issues would be addressed in implementing legislation led the telecommunications industry to link the treaties and implementing legislation to OSP issues. In recent discussions, some members of the Administration have indicated that the Administration may consider drafting OSP legislation. The library community, the Shared Legal Capability (SLC), and the Digital Future Coalition (DFC) have not taken a formal position on this linkage to date. As in the debate last year, the DFC will provide a comprehensive set of legislative recommendations.

The issue of OSP liability is a serious concern to the library and academic community. Issues of responsibility, freedom of speech, technology-ready infrastructure, and education must be considered in determining any institutional policy, let alone a national legislative solution. There is a subtle and less tangible but no less important link between the OSP discussions and freedom of expression and the First Amendment. Institutions, including libraries, will be appropriately more cautious in the provision of information if there is a concern regarding third party liability. Over time, this would have a dampening effect on the role of libraries in the provision of information and on the ability of users to access copyrighted information. Yet, libraries and educational institutions have a responsibility to establish policies regarding the appropriate use of copyrighted materials in both the print and digital environments, and to carry out due process when appropriate.

In addition to anti-circumvention measures, copyright management information, and OSP issues, a host

of other issues require congressional consideration, including:

- amending Section 107 to clarify that fair use is carried forward into the digital environment;
- amending Section 108 to permit libraries to fully engage in digital preservation activities;
- amending Section 109 to ensure that the notion of sharing resources (first sale) is appropriately extended to the digital environment;
- amending Section 110 and 112 to ensure that distance education activities continue; and
- amending the Copyright Act to clarify the implications of RAM and other "ephemeral" reproductions.

## Database Proposal

The failure to act on the draft database treaty during the December WIPO conference has not deterred proponents of the proposal, who are advocating the need for speedy approval of new protections for databases. Delegates to the WIPO conference did not engage in discussions on the draft treaty for several reasons, including: strong concerns, indeed opposition, by many delegations to the proposal; and insufficient time to discuss the need for the proposal prior to the December conference. At a Spring meeting in Geneva, WIPO conducted an "information exchange" session on databases. A second exchange session is scheduled for September.

On the domestic front, staff of the Subcommittee on Courts and Intellectual Property suggest that Rep. Coble (R-NC) may introduce two bills designed to spur competition by providing additional protection for databases. The first bill would provide owners of databases with a *sui generis* (of its own kind) exclusive property right, with some as yet undefined exceptions for research, education, science, and related purposes. The second bill would grant owners a non-exclusive property right. A registration system would be developed and would list a minimum criteria (of level of investment) that must be met. Protection would be available to the owner for a set period of time (to be determined). House staff suspect these bills may be introduced sometime this summer, with a possible hearing in the fall.

At the request of Sen. Hatch (R-UT), the Copyright Office is conducting a series of meetings with stakeholders to solicit input on the database proposal. Members of the SLC met with Copyright Register Marybeth Peters and Shira Perlmutter, from the Copyright Office, in early March to express opposition to the current proposal, which extends intellectual property protection to databases. Throughout May, PTO staff met with members of the scientific, research, and education communities, and proponents and opponents within the commercial sectors.

© ARL: A Bimonthly Newsletter of Research Library Issues and Actions 192 (June 1997). Washington, DC: Association of Research Libraries.



[ARL Home](#)

© Association of Research Libraries, Washington, DC

Maintained by [ARL Web Administrator](#)

**Last Modified:** June 24, 1997